NO HELP FROM ABOVE: *STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC. v. KARLEN*

The National Environmental Policy Act of 1969[1] (NEPA) imposes upon administrative agencies a "continuing responsibility" to preserve and protect the environment.[2] To insure fulfillment of this responsibility, environmentalists often call upon the judiciary to examine the legitimacy of agency action which adversely affects the environment.[3] Courts reviewing administrative action under NEPA must determine whether the agency gave environmental factors sufficient consideration in its decisionmaking process.[4] The proper scope of agency consideration has eluded many courts.[5] In *Strycker's Bay*

1. 42 U.S.C. §§ 4321-4347 (1976). For the legislative history of NEPA, see H.R. REP. No. 91-378, 91st Cong., 1st Sess. (1969); S. REP. No. 91-296, 91st Cong., 1st Sess. (1969), *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 2751-73. For general discussions of NEPA, see F. ANDERSON, NEPA IN THE COURTS (1973); W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 697-834 (1977); Goperlud, *NEPA at Nine: Alive and Well or Wounded in Action?* 55 N.D. L. REV. 497 (1979).

2. 42 U.S.C. § 4331(b) (1976).

3. Neither NEPA nor its legislative history mentions judicial review. Courts have had to decide whether the Act implicitly confers jurisdiction or whether it must be found under the Administrative Procedure Act (APA) and other statutes. *See* Students Challenging Regulatory Agency Procedures (SCRAP) v. United States (SCRAP I), 412 U.S. 669 (1973). The first NEPA case to reach the Supreme Court, *SCRAP I* reversed the lower court's holding that NEPA implicitly confers jurisdiction on federal courts to enjoin NEPA related agency action. *Id.* at 690.

4. *See generally* RODGERS, *supra* note 1, at 738-50 (1977); Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685 (1972); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

5. While the actual standard of review has eluded the courts, all have demonstrated a willingness to examine agency action under NEPA. Scholars believe the primary reason for the positive reception is public concern. In the last fifteen years people have voiced their concerns more strongly about the effects administrative agency actions have on their rights. They have united to form public interest groups to contest agency actions. Due to heightened concern for the environment, public interest foundations, such as the Environmental Defense Fund and the Natural Resources Defense Council, as well as community groups, such as Scenic Hudson Preservation Conference, Strycker's Bay Neighborhood Council, and Citizens to Preserve Overton Park, have had sufficient support to adjudicate the widely shared views of their constituents. Courts applaud this representation. It constitutes an alternative to

Neighborhood Council, Inc. v. Karlen,[6] the Supreme Court held that, under NEPA, a reviewing court's role should extend only to insuring that agencies "consider" environmental factors.

The original litigation in *Strycker's Bay* stemmed from a proposed urban redevelopment project on Manhattan's Upper West Side.[7] The project initially provided for a 70% to 30% ratio of middle- to low-income housing.[8] This ratio resulted in an insufficient number of low-income housing units.[9] To alleviate this shortage, the project planners, the City of New York Planning Commission (the Commission) and the United States Department of Housing and Urban Development (HUD), decided to devote one portion[10] of the redevelopment area solely to low-income housing.[11]

Plaintiff Trinity Episcopal School Corporation sued to enjoin construction, contending that the Commission and HUD violated NEPA by failing to file an environmental impact statement (EIS).[12] The dis-

using polling booths to express local or national environmental concerns. It also provides for more effective representation of the interests affected by administrative agency decisions. *See* ANDERSON, *supra* note 1, at 16-27 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-70 (1975).

6. 444 U.S. 223 (1980).

7. *See* Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044, 1049-50 (S.D.N.Y. 1974). In 1956, the City of New York received a federal grant to study a twenty square block area to determine the feasibility of an urban renewal project. The study concluded that the area, though deteriorating, was structurally sound. Based on this finding, the West Side Urban Renewal Area (WSURA) plan evolved. The City of New York Planning Commission and the federal Department of Housing and Urban Development began to formulate the plan in 1959. It envisaged the rehabilitation and preservation of existing structures to accommodate the needs of the community's residents. *Id.*

8. *Id.* at 1057. The planners sought to promote economic and racial integration through the 70% to 30% ratio. *Id.*

9. *Id.* at 1055.

10. *Id.* at 1071, 1075. The planners broke the twenty square block area into over 45 sites to facilitate implementation of the redevelopment project. *Id.* at 1047, 1057. They chose to convert all residential units on Site 30 into low-income housing units. As proposed, Site 30 would contain 160 public housing units. *Id.* at 1055-56.

11. *Id.* at 1055-56.

12. *Id.* at 1048. Plaintiff originally brought suit on four grounds. First, it alleged the city had breached its contract with them by making changes after execution of the contract. *Id.* Secondly, it claimed the city should have secured consent from the residents of the areas where the middle to low income ratios were changed. *Id.* Thirdly, it queried whether construction of only public housing on site 30 would "tip" the area, thereby causing middle income residents to flee. *Id.* at 1048, 1063. Lastly, the plaintiff charged that defendants failed to comply with NEPA's requirements. *Id.* at 1048. Only the NEPA issue went beyond the court of appeals.

trict court denied an injunction, holding that the change from 30% to 100% low-income housing in one area did not require preparation of a full-scale EIS.[13] The Second Circuit reversed.[14] Although it agreed that the defendants did not have to prepare an EIS, it ordered HUD to prepare a statement discussing alternatives to 100% low-income housing.[15]

HUD explored the reasonable alternatives and found none of them acceptable.[16] The district court examined HUD's study and, satisfied with its thoroughness, again refused to enjoin construction.[17] The

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13. *Id.* at 1079-82. The district court decided the alleged antisocial propensities of low income residents and the fear that an increase of low income residents would jeopardize community stability were insufficient reasons to require HUD to file an EIS. *Id.* at 1079.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires an agency to file an EIS whenever it proposes a major federal action which will significantly affect "the quality of the human environment." This does not restrict the filing of an EIS to instances when the proposed action will create pollution or destroy open land. It includes social, cultural, and aesthetic impacts as well. *See* Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972) (holding environmental assessment incomplete because agency failed to examine effect of proposed jail on surrounding neighborhood); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (NEPA requires consideration of cultural as well as physical environmental effects of proposed projects); Como-Falcon Coalition v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978) (NEPA requires consideration of effect of project upon the urban environment, including health and public safety, social services, zoning and land use, and community's development policy). *But see* I.M.A.G.E. of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978) (NEPA is primarily concerned with project impact upon the physical environment; socio-economic effects alone may not trigger need for EIS.

14. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 92 (2d Cir. 1975).

15. *Id.* at 94. NEPA requires EIS's only for "major" federal actions "significantly affecting" the environment. 42 U.S.C. § 4332(2)(C) (1976). An agency, however, must study and discuss alternative courses of action to "any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(2)(E). HUD originally filed a Special Environmental Clearance statement discussing the impact of the proposed project. The only reference in the study to alternatives was an adoptation of the New York City Housing Authority's study of alternatives. The Second Circuit decided that HUD could not accept a local agency's conclusion; it must conduct an exploration of alternatives on its own. 523 F.2d at 94.

16. Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204, 215-18 (S.D.N.Y. 1978). HUD's Special Clearance Study discussed alternatives to construction of 100% low income housing units on Site 30. The agency concluded that relocation of the low income housing project to another area with WSURA would not solve any racially motivated problems; it would only change the complainants. HUD also considered alternative building designs and the possibility of dispersing low income units over more sites. The increased cost of either alternative, however, would only serve to further strain the class relations of WSURA residents. *Id.* at 215-16.

17. *Id.* at 220, 223. Much of the opinion is devoted to a discussion of the contents

Second Circuit reversed, concluding that HUD rejected preferable alternatives solely because they would result in a two-year construction delay.[18] Declaring delay an inappropriate determining factor,[19] the court remanded the case, instructing HUD to find another way to solve the low-income housing shortage.[20]

On certiorari, the Supreme Court reversed.[21] In a per curiam opinion, the majority concluded that a court reviewing agency decisionmaking under NEPA can require only that the agency adhere to the Act's procedural mandate to "consider" environmental factors.[22] Justice Marshall dissented, arguing that such limited review of agency decisions would render the reviewing court's task mindless.[23]

NEPA requires that federal agencies follow certain procedures[24] to effectuate its long-term goals of managing and preserving the environment.[25] In order to comply with the Act, agencies must consider

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of HUD's Special Clearance Study. *See id.* at 209-18. At no time does the court discuss the significance the delay factor played in HUD's rejection of alternatives. Regarding HUD's analysis of alternatives, the district court found that HUD considered all relevant factors, including design, site selection, relocation of residents, quality of the final structure, impact of the environment on current residents and their activities, and the existence of local support services to satisfy the needs of new residents. *Id.* at 220.

18. Karlen v. Harris, 590 F.2d 39, 44 (2d Cir. 1979). *Karlen v. Harris* was the first case in which a court enjoined agency action because it conflicted with NEPA's substantive goals. For this reason, the case stood as "the high water mark among 'substantive NEPA cases'." Comment, *Charting the Boundaries of NEPA's Substantive Mandate:* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 10 E.L.R. 10039, 10043 (1980).

19. 590 F.2d at 44-45. The court ruled environmental factors such as overcrowding should determine the choice of alternatives. *Id.* at 44.

20. *Id.* at 45.

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

22. *Id.* at 227.

23. *Id.* at 231 (Marshall, J., dissenting).

24. *See* NEPA § 102, 42 U.S.C. § 4332 (1976).

25. Section 101 of NEPA, 42 U.S.C. § 4331 (1976), reads in pertinent part:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony. . . .

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and

environmental factors during their decisionmaking process.[26] Courts examining agency compliance have had great difficulty articulating and applying a proper standard of review.[27] Consequently, two con-

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coordinate Federal plans, functions, and resources to the end that the Nation may [attain broad national goals in management of the environment].

26. Under NEPA, § 102(2)(c), 42 U.S.C. § 4332(2)(C) (1976), federal agencies must prepare detailed environmental impact statements on all "major federal actions significantly affecting the quality of the human environment." An environmental impact statement must cover:

(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.

Id. For discussions of the proper content of an environmental impact statement, see Karp, *Judicial Review of Environmental Impact Statement Contents*, 16 AM. BUS. L.J. 127 (1978); Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815 (1978).

27. Courts may examine agency action at four different stages during preparation of an environmental impact statement. First, a court may examine an agency's threshold determination not to prepare an EIS since its proposed action does not fall within the classification of a "major" federal action "significantly" affecting the quality of the environment. Second, judicial review may follow a challenge by environmental groups of the adequacy of an agency's procedural compliance with Section 102(2) of the Act. Third, courts will review agency action when environmentalists challenge the adequacy of the substance of an EIS. Finally, courts will examine agency action when environmental groups allege an agency's decision to continue with a project disregards the findings set forth in an otherwise properly completed EIS. Leed, *The National Environmental Policy Act of 1969: Is the Fact of Compliance a Procedural or Substantive Question?* 15 SANTA CLARA LAW. 303, 311-15 (1975).

Since the enactment of NEPA, courts have applied five different standards of review to these issues. First, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1976), sets forth the arbitrary and capricious standard. Under this standard a reviewing court may set aside an agency decision if it is arbitrary, capricious or an abuse of discretion. *Id.* § 706(2)(A). For cases employing this standard, *see* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) (APA requires a reviewing court to engage in a "substantial inquiry"); Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973) (courts should review agency decisions on the merits to determine whether they are arbitrary and capricious); Hanly v. Kleindienst, 471 F.2d 823, 829-30 (2d Cir. 1972) (finding there is no reason to deviate from APA standard of review since it allows for effective judicial scrutiny).

The second standard, the substantial evidence test, also is derived from the APA and permits limited judicial review of agency decisions. 5 U.S.C. § 706(2)(E) (1976). *E.g.*, Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1972), *cert. denied*, 407 U.S. 926 (1972) (evidence supported a finding that the agency complied with NEPA's mandates). Under the third standard, the judicially-created rational

flicting approaches have emerged. Some courts examine the substantive merits of the agency decision.[28] Others merely insure that the agency has complied with NEPA's procedural mandates.[29]

The District of Columbia Circuit effectively established a standard of limited substantive review of agency action under NEPA in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*.[30] In *Calvert Cliffs'*, the court determined that a reviewing court should examine the actual reasoning behind agency action.[31] The court recognized that agencies often have difficulty respecting environmental interests because of competing economic

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basis standard, the court examines the agency decision to determine whether there is a rational basis for it. *See, e.g.*, Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1094 (D.C. Cir. 1973) (judicial scrutiny to ensure NEPA's policies were not being frustrated or ignored). Fourth, the judicially-created reasonableness standard allows for some agency discretion. *See* Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975) (compliance with Section 102(2) of NEPA is governed by a "rule of reason"). Finally, some courts use the APA standard of de novo review, 5 U.S.C. § 706(2)(F) (1976), on the ground that agencies should not exercise discretion. *See, e.g.*, National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (agency action of summarily terminating a contract without first complying with NEPA's mandates is erroneous). *See* Comment, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 82-87 (1976).

28. For cases applying a substantive standard of judicial review, see Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973) (concluding EIS lacked the requisite detail to comply with NEPA's full-disclosure requirement); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973) (holding proper judicial review requires examination of the entire record); Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (4th Cir. 1973) (rejecting district court's ruling that EIS need only identify, not discuss, alternatives).

29. A number of cases have held that procedural compliance with NEPA suffices. *See, e.g.*, Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973) (agency circulation of properly prepared EIS satisfies NEPA's requirements); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972) (upon finding good faith compliance with NEPA's procedural mandates, reviewing court essentially has fulfilled its duty).

30. 449 F.2d 1109 (D.C. Cir. 1971).

31. *Id.* at 115. Numerous subsequent cases have approved the *Calvert Cliffs'* view that a reviewing court should examine the record upon which an agency bases its decision. *See, e.g.*, Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972) (reviewing court should examine both the environmental impact statement and the transcript of the lower court proceeding); Hanly v. Kleindienst, 471 F.2d 640 (2d Cir. 1972) (NEPA requires agencies to develop a complete reviewable record; a perfunctory explanation of the agency's reasoning is insufficient); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (NEPA requires production of a record showing agency complied with procedural requirements and considered the factors specified).

and technical concerns.[32] To insure appropriate consideration,[33] the court found NEPA requires agencies to balance environmental factors against economic and technical factors.[34] Accordingly, a court has authority to examine the agency's decisionmaking process to determine whether it reasonably reflects proper consideration and balancing of the statutorily mandated factors.[35]

In *Environmental Defense Fund, Inc. v. Corps of Engineers (Gillham Dam)*,[36] perhaps the most expansive interpretation of NEPA,[37] the

32. 449 F.2d at 1113. Environmental amenities generally increase costs. Agencies hesitant to overextend themselves financially prefer to ignore the environmental consequences in favor of more economical proposals.

33. Id. at 1112. Section 102(2)(B) of NEPA requires agencies to "consider" environmental factors in the same way they "consider" other factors within their statutory mandates. 42 U.S.C. § 4332(2)(B) (1976). The term "consider" can be interpreted many ways. It may mean that an agency must make great efforts to avoid detrimental environmental consequences. On the other hand, it may mean that an agency merely must recognize the environmental impact its action will have.

The *Calvert Cliffs'* court rejected the idea that mechanical compliance with the procedural mandates of NEPA will suffice. It found that the § 102 mandate that agencies consider environmental factors "to the fullest extent possible" sets a very high standard. 449 F.2d at 1114. *Accord*, Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee Tombigee), 492 F.2d 1123 (5th Cir. 1974) (NEPA requires full consideration of environmental factors, not formalistic paper shuffling); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973) (discussion of environmental impacts and alternatives cannot be superficial); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973) (agency EIS must explain the course of inquiry, analysis, and reasoning to comply with NEPA); Environmental Defense Fund, Inc. v. Tennessee Valley Authority, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd per curiam*, 492 F.2d 466 (6th Cir. 1974) (EIS must discuss environmental impacts in detail); Conservation Soc. of Southern Vt. v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *vacated*, 423 U.S. 809 (1975) (agency must show willingness to modify or drop proposed project if environmental costs outweigh benefits). *Cf.* National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973) (courts should look for adequacy in EIS's, not perfection).

34. 449 F.2d at 1113. Senator Jackson, who sponsored NEPA in the Senate, had discussed the necessity of a balancing process during the congressional hearings. *See* 115 CONG. REC. 29055 (1969) (remarks of Senator Jackson).

35. 449 F.2d at 1115 (1971).

36. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972). Plaintiffs in *Gillham Dam* sought to enjoin construction of the dam on the ground that the decision to construct it was "arbitrary and capricious" and contrary to the policies set forth in section 101 of NEPA. The district court held that NEPA falls short of creating the substantive rights plaintiffs claimed. 325 F. Supp. 749, 755 (E.D. Ark. 1971). The court of appeals reversed, holding that the procedural requirements of NEPA exist for the specific purpose of achieving the policy objectives set forth in section 101. 470 F.2d at 297.

37. The Eighth Circuit somewhat limited this expansive interpretation in subse-

Eighth Circuit expressly recognized the judicial power to substantively review agency actions.[38] The court reasoned that the *Calvert Cliffs'* balancing process and NEPA's procedural requirements place an obligation upon agencies to carry out the Act's substantive policies. A correlative obligation therefore arises in the judiciary to review substantive agency actions on the merits.[39] This prospect of substantive review insures that agencies consider environmental effects more thoroughly and, as a result, promotes NEPA's broad purposes.[40]

The Supreme Court discussed the breadth of the judiciary's role in reviewing agency action under NEPA only twice prior to *Strycker's Bay*. In *Kleppe v. Sierra Club*,[41] the Court dealt primarily with NEPA's requirements for the production of an EIS.[42] It concluded that a reviewing court has no authority to create a test of its own since the Act clearly defines the point at which an EIS becomes necessary.[43] Relegating its discussion of the role of a reviewing court to a

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quent decisions. In Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976) *cert. denied*, 430 U.S. 922 (1976), the court acknowledged its obligation to review substantive agency decisions on the merits. It stated, however, that this review is "extremely narrow," limited to an examination of whether the agency made its decision in good faith, giving sufficient weight to environmental values. *Id.* at 1300.

38. 470 F.2d at 299.

39. 470 F.2d at 298.

40. *Id.* at 299. The court found support for its conclusion regarding substantive review in other circuits. *See* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972) (reaffirming *Calvert Cliffs'* premise that courts can only reverse agency decisions which are clearly erroneous); Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463, 468-69 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (courts must review the merits of an agency decision); Ely v. Velde, 451 F.2d 1130, 1138-39 (4th Cir. 1971) (the purpose of environmental impact studies is to create a reviewable record); Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (reviewing court must examine agency's decisionmaking process to ensure that it balanced environmental and financial factors). *See also* Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978) (finding substantive review of agency actions under state statute patterned after NEPA permissible under a "clearly erroneous" test).

41. 427 U.S. 390 (1978).

42. *Id.* at 405. *Kleppe* has been analyzed in numerous law review articles. *See generally* Note, *Interior Department Not Required by NEPA to Prepare Comprehensive Regional Environmental Impact Statement on Coal Development Prior to Formal Agency Proposal*, 55 TEMP. L.Q. 410 (1977); Case Note, *When Does Section 102(2)(C) of NEPA Require Preparation of a Regional Impact Statement?*, 12 LAND & WATER L. REV. 195 (1977); Recent Decisions, 26 EMORY L.J. 231 (1977).

43. 427 U.S. at 406.

footnote,[44] the Court adopted a viewpoint previously set forth in both the District of Columbia[45] and Second Circuits.[46] When reviewing agency action subject to NEPA's mandates, a court may not substitute its judgment for the agency's.[47] It can only insure that the agency gave environmental factors a "hard look" before making its decision.[48] An agency, therefore, according to the *Kleppe* Court, must seriously examine the environmental impact of its actions.[49]

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[50] the Supreme Court examined the sufficiency of

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44. *Id.* at 410 n.21.

45. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

46. Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

47. 427 U.S. at 410 n.21.

48. Id. The actual meaning of "hard look" is quite amorphous. The term originated outside of the NEPA context. In WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), the court discussed the meaning of the term in a footnote. It stated that the agency need not "author an essay . . . it suffices, in the usual case, that we can discern the 'why and wherefore.'" *Id.* at 1157 n.9.

NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), was the first NEPA case to employ the term. The court stressed that courts should work in collaboration with, not in opposition to, agencies. It stated it would not interject itself within the area of agency discretion nor impose unreasonable requirements so long as the agency has taken a "hard look" at environmental consequences. *Id.* at 838. Thus, the term leaves the depth of any "looking" up to the discretion of the court.

49. In *Kleppe v. Sierra Club*, the Supreme Court applied the "plain language" rule to its interpretation of NEPA's EIS requirement. Under the "plain language" approach, an agency can still consider and ignore environmental factors. Some scholars have suggested this defeats the Congressional intent of NEPA. Moreover, even where the Congressional intent is clear, as in the mandate that agencies consider environmental factors, neither the statute nor its legislative history offers much guidance as to how to carry out that intent. An amendment could alleviate these problems. *See* Note, *When Does Section 102(2)(C) of NEPA Require Preparation of an Environmental Impact Statement?*, 12 LAND & WATER L. REV. 195, 213-14 (1977).

50. 435 U.S. 519 (1978). *Vermont Yankee* consolidated two cases. The first dealt with the propriety of the Atomic Energy Commission's rulemaking procedures. The lower court had concluded that the AEC's rulemaking procedings, though in compliance with Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976), were insufficient and remanded the matter to the AEC. NRDC v. United States Nuclear Reg. Comm'n, 547 F.2d 633, 655 (D.C. Cir. 1976). The Supreme Court had to determine whether NEPA requires procedures beyond those set out in the APA when an agency investigates factual issues through rulemaking. It concluded that NEPA does not require additional procedures. 435 U.S. at 548. NEPA mandates only the procedures expressly contained in the Act itself. *Id.*

The second issue before the Court addressed the propriety of an AEC decision

the Nuclear Regulatory Commission's procedures for granting construction and operating licenses for nuclear power plants. At the end of the opinion, the Court made a passing observation regarding the applicability of NEPA.[51] Although the Act sets forth substantive policies for the nation as a whole, NEPA's mandate to federal agencies is essentially procedural.[52] While courts should insure that agency decisions are "fully informed," they must restrict their examination of agency decisionmaking processes to that inquiry.[53] The intent of the Court in replacing the *Kleppe* "hard look" standard with a "fully-informed and well-considered" standard is unclear. It may have intended to articulate a less stringent standard. It is possible, however, it simply chose to use a different but analogous descriptive phrase.[54]

Strycker's Bay afforded the Supreme Court an opportunity to establish a concise standard of judicial review under NEPA. The court of appeals had attempted to force HUD to elevate environmental factors above all others in its decisionmaking.[55] The Supreme Court found this action improper. It held that a reviewing court must conduct only a limited examination of the record to insure that the decisionmakers "considered" environmental factors.[56] In reaching this

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which failed to consider the alternative of energy conservation in its EIS accompanying an application for construction of a nuclear reactor. Aeschliman v. United States Nuclear Reg. Comm'n, 547 F.2d 622 (D.C. Cir. 1976). The Supreme Court concluded that NEPA requires investigation of reasonable alternatives. 435 U.S. at 551-52. Energy conservation was not widely recognized when the AEC filed its EIS. The Court therefore concluded that the Commission was justified in not considering it as an alternative. *Id.* at 552-53. *See generally* Breyer, Byse, Stewart, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: *Three Perspectives*, 91 HARV. L. REV. 1804 (1978).

51. 435 U.S. at 557.

52. *Id.* at 558.

53. *Id.* The Court further stated that policy questions properly resolved in Congress may not be reviewed by courts "under the guise of judicial review of agency action." *Id. See generally* Rodgers, *A Hard Look at* Vermont Yankee: *Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 710-12 (1979); Note, *Judicial Review of Administrative Agency Action*, 19 SANTA CLARA L. REV. 799 (1979).

54. *Kleppe* deals with the threshold question of whether the agency must prepare an EIS. *Vermont Yankee* on the other hand, examines the adequacy of the discussion of alternatives. The Court's reasoning for using different descriptive terms may stem from the fact that it was examining different issues. These issues require somewhat different tests, but not different standards of review.

55. *See* 444 U.S. at 227; notes 18 & 19 *supra*.

56. 444 U.S. at 227. The Supreme Court declined to hear oral argument on the case. Comment, *supra* note 18 at 10043. Petitions for certiorari were filed by Strycker's Bay Neighborhood Council, the City of New York, and HUD. HUD's petition

conclusion, the Court relied heavily upon both *Vermont Yankee* and *Kleppe*. It restated the premise that NEPA mandates "fully-informed and well-considered" agency decisions.[57] Nonetheless, it concluded that courts may not overturn such decisions simply because they find the results unsatisfactory.[58]

Justice Marshall dissented, arguing that the majority misread *Vermont Yankee*.[59] He contended that the case does not confine a reviewing court to a factual inquiry into whether an agency went through the motions of "considering" environmental factors.[60] Under *Vermont Yankee*, a court must still set aside an arbitrary and capricious decision.[61] Furthermore, *Kleppe* requires an agency to give environmental concerns a "hard look."[62] By reading *Vermont Yankee* so narrowly, Justice Marshall feared that the majority had withdrawn agency decisionmaking under NEPA from the general rule that agency decisions must receive careful scrutiny to insure that the decisionmaker has not acted arbitrarily and capriciously.[63]

The majority opinion in *Strycker's Bay* offers little guidance to courts reviewing agency decisionmaking under NEPA.[64] It neither

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included the lower court opinions in its appendices. The Special Environmental Clearance statement, which discussed the alternatives to 100% low income housing on Site 30 and HUD's reasoning for rejection of the alternatives, was not a part of the record reviewed by the Supreme Court.

57. 444 U.S. at 227.

58. *Id.* at 227-28. The Court also cited Federal Power Comm'n v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976), supporting the *Kleppe* proposition.

59. 444 U.S. at 229. Justice Marshall argued that the *Vermont Yankee* passage relied upon by the majority "was meant to be only a further observation of some relevance" to a particular part of that case. *Id.*

60. *Id.* The Court in *Vermont Yankee* stated that NEPA is essentially procedural. Marshall alleged that the majority in *Strycker's Bay* took the statement out of context. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 231. Justice Marshall argued that the Court should determine whether HUD acted arbitrarily and capriciously. Application of this standard of review requires the court to engage in a " 'searching' and careful judicial inquiry to ensure that the agency has not exercised its discretion in an unreasonable manner." *Id.* *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

64. One commentator had predicted prior to *Strycker's Bay* that given a chance to answer, once and for all, the question of substantive review under NEPA, the Supreme Court's response would have little effect. Rodgers, *A Hard Look at* Vermont Yankee: *Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 710-11 (1979). While substantive NEPA review is a volatile issue, it does not decide many cases. Rodgers asserts that, even in the absence of NEPA, judicial review of agency

defines the extent to which agencies must "consider" environmental factors nor discusses previously developed standards of judicial review.[65] The per curiam opinion gives rise to two possible interpretations. The Court may believe, as Justice Marshall feared, that cursory consideration of environmental factors is satisfactory.[66] On the other hand, the decision may simply mean that the Court will sanction the conduct of reviewing courts in the past and refrain from interfering.

If the Court believes that NEPA requires a minimal "consideration," it eliminates effective judicial review. Under this view, agencies may consider and ignore environmental factors. Yet, as long as they "consider" these factors, *Strycker's Bay* precludes courts from overturning their decisions, regardless of the resulting detriment to the environment.

If, on the other hand, the ruling indicates the Court's approval of judicial treatment of NEPA thus far, *Strycker's Bay* allows reviewing courts the freedom to continue to develop their own definitions of the term "consider." While this may result in a wide spectrum of judicial interpretations, courts acted reasonably in the absence of a definite standard for ten years. Presumably, they will continue to do so.

The majority's four-line discussion of law renders analysis speculative. The Court had the opportunity to make *Strycker's Bay* a landmark decision. Its failure to clearly articulate its view makes the significance of the case minimal. Reviewing courts most likely will adopt the latter, less restrictive interpretation. In doing so, they will

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actions involving the environment tends to be substantive. Courts often have to define agency authority and this decision can only be made on the merits. *Id.*

Another commentator has noted that while the Supreme Court has not taken an active role in implementing NEPA, it has not tied the hands of lower courts and agencies either. Goperlud, *NEPA at Nine: Alive and Well, or Wounded in Action?* 55 N.D. L. REV. 497, 512 (1979). While he made this remark in conjunction with an analysis of *Vermont Yankee*, *Strycker's Bay* does not alter it.

Goperlud also points out that, despite the treatment the Court has given NEPA, the new Council on Environmental Quality (CEQ) regulations, which became effective in 1979, are stringent enough to insure protection of NEPA's substantive goals. *See* 40 C.F.R. §§ 1500.00-1508.28 (1980). The regulations require agencies to conduct in-depth analyses in conjunction with full discussion of environmental impacts. This "scoping process" requires agencies to draw up concise, thorough, and relevant statements. Goperlud, *supra*, at 513-21.

65. The Court could have either hinted at its interpretation of the term "consider" or discussed the standards developed by lower courts. This would have given courts some indication of how to proceed when next reviewing a NEPA case.

66. 444 U.S. at 231 (Marshall, J., dissenting). *Cf.* Comment, *supra* note 18.

remain free to define and apply their own standards of review to NEPA cases.[67]

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67. Only a few decisions have come down citing *Strycker's Bay*. They suggest that courts are not giving the case great weight. In National Center for Preservation Law v. Landrieu, 496 F. Supp. 716 (D.S.C. 1980), *aff'd* 635 F.2d 324 (4th Cir. 1980), plaintiffs asked the court to examine the adequacy of an EIS. Citing *Strycker's Bay*, the court said its role is to examine the statement to determine whether it contains sufficient information to allow the decisionmaker to make a reasoned choice. *Id.* at 724.

In Aersten v. Landrieu, 488 F. Supp. 314 (D. Mass. 1980), *aff'd* 637 F.2d 12 (1st Cir. 1980), plaintiffs contended that NEPA required HUD to draw up a full EIS. The court had ruled at an earlier date that HUD's decision not to draw up an EIS was reasonable. The district court, in a footnote, discussed the standards of review applied in the various circuits. *Id.* at 321 n.4. It pointed out that some courts apply an "arbitrary and capricious" standard while others apply a "reasonableness" standard. *Id.* It decided that, because the Supreme Court never expressly articulated the appropriate standard of review, it would apply the "reasonableness" standard ignoring language in *Kleppe* which could possibly foreclose its use. *Id.*

In North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980), the district court relied upon *Strycker's Bay* as well as *Vermont Yankee*, *Kleppe*, and other lower court cases. It found that a court's role in examining an EIS is to determine whether there is sufficient detail to allow the decisionmaker to make a reasoned choice. *Id.* at 345.

RECENT DEVELOPMENTS