NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act

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THE LAST twenty-five years have seen great strides in the public's awareness of the environment. Ideas and slogans such as "save the whales" and "dolphin-safe tuna" have, in one way or another, touched our ears, changed our attitudes and become part of our daily life. Environmental concerns, however, go beyond protecting endangered animals and their habitats. Environmental awareness also extends to protecting the human environment - where we live, where we play, and even where we work.

The airline industry has not escaped this awareness. Indeed, the creation and expansion of airports has multiple effects and costs on surrounding property and individuals. The most obvious concerns are often voiced by nearby residents and businesses. Questions such as "Do they have to put another runway right by my house?" or, "Will my business suffer?" are voiced no sooner than a prospective plan is unveiled. These are legitimate concerns. Each asks in what way the environment in which we live will be affected by change.

Congress has drafted several pieces of legislation to address these and other concerns hastened by the growth of the American air industry.¹ This comment will address

¹ Prior to the passage of the National Environmental Policy Act of 1969, Congress had recognized environmental concerns in acts such as the Department of Transportation Act of 1966, 49 U.S.C. § 303 (1988). Since the passage of NEPA,
one such piece of legislation, the National Environmental Policy Act of 1969 (NEPA).\(^2\)

Part I of this comment will address the background, and workings of the National Environmental Policy Act. The first step in analyzing any piece of legislation is to examine its language. Accordingly, pertinent provisions of NEPA will be discussed. In doing so, the players involved in NEPA activity will be identified and their roles defined.

Part II of the comment will examine whether the goals set by Congress in NEPA are legitimately addressed in practice. Looking back over the last twenty-five years, many questions regarding the federal government’s stance toward the environment remain unanswered. These questions include determining whether the procedural requirements in NEPA are sufficient to cope with the lofty ideals set forth in the legislation’s preamble. Related to this is ascertaining whether the judiciary is occupying a proper role in insuring that the promises of NEPA are fulfilled.

Finally, Part III will point to alternative methods that may be employed to reach the high ideals espoused by NEPA while, at the same time, remaining consistent with the language of the act. While much has been written over the last twenty-five years regarding the first two parts of this paper, Part III seeks to provide new insight into what will continue to be a controversial issue in our time, the environment. In final analysis, it will be shown that action is required on all fronts to assure that policies espoused in NEPA are given more than ceremonial lip service. Specifically, the government, the judiciary, and individuals must each do their part to ensure that environmental concerns are addressed with the attention they deserve.

I. NATIONAL ENVIRONMENTAL POLICY ACT

A. THE NEED RECOGNIZED

The National Environmental Policy Act was enacted to provide procedural requirements for both governmental and non-governmental entities who plan to undertake any major development or construction that might affect the environment. The legislative history behind NEPA is rich with the congressional intent that the act serve a significant purpose in a rapidly changing society becoming shockingly aware of the toll progress had taken on its natural resources. Senator Jackson, one of the major forces behind the legislation, called it "the most important and far-reaching environmental and conservation measure ever enacted."

B. SUBSTANCE AND PROCEDURE

NEPA begins with an introduction and declaration of Congressional intent in section 4321 of the act. NEPA is

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5 Id.
4 Senator Muskie commented that the act would require government agencies "to respond to the needs of environmental quality." 115 Cong. Rec. 40,425 (1969) (statement of Sen. Muskie).
A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer . . . for guidance in making decisions which find environmental values in conflict with other values. What is involved is a congressional declaration that we do not intend, as a government or as people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth. . . . The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings. If there are to be departures from this standard of excellence they should be exceptions to the rule and the policy. And as exceptions, they will have to be justified in light of public scrutiny as required by section 102.

6 Id.
The purposes of this chapter are: To declare a national policy which
then divided into three subchapters. Subchapter I focuses on the policies and goals of the legislation. Within this first subchapter, section 4331 reinforces section 4321’s commitment to the environment by stating Congress’ declaration of “national environmental policy.” These

will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id. § 4331.

(a) The Congress, recognizing the profound impact of man’s activities on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, 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, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(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 coordinate Federal plans, functions, programs, and resources to the end that the Nation may

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of deplorable resources.

(c) The Congress recognizes that each person should enjoy a
first two sections, consistent with Senator Jackson’s comments, compose what may be called the “substantive” aspect of NEPA. They elaborate hopes and standards for environmental watchfulness.

Finally, section 4332 provides procedural mechanisms to carry out the policies espoused in the preceding two sections of the act.\(^8\) While sections 4321 and 4331 pro-

healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

\(^8\) Id. § 4332.

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 —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man’s environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

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

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should 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. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by
vide insight into the goals of the legislature, section 4332 provides the teeth with which to carry out those goals. For example, it is within section 4332 that the roles of agencies are laid out. It is also within this section that the role of the judiciary is set. Despite the importance of section 4332, however, the substantive aspect of NEPA found in the introductory sections of the legislation must not be overlooked when determining whether the parties charged under NEPA are fulfilling their procedural obligations. As this comment will show, these “substantive” sections provide authority and obligations to agencies to insure that environmental consequences are recognized. Unfortunately, this comment will also show that procedure often wins out over substance at the expense of environmental concerns.

C. THE PROCEDURAL TEETH

The procedural element of NEPA is found in subsection (2)(c) of section 4332. Within this subsection, Congress requires that for every major project, the responsible agency include in their recommendation “a detailed statement by the responsible official.”9 This statement, referred to as an Environmental Impact Statement (EIS), must include the “environmental impact of the proposed action,”10 “any adverse environmental effects which cannot be avoided should the proposal be implemented,”11 “alternatives to the proposed action,”12 “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,”13 and “any irreversible and irretrievable commitments of resources which would be involved in the

section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . . .

Id. 9 42 U.S.C. § 4332(C) (1988).
10 Id. § 4332(2)(C)(i).
11 Id. § 4332(2)(C)(ii).
12 Id. § 4332(2)(C)(iii).
13 Id. § 4332(2)(C)(iv).
proposed action should it be implemented."14

D. THE ACTORS

1. Executive Agencies

The most prominent actor under NEPA is the executive branch.15 Specifically, executive agencies are charged with insuring that NEPA's guidelines are followed before projects are initiated. For purposes of this comment, the Federal Aviation Administration (FAA) is the primary agency that insures that an EIS is prepared that sufficiently examines the environmental consequences of actions relating to the air industry.16 FAA approved actions range from the construction of additional runways to building new airports to altering existing flight patterns at established airports. It is important to note, however, that the following analysis is not limited to NEPA activity as it relates to the air industry. The strengths and weaknesses of NEPA may be found in many other areas of government activity. Examining case law in these areas is helpful in distilling NEPA issues that are also present in the air industry.

The most important function of agencies such as the FAA in approving proposed actions under NEPA is analyzing alternatives under section 4332(2)(C)(iii).17 The reasoning is simple — all action, no matter how small, has environmental repercussions. Some repercussions are minor, requiring little more than an acknowledgment.18

14 Id. § 4332(2)(C)(v).
15 Specifically, executive agencies such as the FAA must insure that EISs are made in areas of their responsibility.
16 As this comment will show, however, the FAA is not the only government agency bound by NEPA when dealing with aviation issues. See, e.g., Valley Citizens For A Safe Environment v. Aldridge, 886 F.2d 458 (1st Cir. 1989) and a discussion of the case infra notes 131-44 and accompanying text.
17 The discussion of alternatives has been called the "heart of the environmental impact statement." 40 C.F.R. § 1502.14 (1992).
18 In 1978, the Council on Environmental Quality provided regulations in the event that the responsible agency decides not to prepare an EIS. Under these regulations, the agency is required to prepare an Environmental Assessment (EA) to support a Finding of No Significant Impact (FONSI), as well as a Record of
Other repercussions have more dramatic impacts. When the latter occur, the process of looking into and discussing alternatives becomes essential.

2. Council on Environmental Quality (CEQ)

A second actor involved in the administration of NEPA is the Council on Environmental Quality (CEQ). The CEQ occupies Subchapter II of the act. Subchapter II begins by establishing the executive’s role under NEPA, which consists of the President transmitting an annual report on the Nation’s environment. Included in this report is an analysis of the current status of federal projects affecting the environment, “foreseeable trends in the quality, management and utilization” of the environment, and programs “for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.”

To aid the executive in this process, section 4342 establishes a council of three appointed members, one of which the President is required to designate as Chairman. Section 4344 of the subchapter subsequently lays out the specific duties of the council. The council was formed to

Decision (ROD) that identifies all the alternatives that it considered in reaching its decision. 40 C.F.R. §§ 1508.9, 1508.13 (1992).


20 Id. § 4341.

21 Id. In 1977, President Carter directed that the CEQ formulate binding regulations that would implement the procedural provisions of NEPA. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). These regulations provide more specific instruction for agencies to carry out the general goals of NEPA.


23 Id. § 4344. Section 4344 reads: It shall be the duty and function of the Council-

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;
(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;
(3) to review and appraise the various programs and activities of the
help promote environmental policy consistent with NEPA. The CEQ has a variety of specific functions, the most notable being its duty to report to Congress and recommend legislation.\textsuperscript{24} In \textit{Seattle Community Council Federation v. FAA}\textsuperscript{25} the Ninth Circuit recently described the significance of the CEQ.

The regulations promulgated by the Council on Environmental Quality implement the directives and purpose of NEPA. 'The provisions of [NEPA] and these regulations must be read together as a whole in order to comply with the spirit and letter of the law.' The regulations have been enacted in such a way as to remove from the ambit of judicial review any agency decision which meets the requirements of the regulations.\textsuperscript{26}

As the Ninth Circuit recognizes, the role of the CEQ has a significant impact on the judiciary. By setting the standards that agencies must follow in their interpretation of NEPA, the CEQ necessarily sets standards that the judiciary must also follow.\textsuperscript{27} Its actions and policies thus shape

\footnotesize{Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.}

\textsuperscript{24} 42 U.S.C. § 4341.

\textsuperscript{25} 961 F.2d 829 (9th Cir. 1992).

\textsuperscript{26} Id. at 832 (citing 40 C.F.R. §§ 1500-1508 (1990) (citations omitted)).

\textsuperscript{27} In \textit{Andrus v. Sierra Club}, 442 U.S. 347, 358 (1979), the Supreme Court held that CEQ regulations are entitled to 'substantial deference.'
both agency and judicial decision-making regarding environmental activity. The importance of the CEQ and its rule-making powers will accordingly be examined within the text of this comment.

3. The Judiciary

As alluded to in the above discussion of the CEO, the judiciary has a rather limited role in shaping the nation's environmental policy. NEPA's sole directive is instructing agencies to examine the environmental consequences of their decisions as set forth in section 4332 of the Act. The judiciary's role is to insure that the agencies comply with these procedures. This role is not subject to expansion. In fact, the Supreme Court has repeatedly issued warnings to environmentally conscious judges to refrain from overstepping their authority. In Strycker's Bay Neighborhood Council, Inc. v. Karlen the Court stated:

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

Similarly, in Kleppe v. Sierra Club the Court stated: "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."

Thus, implicit in judicial analysis of NEPA is the weakness of the judiciary to make substantive decisions. This weakness arises primarily from the limitations of the language of NEPA as well as subsequent regulations issued by the CEQ. In short, NEPA imposes procedural meth-

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28 Standing to raise aesthetic and environmental issues under NEPA is found under 5 U.S.C. § 702 (1988).
31 Id. at 410, n.21.
methods for the executive branch to review proposals. Enforcing conformity to procedures serves as the only policing mechanism for the courts. The court cannot substitute its decision for that of the agency, and would be overstepping its bounds and violating principles of the separation of powers to go beyond this check. As Part II of this comment will show, however, there are problems beyond the concept of separation of powers, as the judiciary is sometimes unwilling to make decisions that are in fact consistent with NEPA.

II. WEAKNESSES OF NEPA

As section 4321 and 4331 intimate, NEPA sets out with a mission. Through NEPA, Congress sought to establish a balance between man's needs and the environment in which those needs are fulfilled. Or, in their own words, they sought "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill social, economic, and other requirements of present and future generations of Americans." This wording has prompted some to call NEPA an "environmental Magna Carta." This analogy is misplaced, however, because NEPA's version of environmental optimism is hindered by the reality and limitations inherent to most legislation.

This part of the comment will examine three areas that have caused the goals of NEPA to fall short of their mark. The first of these areas addresses the delegation of authority under the act; specifically the fact that NEPA

32 Still, however, the courts have the obligation of insuring that the reviewing agency take a "hard look" at the environmental consequences of their actions. Id.

33 See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 558 (1978) (Congress enacted NEPA "to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency.").

34 See West Houston Air Comm. v. FAA, 784 F.2d 702 (5th Cir. 1986) and discussion of the case infra notes 65-80 and accompanying text.


places the power of review of environmental impacts in inappropriate hands. The second area involves the judiciary's inadequate reading of NEPA and especially its tendency to look solely at the procedure of the act instead of to its substance. The third area deals with the specific provision within NEPA requiring that alternatives be examined. Although alternative analysis is the heart of an environmental impact statement, case law will show that government agencies have failed to treat it with the importance it demands.

A. LACK OF PROCEDURAL INTEGRITY

The most obvious weakness of NEPA is that, aside from its lofty objective of protecting the balance between man and his environment, it is merely a checklist that federal agencies must glance at before making significant decisions. NEPA does not provide guidance nor an enforcement mechanism to adequately carry out the requirements set forth in sections 4321 and 4331. Although the act professes the nation's intent to preserve the harmony between man and his environment, NEPA does not require that environmental objectives take precedence, nor does it provide a gauge for agencies to determine when environmental factors should be considered. The Supreme Court recognized this in *Robertson v. Methow Valley Citizens Council* stating:

NEPA itself does not mandate particular results, but simply proscribes the necessary process . . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed - rather than unwise - agency action.

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39 Id. at 350 (citations omitted); see Strycker's Bay Neighborhood Council, Inc.
This observation has severe implications for environmental supporters. Under NEPA, agencies such as the FAA are required only to be aware of the environmental consequences of their actions.\(^{40}\) Measures that threaten visible environmental concerns will not, of course, be permitted because of the legislation that protects those specific environmental issues.\(^{41}\) Similarly, public outcry serves to restrain agencies from encroaching on widely publicized environmental concerns.\(^{42}\) At the same time, however, issues that some would consider less controversial—such as the quality of life of residents near an airport—may be overlooked in the name of progress.\(^{43}\) In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*\(^{44}\) the Court observed: "NEPA does set forth significant goals for the Nation, but its mandate to the agencies is essentially procedural."\(^{45}\) As long as these procedures are followed, the goal achieving a true environmental conscious may be ignored. This author of course realizes that NEPA was not meant to be a cure-all piece of legislation. At the same time, however, there are basic flaws in the procedural nature of the act.

1. **Inappropriate Watchdogs**

The most obvious flaw is that the legislation places in-

\(^{40}\) In *Methow Valley* the court noted that as long as the effects of the proposal are examined, NEPA is not violated. *Methow Valley*, 490 U.S. at 350-51. The court illustrated the practical effect of this fact in stating that NEPA provided no protection to a mule deer population even if the proposed actions under NEPA threatened to eliminate the entire population. *Id.*


\(^{42}\) If for example an airport was to be constructed on one of the primary mating grounds for bald eagles, public outcry would most likely encourage stricter scrutiny on the part of the FAA and other executive agencies.

\(^{43}\) While acts such as the Endangered Species Act protect animals and their habitats, NEPA is the only piece of legislation that directly promotes the human environment.

\(^{44}\) 435 U.S. 519 (1978).

\(^{45}\) *Id.* at 558.
appropriate watchdogs over environmental concerns. In the case of air-related activity, NEPA places an agency created for developing air transportation in charge of determining the environmental impact of its expansion. Granted, while the FAA is undoubtedly capable of determining the effects of flight patterns and other air transportation issues, this writer has serious doubts as to the capability of the agency to adequately determine the effects an airport will have on more complex environmental issues.

In all fairness, the FAA does not itself perform all scientific research regarding the environmental consequences of its projects, but instead often defers to researchers and scientists. The FAA does, however, decide which tests will be employed in determining various effects on the environment. The FAA then has final say over this information in its power to approve or reject proposals. Thus, barring the intervention of specialized agencies such as the EPA, the FAA is in effect the environmental guardian for its projects.

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46 See 40 C.F.R. § 1506.5(c) (1992) (Agency may choose to contract out for preparation of environmental impact statements as long as the "[c]ontractors . . . execute a disclosure statement prepared by the lead agency . . . specifying that [it has] no financial or other interest in the outcome of the project").

47 See id. (stating that agency may choose to contract out for preparation of environmental impact statements as long as the "contractor . . . execute[s] a disclosure statement prepared by the lead agency . . . specifying that [it has] no financial or other interest in the outcome of the project").

48 See Seattle Community Council Fed'n v. FAA, 961 F.2d 829, 833 (9th Cir. 1992). "It was within the FAA's discretion to establish [an appropriate test] as the threshold of significance for noise impacts. NEPA authorizes federal agencies to develop their own methods and procedures in regard to environmental analysis." Id. at 833 (citing 42 U.S.C. § 4332(B) (1988)); Valley Citizens For A Safe Env't v. Aldridge, 886 F.2d 458, 467-69 (1st Cir. 1989); Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 197 (7th Cir.), cert. denied, 479 U.S. 847 (1986); Sierra Club v. U.S. Dep't. of Transp., 753 F.2d 120, 128 (D.C. Cir. 1985); Webb v. Gorsuch, 699 F.2d 157, 160 (4th Cir. 1983).

49 In Valley Citizens the inadequacy of an Air Force measurement of noise disturbance at Westover Air Force base was confirmed. Valley Citizens, 969 F.2d at 32-36; see infra note 132-45 and accompanying text.
2. Conflict of Interest

A closely related reason for not relying solely on FAA recommendations on environmental issues is because a conflict of interest exists between FAA goals and those of the NEPA. The FAA's primary responsibility is to regulate, and to a large degree promote, the air industry. Under NEPA, the FAA is also required to be sensitive to the environment. Because promoting construction necessarily creates tension on the environment, the FAA is caught between following its primary function and following an ancillary one. For example, legislation such as the Airport and Airway Improvement Act (AAIA) mandates the FAA to encourage the development of a national system of air cargo hubs. At the same time, NEPA requires that in encouraging this development of hubs, the FAA not jeopardize environmental concerns.

Common sense shows inherent conflict of these two objectives. As an air-related government agency, it only seems natural that the FAA would follow the path of least resistance and lean more toward developing the cargo hub than looking out for the environment. Unfortunately, because of the lack of kick in the procedures required under NEPA, the FAA and other agencies are able to do just this: to pay those requirements lip service while continuing to follow the louder mandate. Of course, en-

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50 This is not to say that the FAA is not a valuable part of the equation. FAA input is essential in determining issues such as noise pollution.
52 Id. § 2201(a)(7).
53 Since, under Methow Valley, an agency has only to make informed rather than unwise decisions, the FAA is free to promote its policies at the expense of the environment - as long as it can show that it informed itself of the consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).
54 See discussion infra notes 94-131 and accompanying text (discussing Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), cert. denied, 112 S. Ct. 616 (1991)); see also River Rd. Alliance v. Corps Of Eng. of U.S. Army, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, 475 U.S. 1055 (1986). In addressing the Corps of Engineers' responsibility of preparing an environmental assessment, the Seventh Circuit Court of Appeals stated that "[c]ourts . . . are concerned that an agency whose primary mission is not the protection of the environment - an agency such as the Corps of Engineers — may tend to slight environmental con-
couraging cargo hubs is not an evil objective. In fact, these hubs are seen by many as a blessing from an economic standpoint.\textsuperscript{55} The problem arises when the FAA places too much emphasis on AAIA requirements and, in doing so, necessarily lessens its NEPA analysis. This argument, therefore, is not made to place total blame on the FAA or any government agency, but rather to highlight the simple fact that, under NEPA, objectivity may be lacking in agency analysis when conflicting goals must be carried out.\textsuperscript{56}

### B. A Weak Judiciary

Closely associated with agency inadequacy is the inadequate role the judiciary has played in enforcing the substantive nature of NEPA. As previously discussed, the main source of judicial impotency stems from both the original language of NEPA and the subsequent declarations of the CEQ.\textsuperscript{57} CEQ regulations emphasize the preeminence of agency decision-making, thereby relegating courts to overseers with little substantive input.

The most recent Supreme Court case to deal with NEPA is *Robertson v. Methow Valley Citizens Council*.\textsuperscript{58} Although not dealing directly with aviation or the FAA, this case provides an important view of how the judiciary interprets both NEPA and judicial responsibility under the act.\textsuperscript{59} *Methow Valley* is an important case for two reasons. First, the Court reaffirms its position that agencies

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\textsuperscript{55} These hubs boost local economies, provide jobs and encourage future business development. See discussion infra notes 94-112.

\textsuperscript{56} See discussion of Valley Citizens For a Safe Env't v. Aldridge infra notes 132-45 and accompanying text.

\textsuperscript{57} See supra notes 19-27 and accompanying text.

\textsuperscript{58} 490 U.S. 332 (1989).

\textsuperscript{59} In *Methow Valley* the environmental issue involved the National Forest Service's issuance of a special use permit for the development and operation of ski resorts on national forest land. The issue was whether the appellate court erred in holding that agencies are required under NEPA to provide a worst case analysis.
take a "hard look" at the consequences of their actions. Second, the Court reaffirms its warning to lower courts to avoid reading substantive requirements into NEPA, stressing that the act relies primarily on "procedural mechanisms." As a result of the Supreme Court's position in Methow Valley, lower courts have consistently been, for lack of a better word, "gun-shy" in their approach to NEPA. Accordingly, great discretion has been given to agency regulations and resulting agency decisions. Recognizing the limits set by the Supreme Court in cases such as Methow Valley, however, the judiciary is further restrained by its consistent refusal to give any weight to the substance of NEPA as espoused in sections 4321 and 4331. As shown in Methow Valley, the judiciary has focused more on the technical nature of the act than on the spirit it intended to foster in governmental decision-making. Granted, it is difficult for a court to stray from form, especially when the easy solution in cases is to affirm the government's actions under an act that gives the government a large degree of discretion. Still, it is important to note that courts have the power to recognize when the government is upholding NEPA, and when it is merely going through the motions.

A case where both the court and the FAA fail to recog-

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60 Id. at 350 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
61 Id. at 353. The Court held that the appellate court had erred in two respects: first, in "assuming that 'NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,' " (quoting Stop H-3 Assn. v. Brinegar, 389 F. Supp. at 1111) and second, "in finding that this substantive requirement entails the further duty to include in every EIS 'a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action.' " Id. at 353 (emphasis in original). Citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978), the Court reemphasized that NEPA does not mandate specific results, "but simply prescribes the necessary process." Methow Valley, 490 U.S. at 350.
62 See discussion infra notes 91-131 and accompanying text.
63 Methow Valley, 490 U.S. at 359.
nize the substance of NEPA is *West Houston Air Committee v. FAA*. In this case, the court was asked to determine if the FAA correctly followed NEPA and CEQ procedures in deciding that an environmental assessment was not necessary in granting an Airport Operating Certificate (AOC) to West Houston Airport (West Houston). This certificate would allow West Houston to serve larger planes, including passenger flights. The court held that the FAA had not violated NEPA procedures.

West Houston is a privately owned airport consisting of a single runway that, before issuance of the Part 139 certificate, was only authorized to serve small planes. Issuance of the Part 139 certificate would enable West Houston to serve larger passenger flights. In addition to Part 139 authorization, however, West Houston also required a Part 121 certificate before larger flights could be scheduled. Initially, Air West Airlines, Inc. (Air West) notified the FAA of its intention to apply for a Part 121 certificate. Under FAA regulations, an environmental assessment is required before a Part 121 certificate can be issued. An assessment was subsequently prepared by a private consulting firm. The result of the assessment was a "Finding of No Significant Impact" (FONSI), and a Part 121 certificate was subsequently issued. West Houston Air Committee initially challenged this finding on the basis that the FAA violated both NEPA and FAA regulations in granting the Part 121 certificate. This suit, however, became moot when the party that received the grant relinquished all rights to it. West Houston then continued its suit on the basis that the FAA incorrectly issued a Part 139 certificate without preparing a formal environmental assessment.

The issue in *West Houston* was whether or not the FAA

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64 784 F.2d 702 (5th Cir. 1986).
65 Also known as a Part 139 Certificate, an AOC authorizes an airport to serve any scheduled or unscheduled passenger planes with a seating capacity of greater than thirty persons. *Id.* at 703.
66 *Id.* at 705.
properly concluded that a formal environmental assessment was not merited for the Part 139 certificate. Federal Aviation Administration Order No. 5050.4 paragraph 23n states that “[i]ssuance of certificates and related actions under the Airport Certification Program (14 C.F.R. Part 139) is ‘categorically excluded from the requirement for a formal environmental assessment.’ ”67 The order goes on, however, to state that an environmental assessment be prepared for a Part 139 certificate when the proposed project is “‘highly controversial’” on “‘environmental grounds.’”68 The issue thus became whether the project met the controversial requirement.

The FAA defines a project as highly controversial when it is “‘opposed by a Federal, state, or local government agency or by a substantial number of the persons affected by such action on environmental grounds.’”69 Citing Town of Orangetown v. Gorsuch,70 the court added that the opposition must be of an “extraordinary nature.”71

The opposition in West Houston included concern from two school districts, 558 signatures on petitions and approximately 120 letters. Purporting to follow these definitions of controversial, the court held that this opposition fell below the standards set by the FAA.72 The court justified that since the West Houston area had a total population of 270,782 people, these figures did not rise to the standards set by the FAA and that accordingly, the FAA was not “‘plainly erroneous’” in deciding that the project was not highly controversial.73

67 Id. at 705 (quoting FAA Order No. 5050.4, ¶ 23n).
68 Id. (quoting FAA Order No. 5050.4, ¶ 24b).
69 Id. (emphasis added).
71 West Houston Air Comm., 784 F.2d at 705 (citing Town of Orangetown, 718 F.2d at 39).
72 Id.
73 Id. In fairness to the court, the standard of review of “plainly erroneous” did not give the court much room to find fault with the FAA. Similarly, precedent cited by the court supported giving great deference to agencies in interpreting their own regulations. See City of Alexandria v. Federal Highway Admin., 756 F.2d 1014, 1020 (4th Cir. 1985). "In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of control-
Here, the FAA and the court fail in two respects. First, the FAA fails to recognize the significance of the government agencies that opposed the airport certification. In a footnote, the court states that one school district was "actively" opposed to the project, while another school district "expressed concern." Yet, according to the court the FAA "seems to have determined that these local government bodies were not 'governmental agencies' within the meaning of the FAA regulations." The FAA provides no answer as to why school districts do not qualify as governmental agencies. Unfortunately, the court follows this lead in stating: "These school districts were not charged with any responsibility for evaluating environmental impacts, directly or indirectly." The message that this sends to schools and their students is twofold.

First, the court's holding tells schools that despite the possible environmental consequences of an FAA action, they only have as much standing as an ordinary individual. This is ridiculous when one considers the fact that a school district is a representative body of thousands of individuals, both parents and children. Second, and perhaps more disturbing, is the message sent to the children of these schools that the government does not consider their opinions significant, nor does it consider environmental concerns that would effect them as any more significant than the concerns of an ordinary individual. It is incomprehensible that a school district, charged with educating the future leaders of this country, should be dismissed as not fitting within FAA regulations under the definition of controversial.

Additionally, aside from the numbers represented by

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74 West Houston Air Comm., 784 F.2d at 705 n.3.
75 Id.
76 Id.
77 For that matter, because a district's tax requirements affect all citizens within a given area, a school district can be said to represent all individuals within that area, whether or not they send their children to the schools they support.
the school districts, both the court and the FAA also fail to realistically assess the remaining opposition. While no empirical gauge is supplied that would reveal what percentage of the population would have merited "controversy," the FAA concludes that the present numbers were insufficient. Common sense and knowledge of the West Houston area reveal further flaws in the FAA's analysis. For example, it is only natural that the major opposition to the West Houston project would be from people living closest to the airport. Thus, citing a possible 270,000 individuals that could have opposed the project is both unrealistic and misleading.\(^7\) It would have been more equitable to determine the number of individuals in proximity to the airport. These are the individuals that would realistically feel the impact of changes to the flight capacity of the airport. When one looks at it from this perspective, the numbers opposed to the project call for a more thorough review.

At the same time, it can also be argued that the FAA should not look into the numbers at all. It is in this area that both the judiciary and the FAA handled NEPA in a deficient manner. NEPA does not provide majoritarian policy mandates. On the contrary, NEPA was created to provide a check above and beyond individual choice. The act was created with the notion that a legislated national conscious was necessary to insure environmental concerns were not overlooked in the name of progress. The definition of controversial, therefore, should not be dependent on public disapproval or opposition, but rather on reasoned analysis.\(^7\) Under NEPA, it is the FAA's re-

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\(^7\) By pointing to West Houston's total population, the court inaccurately states that the entire population of West Houston "would be affected by the certification." West Houston Air Comm., 784 F.2d at 705. A more realistic approach would have been for the court to determine the population in West Houston that would reasonably be affected by the change in the airport's flight capacity.

\(^7\) Some courts have recognized the importance of the substance of NEPA. In North Carolina v. FAA, 957 F.2d 1125, 1133 (4th Cir. 1992), the court reaffirmed its position on defining controversial for purposes of triggering NEPA analysis. "This circuit long ago rejected 'the suggestion that controversial must necessarily be equated with opposition.' Otherwise, opposition, and not the reasoned analy-
Responsibility to give meaning to the words of the act. It is then up to the judiciary to insure that this obligation has been fulfilled.

The West Houston case is only one example of a court that accepts the FAA's findings as adequate under NEPA. Judicial inadequacy will be further examined in the pages that follow in connection with the third area of concern - NEPA's requirement that agencies take a "hard look" into alternatives before approving a project.

C. Alternative Analysis: Providing Lip Service Instead of Answers

The final area of concern in NEPA analysis is the treatment of alternatives. As stated in the opening, the most important requirement under NEPA is that agencies examine alternatives to a proposed action. Alternative analysis is essential in that it attempts to apply the ideals set forth in NEPA's first sections. By looking into alternative actions, an agency can achieve the best balance between man and environment. Due to the lack of punch of NEPA, however, alternative analysis is at times an empty exercise. Unfortunately, this area of concern is intertwined with agency and judicial inadequacy.

This author sees two major problems with current alternative analysis under NEPA. The first and most recognized problem with alternative analysis is the fact that the word "alternatives is not self-defining." In other words,
under current NEPA procedures, there is no objective framework by which alternatives to a given project may be judged as against the proposed action. The second and more troublesome problem, inseparable from the first, is defining a project's specific goal. Since the scope of defining alternatives depends greatly on how a project's goal is defined, the key to limiting and evaluating possible alternatives depends on how that goal is articulated. What is most threatening to the credibility of NEPA is that parties unsympathetic to the environment may be both directly and indirectly dictating environmental policy through their influence over governmental agencies.

1. "Alternative Not Self-Defining"

Because the term alternative is not self-defining, the range of alternatives for any given project can be limitless or limited depending on particular circumstances. Agencies such as the FAA are then charged with determining the merit of an alternative in comparison to the proposed action. The following hypothetical will help illustrate the extent of this problem.

City X needs to expand its airport. The only way to expand is by encroaching on a wildlife refuge. The EIS finds that the encroachment may disrupt the nesting habits of a bird on the endangered species list. Upon this finding, the FAA looks to possible alternatives. In doing so, it is determined that the only reasonable alternative is to build a new airport at another location at great expense to the city. How should the FAA rule?

In another situation, City Y wants to expand its current airport by adding two runways. This time, however, no major threat to wildlife will accompany the expansion. Yet, City Y has determined that there may be more suitable locations for the runways (i.e., because of residential areas on the north side, individuals argue that the south side would be a better place). Or, it is determined that City Y may be better off building a new airport that will meet its needs into the next century. Which plan does the
FAA approve? \(^{82}\)

Case law and the CEQ regulations have provided some input on how to narrow and define more specifically the range of alternatives for a given project. CEQ regulations, for example, require that agencies discuss only those alternatives that are reasonable or feasible. \(^{83}\) The judiciary has recognized this regulation as the "rule of reason." \(^{84}\) This rule controls "both . . . alternatives the agency must discuss, and the extent to which it must discuss them." \(^{85}\)

Another way the range of alternatives for a project may be narrowed is in the manner in which a particular goal is articulated. In the preceding hypotheticals, for example, the formulation of a range of alternatives for the proposed actions is facilitated by knowing exactly what the parties involved hope to attain. The following questions may help define a project goal. Will the two proposed runways satisfy City X's needs? Does the city's growth pattern merit building a new airport? With these and other questions answered, a goal may be defined that creates a more manageable range of alternatives. Thus, if City X has no need to build a new airport, it is safe to assume that alternatives related to the construction of one may be eliminated from the decision.

Both case law and the CEQ have held that the pertinent agency bears the responsibility of defining the goal or objective of any action in which the government is associated. \(^{86}\) Courts review an agency's defined objective and the alternatives for that objective deferentially, upholding

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\(^{82}\) These simple hypotheticals will help the reader understand some of the problems that arise under NEPA analysis of alternative action. As the cases discussed infra will show, however, real life situations are much more complex.


\(^{86}\) See City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam), cert. denied, 484 U.S. 870 (1987); see also 40 C.F.R. § 1502.15 (1992) (stat-
both as long as they are reasonable. In addressing the fog that encompasses defining what is "reasonable," courts have warned that agencies must refrain from "fulfill[ing] their own prophecies, whatever the parochial impulses that drive them." The objective must not be stated too broadly or narrowly, but rather the agency must focus on the "factors relevant to the definition of purpose." "Once an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices."

From the preceding analysis, it appears that despite the confusion that seems to surround the definitions of "alternative" and "reasonable," agencies are objective in defining the purpose of planned actions. Ironically, much of this analysis is taken from the majority opinion of a case that failed to adhere to either its own verbiage or the requirements of NEPA.

2. Who Is Defining the Interests?

This brings us to the second problem, and one that is most threatening to the credibility of NEPA: who is defining the objectives and the environmental alternatives? Before going down this road of what may amount to "business bashing," this author must preface this commentary as one that is not anti-business, but rather one that seriously questions the impact the business sector
may have on environmental analysis under NEPA. While the National Environmental Policy Act was enacted so that agencies would take a serious and objective look at environmental consequences of government action, the remainder of this section will address how third parties such as business interests may be interfering with this responsibility. It is here that case law provides the best insight into this issue.

a. *Citizens Against Burlington, Inc. v. Busey*

A significant and well visited case on the issue of business interests overcoming an agency’s NEPA responsibility is *Citizens Against Burlington, Inc. v. Busey.*

i. **Facts**

In 1989, the Toledo-Lucas County Port Authority (the Port Authority) began considering the expansion of the Toledo Express Airport. Soon thereafter, Burlington Air Express, Inc. contacted the Port Authority and proposed making Toledo a hub for their operations. At that time, Burlington had been operating out of a World War II hangar at Baer Field in Fort Wayne, Indiana. Prior to selecting Toledo Express as a hub, Burlington had looked at seventeen sites in four midwestern states. Burlington finally settled on Toledo based on a variety of factors such as the quality of Toledo’s work force, zoning advantages, the airport’s prior operating record and Toledo’s location near Detroit and Chicago.

ii. **Preparing an Environmental Impact Statement**

After submitting its proposal to the FAA, the Port Authority hired a private consulting firm to prepare an environmental assessment for the proposed action. This

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94 Baer Field is an Air National Guard airport.
assessment was to be then made into an Environmental Impact Statement (EIS) in compliance with NEPA. A draft of this statement was sent by the FAA to the Environmental Protection Agency (EPA) and to several state and local agencies. This draft was subsequently made available to the public at a hearing.

The final draft of the EIS stated the Port Authority's desire for the FAA to approve their plans for expansion as well as the role that the FAA was to play in the process. Next, the EIS examined the Port Authority's plan and laid out the applicable federal statutes and regulations. In addition, the EIS "briefly described" alternatives to the Port Authority's plan and explained why the FAA determined it only need consider two courses of action. The first course of action considered was the approval of the Port Authority's plans to expand Toledo Express Airport. The other course of action was to take no action at all. Finally, the EIS discussed how the environment would be affected by the proposal, and described the environmental consequences of the two alternatives. Also attached to the EIS were scientific information and inter-agency correspondence.

In the second volume, the FAA included a transcript of the public hearing, written comments made in response to the hearing, and hundreds of letters that had been written in response to the Port Authority's proposal. The FAA approved the Port Authority's plan on July 12, 1990.

The source of some of the letters included with the EIS was from the petitioners in *Citizens Against Burlington*. The petitioners' group ("Citizens") initially formed when the Port Authority first began looking at the possibility of expanding Toledo Express Airport. Citizens included individuals who lived near the airport as well as individuals interested in protecting the Oak Openings Preserve Metropark, one of the world's twelve communities of savanna

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95 Id. at 193.

oaks. The park was used by joggers, skiers, bird watchers, hikers, and campers.

Five days after the FAA approved the Port Authority's proposal, Citizens petitioned the court of appeals for review of the FAA decision and for a stay of the FAA's order until the court of appeals could render its decision. The court denied the request.97 Citizens continued to demand that the court vacate the FAA's decision, force the FAA to prepare a new EIS, and enjoin the FAA from approving the Port Authority's current plan. Citizens also sought to prevent any construction at Toledo Express Airport until the FAA properly complied with NEPA procedures, regulations promulgated by the Council on Environmental Quality, the Department of the Transportation Act, and the Airport and Airway Improvement Act. For purposes of this comment, only arguments regarding NEPA violations will be analyzed.

Citizens' NEPA claim was simple. Citizens contended that while the FAA need only discuss reasonable rather than all alternatives to a proposed action, those alternatives must include "any means available to accomplish the general goal of an action."98 Citing Van Abbema v. Fornwell99 Citizens contended that the general goal of the Port Authority's proposal to the FAA was to build a cargo hub for Burlington. Citizens further argued that to achieve this goal, alternatives were available to Burlington in Fort Wayne and possibly Peoria. As a result, Citizens maintained that these alternatives should be examined in depth by the FAA.

iii. The Majority

In addressing Citizens' claims, the court began by stating the purpose of NEPA.100 The court then discussed the agency's responsibility in defining the objectives of a pro-

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97 Citizens Against Burlington, 938 F.2d at 193.
98 Id. at 198.
99 807 F.2d 633 (7th Cir. 1986).
100 Citizens Against Burlington, 938 F.2d at 193.
posed action and "reasonable" alternatives to that action.\textsuperscript{101} Finally, the court examined the content of the EIS prepared for the Toledo Express Airport in determining that the FAA had met its statutory responsibilities under NEPA. The court focused in particular on whether the FAA properly defined the goal of the project, as well as whether alternatives had been adequately examined before approving the Port Authority's proposal.\textsuperscript{102}

The court concluded that the FAA had fulfilled its statutory obligations.\textsuperscript{103} In making this determination, the court focused on the second chapter of the EIS. In this chapter, the FAA prefaced its findings on the fact that since the federal government is not the "proprietor" of the project, but rather an organ of support, its role in defining the goal of the project and possible alternatives is narrower.\textsuperscript{104} As a result, the FAA prefaced the report on the ground that deference should be shown to the preferences of the applicant.\textsuperscript{105} In this same chapter, the FAA also explained that legislation supports allowing airline management to decide freely on where to locate.\textsuperscript{106}

\textsuperscript{101} Id. at 193-94; see supra note 90 and accompanying text.
\textsuperscript{102} The court focused on alternatives to address Citizens' arguments that the FAA failed in the EIS to consider sites other than Toledo Express Airport. Id.
\textsuperscript{103} Id. at 206.
\textsuperscript{104} Id. at 196-97.
\textsuperscript{105} Id. at 197. The FAA stated:

The scope of alternatives considered by the sponsoring Federal agency, where the Federal government acts as a proprietor, is wide ranging and comprehensive. Where the Federal government acts, not as a proprietor, but to approve and support a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited. In the latter instance, the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.

\textsuperscript{106} Id. The FAA continued its explanation stating:

In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing Federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at Federally funded airports . . . . Similarly, under the Airline Deregulation Act of 1978, the FAA does not regulate rates, routes, and services of air carriers or cargo opera-
The court then examined the "appropriate factors" used by the FAA in defining the goal for the proposed action. These factors included the exodus of over fifty major companies from the Toledo area in recent years which resulted in the loss of over seven thousand jobs. According to the Port Authority, adding the cargo hub to Toledo Express would alleviate this loss by creating over two hundred permanent and six hundred part-time jobs. The Port Authority further estimated that the permanent job figure would raise to over one thousand within three years of operation. As a final note, the Port Authority predicted that an expanded Toledo Express Airport would attract other companies to Toledo.

Based on the FAA's findings, the court held that the FAA properly "defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy." The court found that the FAA properly "eliminated from detailed discussion the alternatives that would not accomplish this goal." After eliminating the alternatives that would not accomplish the goal of providing a hub for Toledo, the FAA was left with two choices: approve the proposal, or make a finding that no action be taken. The FAA chose the former.

Although ultimately holding the EIS to be adequate, the majority ruled that the FAA violated CEQ regulations by allowing the Port Authority to select the contractor who prepared the EIS. Under these regulations, an EIS must be prepared "directly by or by a contractor selected by the lead agency." The rationale behind this is to avoid potential conflicts of interest. If the FAA chooses

tors. Airline managements are free to decide which cities to serve based on market forces.

Id. at 197-98.

Id. at 198.

Id.

Citizens Against Burlington, 938 F.2d at 201.

40 C.F.R. § 1506.5(c) (1992).

Citizens Against Burlington, 938 F.2d at 201.
a contractor, the contractor "must execute a disclosure statement prepared by the lead agency... specifying that [it has] no financial or other interest in the outcome of the project." Here, the FAA failed to fulfill either of these obligations.

While recognizing that the FAA violated CEQ regulations, the majority remained unwilling to invalidate the EIS. The majority stated that "[t]his particular error did not compromise the 'objectivity and integrity of the [NEPA] process.'" The majority did, however, find the contractor's failure to fill out a disclosure form to be the more serious infraction. Accordingly, the majority ordered the FAA to have the contractor execute an appropriate disclosure statement. If a conflict of interest was found to exist, the FAA was to then "decide—promptly—on the measures to take in response."

iv. The Dissent

At the outset, the dissent appeared frustrated with the majority's acceptance of FAA findings under NEPA. Aside from the FAA's obvious violation of CEQ regulations, the dissent found fault in the majority's analysis of the FAA's examination of alternatives. While the dissent conceded that only reasonable alternatives need be discussed, it pointed out that "the discussion of reasonable alternatives—'the heart of the environmental impact

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113 Id.
114 Id. at 202.
115 Id. (quoting Forty Questions, 46 Fed. Reg. at 18,031). Relying on Sierra Club v. Sigler, 695 F.2d 957, 963 n.3 (5th Cir. 1983), the majority found the infraction trivial. Citizens Against Burlington, 938 F.2d at 202. "It is the [CEQ's] intention that any trivial violation of these regulations not give rise to any independent cause of action." Sierra Club, 695 F.2d at 963 n.3 (citing 40 C.F.R. § 1500.3 (1992)).
116 Citizens Against Burlington, 938 F.2d at 202.
117 Id.
118 Id.
119 Unfortunately, the use of the word "reasonable" may not provide much help. Determining a reasonable alternative can be as subjective as defining the goal of the proposal. Still, some limit must be set on the scope of analysis and the courts have determined this limit to include only reasonable alternatives.
statement,' 40 C.F.R. § 1520.14—becomes an empty exercise when the only alternatives addressed are the proposed project and inaction." The dissent’s observation has merit.

The element of objectivity, required both by NEPA and CEQ regulations was, in the dissent’s view, missing in Citizens Against Burlington. As a result, the dissent believed that the scope of FAA analysis regarding alternatives was too narrow in that the only alternatives considered were those available to the Toledo-Lucas County Port Authority. Thus, like Citizens, the dissent believed that the goal of the proposal was to provide a cargo hub for Burlington. This hub did not, however, have to be located in Toledo. The dissent believed that other options were available. In particular, the dissent raised the alternative of airport expansion in Fort Wayne, Indiana to meet the needs of Burlington. Despite analysis in the EIS regarding Fort Wayne, this alternative was not considered.

The dissent in Citizens Against Burlington recognizes that Burlington was a major party to the airport expansion in Toledo was Burlington. After looking at seventeen possible sites, Burlington made a business decision to make Toledo its choice as a cargo hub. In the Record of

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120 Citizens Against Burlington, 938 F.2d at 210 (Buckley, J., dissenting).
121 Id.
122 Id. at 207-08.
123 The dissent stated:
   The majority would limit the consideration of alternatives to those available to the Toledo-Lucas County Port Authority. As the majority sees it, the FAA “defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy.” As a consequence, airports outside the Toledo area were not to be considered because “[n]one . . . would serve the purpose of the agency’s action.” Maj. op. at 397. I read the EIS differently. Recognizing that Burlington is an essential party to the Port Authority’s application, the FAA understands that the EIS must consider any reasonable alternative to Toledo Express Airport that might be available to Burlington, whether it lies within the Toledo area or outside it.
   Id. at 207.
124 Id. at 208. “While both Toledo and Burlington are indispensable to this enterprise, Burlington is plainly the dominant partner.” Id.
Decision, the FAA accepted Burlington’s decision that Toledo was the best choice. " 'This is a business decision on the part of Burlington in which the FAA has not been involved.' " It is this aspect of the case that the dissent understandably finds fault with both the FAA and the majority’s handling of NEPA responsibilities. The FAA, according to the dissent, should have done its own homework, as required under NEPA, in determining if Toledo was indeed the best choice for a hub. As Judge Buckley stated in his dissent:

I do not suggest that Burlington is untrustworthy, only that the FAA had the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project. It may well be that none of the sixteen other alternatives examined by Burlington and its consultants could be converted into a viable air cargo hub at acceptable cost. That, however, was something that the FAA should have determined for itself instead of accepting as a given. Under NEPA, "the federal agency must itself determine what is reasonably available." 

The dissent then warned that:

[b]y allowing the FAA to abandon this requirement, the majority establishes a precedent that will permit an applicant and a third-party beneficiary of federal action to define the limits of the EIS inquiry and thus to frustrate one of the principal safeguards of the NEPA process, the mandatory consideration of reasonable alternatives.

Here, unlike the majority, the dissent was concerned that the FAA violated CEQ regulations by allowing the Port Authority to choose the contractor which prepared the EIS. Although the majority scolds the FAA, it does not recognize, as does the dissent, that objectivity under NEPA is not a trivial requirement. Simply preparing a

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125 Id. (quoting the FAA's Record of Decision at 10).
126 Id. at 209 (Buckley, J., dissenting) (citing Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 94 (2d Cir. 1975)).
127 Id.
disclosure will not, as the majority intimates, give the project an air of objectivity.

The dissent then responds to the majority's argument that the FAA was correct in giving deference to Burlington's decision to make Toledo a hub.128 Burlington, according to the dissent, is free to choose where it will place its hubs. The FAA does not and should not have any say in a purely business decision. The FAA does, however, have the authority and obligation, if necessary, to refuse to approve a project, or to provide funding for one.129 Had the FAA refused the plan in Toledo, nothing would have stopped Burlington from obtaining a hub elsewhere.130 Burlington, as well as the Port Authority, had an agenda that, without proper FAA guidance, was allowed to slide by NEPA scrutiny.

b. Valley Citizens For a Safe Environment v. Aldridge

Another case in which the alternatives are limited to action or no action is Valley Citizens For a Safe Environment v. Aldridge.131 Here, unlike Citizens Against Burlington, the controlling interest was not a private business, but rather the government itself. In this case, the United States Air Force was in the process of transferring sixteen C-5A airplanes from Dover, Delaware to Westover Air Force Base in western Massachusetts when Valley Citizens for a Safe Environment132 brought legal action to enjoin the action claiming that the Air Force had not complied with NEPA procedures.133 Prior to the transfer, the Air Force prepared an EIS that became the source of the legal action.

In the EIS, the Air Force cited five possible alternatives

128 Id. at 208.
129 Id.
130 Id. at 209.
131 886 F.2d 458 (1st Cir. 1989).
132 Valley Citizens for a Safe Environment is an organization that consists of local residents of western Massachusetts that opposed the transfer of the C-5A airplanes, primarily due to the concern over airplane noise. Id. at 458.
133 Id. at 459.
to Westover Air Force Base.\textsuperscript{134} Valley Citizens contended that the EIS “did not adequately describe” these alternatives before deciding on the placement of the C-5As at Westover.\textsuperscript{135} In support of this position, the EIS, by its own admission, did not discuss the environmental impact of the C-5As at any of the other locations.\textsuperscript{136} Instead, the report concluded that Westover was the primary choice based on what the EIS labeled as non-environmental factors.\textsuperscript{137}

In examining the reasonableness of the Air Force’s decision to not look at the environmental consequences of the alternatives, the court states:

The EIS makes clear that the Air Force will not send the C-5As to other bases because of significant added construction costs or recruitment problems. It will not send them \textit{irrespective} of environmental effects at those other bases; it will not send them even if there are \textit{no} harmful environmental effects, even if \textit{no one} in those areas thinks the planes are too noisy. What purpose, then, could a discussion of environmental effects at those other bases serve, at least as long as the Air Force makes clear it is prepared to evaluate those alternatives on the assumption that their ‘adverse environmental effects’ are zero?\textsuperscript{138}

Here, the court seems to accept that non-environmental concerns\textsuperscript{139} absolve the Air Force of performing its obli-

\textsuperscript{134} The five locations were: Orlando Air Force Base, Florida; Patrick Air Force Base, Florida; Cape Canaveral Air Force Station, Florida; Charleston Air Force Base, South Carolina; and Hunter Airfield, Georgia. \textit{Id.} at 461.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 462.

\textsuperscript{137} Id. at 461. These factors included: “(1) the adequacy of physical facilities, such as runways, ramps, etc.; (2) the recruiting potential for reservists in the base area; (3) the costs of additional needed construction; (4) the relationship to existing base uses; and (5) the adequacy of fuel systems.” \textit{Id.}

\textsuperscript{138} Id. at 462.

\textsuperscript{139} According to the EIS the particular non-environmental factors that eliminated the alternatives to Westover were as follows: (1) Orlando would have required spending $83.4 million for construction and would require buying additional land; (2) Patrick would also have required spending $83.4 million for construction as well as the cost of filling in 70 to 150 acres of Banana River; (3) Cape Canaveral meant spending $138.6 million for construction as well as risking interference from missile launches; (4) Charleston require spending $23.6 mil-
gations under NEPA. The Air Force, according to the court, fulfilled its obligations by listing and briefly discussing the five alternatives. The court's affirmation of Air Force action merits a closer look.

Under section 4332(2)(C)(iii) of NEPA, the Air Force was required to investigate alternatives to the move to Westover. Accordingly, the Air Force examined five alternative locations for the C-5As. The Air Force's final decision, as stated, rested entirely on non-environmental factors. The chief reason cited by both the Air Force and the court was financial differentiation between the various locations. At first glance, no one can quarrel with the legitimacy of saving money by choosing the least costly site. When one recalls the function of NEPA, however, this reason becomes less legitimate.

NEPA calls for action among government agencies to insure that environmental consequences are carefully considered before proceeding with a project. The key to NEPA analysis is balance; the recognition that advancing environmental policy could entail unwanted restraints on the normal decision-making process. Without NEPA, the government would be less accountable for its actions and the decision-making process would have one less interest to consider. Under NEPA, that interest is the environment. In Valley Citizens the Air Force took a very limited look at this interest by considering only the environmental impact of the move on Westover.

The problem with Valley Citizens, as with many cases involving NEPA, is that the agency's analysis is conclusory. The Air Force, like the FAA in Citizens Against Burlington,
set out with an objective that NEPA was not likely to hinder. This is not to say that non-environmental factors must bow to environmental concerns. Balance is the heart of NEPA. It is true that in every decision there is the realization that sometimes environmental concerns, though legitimate, cannot overcome the necessity of a project. Thus, Westover may in fact be the most plausible location to place the C-5A's both from an environmental as well as non-environmental standpoint. However, Valley Citizens will never know, since the Air Force refused to look at the environmental consequences of locating the C-5As at one of the alternative locations. The Air Force found a location that met its needs from a non-environmental standpoint and simply went through the motions to satisfy NEPA.

c. Additional Analysis

From the preceding analysis, both Citizens Against Burlington and Valley Citizens provide examples of how agencies may not be fulfilling their responsibilities under NEPA. As the dissent in Citizens Against Burlington correctly points out, the FAA incorrectly allowed a business interest to dictate the objective of a proposed action requiring FAA approval.\textsuperscript{145} This problem is compounded by the fact that the FAA relied on Burlington's word that Toledo was the best business choice without even questioning whether it was the most environmentally sound. Similarly, in Valley Citizens the Air Force dictated its will such that alternatives were eliminated without proper environmental consideration. The breakdown of NEPA in these two cases, however, goes beyond the defining of alternatives.

i. Inappropriate Watchdog

Throughout the dispute in Valley Citizens, one of the primary contentions espoused by Valley Citizens was that the

\textsuperscript{145} Citizens Against Burlington, 938 F.2d at 208 (Buckley, J., dissenting).
Air Force used inappropriate noise measurements in the EIS.\textsuperscript{146} Within two years after the Air Force moved the C-5As to Westover, Valley Citizens attempted to reopen the case on the grounds that the EIS was seriously flawed.\textsuperscript{147} Legal action was instituted after the Air Force, in an attempt to increase C-5A activity at the base, prepared two further studies.\textsuperscript{148}

The basis of Valley Citizens' claim was that because the subsequent studies employed a different methodology than the original EIS, the original must have been incorrect.\textsuperscript{149} It is important to note that, like the courts in both cases, this author has no expertise in noise measurements. It is quickly conceded that analyzing appropriate noise measurements is beyond the scope of this comment. What is significant about this case, however, is the fact that the Air Force, a potentially major polluter, is put in the position to determine an appropriate method to measure the effects of noise on the human environment under NEPA.\textsuperscript{150} Although not directly criticizing the Air Force's

\textsuperscript{146} Valley Citizens, 886 F.2d at 468.
\textsuperscript{147} Aldridge, 969 F.2d at 1317.
\textsuperscript{148} Id. The increase in transport activity was the result of the United States involvement in Desert Storm/Iraq War of 1991. Id.
\textsuperscript{149} Id. In the original EIS, the Air Force determined the amount of noise that would occur in a typical day by dividing the average total amount of noise in a year by 260 (under the assumption that the planes would fly five days a week). In the subsequent Environmental Assessment, the EIS used 3.23 instead of 5 for the number of days the C-5As would fly. Valley Citizens contended that had the Air Force had used 3.23 in the original EIS, it would have found that the noise would "highly annoy" more than 3000 people. Id. at 1317-18. This is significantly more than the Air Force's original estimate of 771 people using a five day projection.
\textsuperscript{150} This author is not attempting to criticize the Air Force for carrying out its duty as protector of American interests, but rather to point out that since defense is its primary responsibility, the Air Force may not be the most appropriate entity to examine environmental issues. Although the Air Force shrouds its analysis with the fact that it applies National Academy of Science Guidelines for noise levels, its ultimate decision has little relation to the guidelines. The guidelines do not tell an agency when a project should be abandoned in favor of the environment, but rather provide a gauge to measure environmental impact. In this case, the Air Force concluded that under the guidelines, over 700 people would be highly annoyed by the transport planes. The Air Force then determined this was acceptable without evaluating the possible environmental impacts at the alternative locations. Thus it appears that the Air Force may be too self-interested to make an objective determination.
judgment, the court intimated that Valley Citizens may have a valid point when it stated:

[W]e did not uphold the EIS the first time on the ground that the Air Force “noise disturbance” methodology was a perfect, or even a very good, method for predicting just how much noise there would be or how many people that noise would annoy. . . . We stated that, “[a]lthough we approve of its use here . . . we do not imply that it is immune from criticism or legal attack.”

The court, however, continued in stating that a reviewing court is not the appropriate place to object to a noise disturbance methodology.

ii. Conflict of Interest

Second, in both cases, there exists a conflict both the FAA and the Air Force undoubtedly will face when they follow mandates from NEPA that interfere with agency policy. In Citizens Against Burlington, the majority is greatly influenced by the FAA mandate under the Airport and Airway Improvement Act. The FAA stated that it has a “statutory mandate to facilitate the establishment of air cargo hubs.” The majority uses this mandate in support of its position that in choosing between Toledo or nothing, it must choose Toledo. Thus, in this case, the environmental consequences of expanding Toledo Express Airport are viewed as less significant than the desire to establish cargo hubs. The drafters of NEPA would

151 Aldridge, 969 F.2d at 1318 (quoting Valley Citizens, 886 F.2d at 469).
152 Id.
153 See discussion supra notes 50-56 and accompanying text.
154 Citizens Against Burlington, 938 F.2d at 204-05.
155 Id. at 196 (citing EIS, chapter 1).
156 Common sense demonstrates that in choosing between a “do nothing” alternative and allowing the Port Authority to go forward with its proposal, the FAA will almost always choose the latter unless drastic environmental consequences will result. Again, this is the very reason why alternatives must be more adequately discussed. NEPA was enacted on the premise of finding a balance between man and his environment. This condition will be difficult to achieve when “take it or leave it” propositions are passed. Here, it is important to reemphasize that NEPA was intended to promote awareness for man’s habitat as well as traditional environmental concerns.
probably not welcome this reading of their legislation, as the balance intended to be established under NEPA shifts in order to accommodate FAA goals.

Similarly, in *Valley Citizens* the Air Force is not accustomed to taking orders from outsiders. NEPA creates a conflict of interest for the Air Force in that by following the procedures set forth in the act, the Air Force introduces interference with military decision-making from non-military sources. Traditionally, this position has not received much support. Consistent with this, the United States military has probably enjoyed the most autonomy from public scrutiny of any government agency. Thus, in *Valley Citizens* there was little doubt that the Air Force would be able to locate the C-5As in Westover. And while alternatives were discussed in accordance with NEPA procedures, it is doubtful that the Air Force seriously considered doing anything that would compromise its historical autonomy.

### iii. A Weak Judiciary

The third major problem with both *Citizens Against Burlington* and *Valley Citizens* is the fact that the judiciary fails to give weight to the substantive aspects of the NEPA. In concluding that the FAA carried out its responsibility under NEPA, the majority in *Citizens Against Burlington* stated:

> We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport; we are required instead only to confirm that the FAA has fulfilled its statutory obligations. Events may someday vindicate Citizens' belief that the FAA's judgment was unwise. . . . All this court is decides today is that the judgment was not uninformed.

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157 See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (illustrating that the Supreme Court shows deference to the military in upholding constitutionality of curfew and exclusion laws against American citizens of Japanese dissent). A more recent example can be found in the controversy over admitting homosexuals in the military.

158 *Citizens Against Burlington*, 938 F.2d at 199 (citations omitted).
This statement is full of inconsistency. First, Citizens never asked the judiciary to take sides over Burlington, but rather to insure that NEPA procedures were carried out. These procedures included the FAA doing its own research on what alternatives were available to the Toledo Express proposal.\textsuperscript{159} The FAA did not do so, but rather allowed a self-interested party to so narrowly define the objective of the proposal that the only alternatives were to go through with the project or to abandon it completely.\textsuperscript{160} The FAA has a duty to look beyond the preferences of a business interest or any applicant.\textsuperscript{161}

Ironically, within this same statement the majority points to the fact that Citizens' may one day be vindicated in their beliefs that the FAA decision was "unwise."\textsuperscript{162} This statement flies in the face of the purpose of NEPA. The whole point of the creation and passing of NEPA was the hope that sound decisions regarding the environment would be made using all relevant information available. According to Senator Jackson's comments, NEPA was intended to prevent decisions from having harmful effects on the environment.\textsuperscript{163} Under NEPA, the drafters hoped that the government would more adequately look at the immediate as well as future consequences of its actions on the environment. As previously stated, NEPA was enacted to foster decisions with foresight rather than hindsight. The majority's statement that events in the future may prove Citizens' contentions to be true shows a complete lack of respect for the legislation's emphasis on looking beyond the immediate effects of our actions. Thus, while the court states that the FAA has fulfilled its statutory obligations,\textsuperscript{164} the contrary is true.\textsuperscript{165} Likewise,

\begin{itemize}
  \item \textsuperscript{159} See 42 U.S.C. § 4332(2)(C) (1988).
  \item \textsuperscript{160} Citizens Against Burlington, 938 F.2d at 210 (Buckley, J., dissenting).
  \item \textsuperscript{161} \textit{Id.} Once the FAA undertook to discuss economic effects, it was obliged to be impartial. \textit{Id.}
  \item \textsuperscript{162} \textit{Id.} at 199; see \textit{supra} note 152.
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} See \textit{supra} note 5 and accompanying text.
  \item \textsuperscript{165} See \textit{supra} note 152.
  \item \textsuperscript{166} See \textit{supra} note 152 and accompanying text.
  \item \textsuperscript{167} Citizens Against Burlington, 938 F.2d at 206 (citing Methow Valley, 490 U.S. at 332 (1989), for the proposition that the FAA makes informed decisions).
  \item \textsuperscript{168} While the court cites Methow Valley in support of its position, it fails to recog-
the court has not fulfilled its obligations in insuring that a "hard look" has been taken by the responsible agency.\textsuperscript{166}

On a similar note, the court in \textit{Valley Citizens} attempts to belittle Valley Citizens' claims by intimating the trivial nature of the Air Force's action in comparison to the existence of more "environmentally threatening" projects such as nuclear power plants or ocean dumping.\textsuperscript{167} While the court dismisses the Air Force's action as merely sixteen planes from one base to another, however, the court's opinion is laced with facts that show how significant a move this is for the Air Force. In support, the court cites the fact that one thousand or more additional personnel would be required for the move.\textsuperscript{168} In addition, based on the EIS each of the alternatives cited by the Air Force, including Westover, the move would require additional construction to accommodate the airplanes.\textsuperscript{169}

Both of these facts support Valley Citizen's position as to the scope of the project. Despite the court's self-serving language to the contrary, the Air Force is not moving sixteen gliders. C-5As are cargo planes that require significant space and manpower for their operation. The fact that the Air Force considered a request to send the C-5As

\textsuperscript{166} The \textit{Burlington} majority can best be described as gun-shy. Before finding that the FAA complied with NEPA, it stated:

\begin{quote}
In chiding this court for having overreached in construing NEPA, a unanimous Supreme Court once wrote that Congress enacted NEPA "to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency."
\end{quote}

\textit{Citizens Against Burlington}, 938 F.2d at 199.

\textsuperscript{167} \textit{Valley Citizens}, 886 F.2d at 463.

\textsuperscript{168} \textit{Id.} at 462.

\textsuperscript{169} \textit{Id.} at 461-62.
to "a remote location" or to a base where takeoffs and landings could be "over water" further supports this position.\textsuperscript{170} Thus, while the Air Force's move may not be completely analogous to the placement of a nuclear power plant, it is a significant movement of machinery that will have more than trivial consequences for those near the air base.\textsuperscript{171} As a result, the Air Force was obliged to perform more than a cost-benefit analysis of non-environmental factors. Under \textit{Kleppe v. Sierra Club},\textsuperscript{172} the agency should have taken a hard look at the environmental consequences of its actions. The court should likewise have taken a hard look at whether the Air Force fulfilled this obligation.

\section*{III. THE FUTURE: CHANGE ON ALL FRONTS}

In looking to the future of NEPA, it would be easy to end this analysis in criticism of both government agencies and the judiciary for their previous failures - and to simply provide an admonishment to mend their ways. This approach, however, would be ineffectual. In the first place, it would most likely go unpublished and therefore unheard. More importantly, however, it would also fail to appreciate the more notable contributions that each entity can make under NEPA.

\subsection*{A. THE COUNCIL ON ENVIRONMENTAL QUALITY}

Without creating a new National Environmental Policy Act, the best place to start reforms under NEPA is with the Council on Environmental Quality (CEQ). The CEQ was formed to handle ongoing environmental developments - to provide guidance to agencies in carrying out

\textsuperscript{170} \textit{Id.} at 462.

\textsuperscript{171} In fact, in the initial EIS it was estimated that 3,440 persons would be exposed to an average noise level of over 65 decibels. Of these persons, it was predicted that 22\% would be "highly annoyed." \textit{Id.} at 468. Without taking issue with the Air Force's estimates, the fact that over 700 individuals would be highly annoyed by the noise produced by the C-5As would seem to merit that the Air Force examine the environmental consequences of the alternatives.

\textsuperscript{172} 427 U.S. 390, 410 n.21 (1976).
their responsibilities under NEPA. Its role is not static, but rather may expand as the need arises. In the past the CEQ has been a source of information for both courts and government agencies in dealing with NEPA. One example of the CEQ's role in NEPA analysis is its formulation of Forty Most Asked Questions. This list of questions provides answers to the most common problems encountered by government agencies in dealing with NEPA.

In addition to being an advisory council, the CEQ could become more involved in the actual decision-making processes of the agencies. As previously stated, one of the more troubling aspects of current NEPA analysis is the fact that government agencies have a conflict of interest between the goals of NEPA and their respective agency functions. Agencies are perhaps unfairly asked to promote their interests - but to avoid doing so to the detriment of the environment. Because the agency makes the rules under which they examine the environment, it is unlikely that they will find their actions to be detrimental.

One way in which the CEQ can lessen this conflict is by setting objective standards that all government agencies must follow for various environmental situations. In the Valley Citizens for example, a CEQ standard of measuring noise would have, if nothing else, shrouded the Air Force's final determination with a cloak of objectivity. On the other hand, if the decision-making process is left solely in the hands of agencies such as the FAA or the Air Force, the result will commonly be that as seen in the cases discussed earlier.

B. Government Agencies

With guidance provided by the CEQ, government agencies may also play a more significant role in environmental

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175 See discussion of Valley Citizens supra notes 132-45 and accompanying text.
decision-making. One of the primary problems with current NEPA analysis is the fact that government agencies are, in effect, their own keeper. As cases such as Methow Valley have indicated, agencies need only make "informed" decisions. Unfortunately, as the Supreme Court simultaneously intimated, agencies are free to make "unwise" ones. Without rewriting NEPA, the only solution for executive agencies is that they take their responsibility more seriously. Granted, this approach may be the hope of a naive law student. Still, the power is within NEPA for agencies to be sensitive to the environment. The recent change in personnel at the White House may provide a starting point - however, to be truly effective, an agency based commitment to the environment must extend beyond presidential personalities.

C. JUDICIARY

Despite the passive role taken thus far under the NEPA the judiciary can be a primary force in insuring that NEPA procedures are carried out. The court system provides a forum in which the government is held accountable for its actions and decisions. In interpreting NEPA, the judiciary should not overlook the importance of sections 4321 and 4331 of the act, since it is here that the legislative intent behind NEPA is clearly set forth. Thus, unlike situations where courts have had to search for a basis to make a decision in the absence of clear legislative intent, these first two sections can be a primary source of judicial backed environmental protection. This comment is not asking that courts ignore the procedural backbone of NEPA, but rather to take it in context with the purpose of the legislation. In doing so, courts will become more responsible to the balance between man and the environment that NEPA

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176 Methow Valley, 490 U.S. at 332.

177 Agencies have traditionally been heavily bureaucratic. Other than the occasional rhetoric calling for reform, they are free from outside interference and slow to change. Changes in agency respect for NEPA therefore must come from sources outside of the executive branch, possibly from Congress, and the judiciary.
was intended to foster. This will, of course, not be easy. Judges understandably desire to make decisions with more than "birds and flowers" as a reference. Judges would rather point to specific sections of the act or subsequent CEQ regulations than to base a decision on NEPA’s general commitment to the environment. Despite the difficulty that may be encountered in what can be best labeled as a commitment to the substantive nature of NEPA, it can be accomplished without compromising the procedural foundation of the act.

An attitude that exemplifies a more responsible judiciary is found in the dissent of River Road Alliance, Inc. v. Corps of Engineers of United States Army. In this case, the district court found that the Army Corps Engineers violated section 4332 of NEPA by granting a permit to the National Marine Service to build a temporary barge fleeting facility. According to the district court, the Army failed to adequately consider the environmental impact of the facility, especially the effects of the facility on the quality of the human environment. The appellate court reversed this decision.

The facility was to be located on a scenic stretch of the Mississippi River known as "Alton Lake" or "Alton Pool." This area of the Illinois shore is "surmounted by dramatic bluffs," beneath which runs a scenic highway, the "Great River Road." From this road, motorists have a view of Alton Lake, the Missouri shore and bluffs to the east. The shore and Alton Lake provide a haven for nature lovers, recreationalists and fishermen.

In compliance with NEPA, the Army Corps held a pub-
lic hearing on the environmental impact of the facility. The result of this hearing was the issuance of an "environmental assessment" that concluded that the facility would have no significant impact on the environment. In reaching this conclusion, the assessment acknowledged the possible aesthetic and less visible consequences that the project could have on the area.

Regarding the aesthetic impact of the facility, the Corps recognized the environmental significance of the area stating that "'bluff and river areas at and downstream of [National Marine]'s worksite provide some of the most impressive and unique vistas of any area along the Mississippi River' and that 'in the opinion of some individuals, the presence of [National Marine]'s proposed fleeting facility, or any similar intrusion into the natural setting, would be aesthetically objectionable.'" At the same time, however, the Corps stated that "'other individuals welcome the opportunity afforded by the Great River Road for a close-up view of towboats and barges.'"

In addition to the aesthetic aspect of Alton Lake, other environmental concerns included the possible effect the facility could have on wintering catfish and a large mussel bed downstream as well as the effect the facility could have on fishing and boating in general. The concerns over fishing and boating were dismissed as insignificant. Concern over the mussels was likewise quelled both on the rationalization that none of the mussels in question were endangered as well as the fact that any threat to the mussels could be monitored in the future.

The district court held these findings unacceptable

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184 The Corps issued a Finding of No Significant Impact (FONSI).
185 River Road Alliance, 764 F.2d at 447 (emphasis added).
186 Id. at 447.
187 Id. "There was concern that while barges were being towed into and out of the facility, and assembled into tows or disassembled, the propellers of the tug boats would stir up silt on the river bottom, and this silt would drift down onto the mussels and smother them." Id.
188 Id.
189 Id.
under NEPA. Specifically, the district court found that Corps’ Finding of No Significant Impact was “arbitrary and capricious” in that it

inadequately considered the fleeting facility’s impact on aesthetic values and recreational activities; . . . did not take a ‘hard look’ at the facility’s potential impact on the mussel bed and over-wintering catfish; . . . and inadequately evaluated the degree to which the fleeting operation’s effects on the quality of the human environment are likely to be highly controversial.\textsuperscript{190}

The district court also found that Corps failed to “study, develop, and describe appropriate alternatives.”\textsuperscript{191} Unfortunately, the appellate court refused to reach the same conclusion, a decision which invoked a scathing, well reasoned dissent by Judge Harlington Wood.

In attacking the majority, Judge Wood began by emphasizing the degree of deference that should have been accorded the district court in this case.

Judge Beatty, the trial judge, knows this territory. He does not need to rely on a stagnant record and pictures to appreciate the diverse and adverse impact which will result from this commercial intrusion into this living park-like area. We should not therefore . . . so lightly toss his findings over the side.\textsuperscript{192}

The dissent raises a legitimate point. Common sense dictates that a district court will be better equipped to examine whether agencies have in fact carried out NEPA, or whether they have merely paid NEPA requirements lip service.\textsuperscript{193}

\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 454 (Wood, J., dissenting) (citing Anderson v. City of Bessemer, N.C., 470 U.S. 564 (1985)).
\textsuperscript{193} This position has been supported in cases such as Brown v. Board of Education, 349 U.S 294 (1955). In the nation’s attempt to desegregate schools, the Supreme Court remanded cases to the district courts to ensure that the policy espoused in Brown v. Board of Education, 347 U.S. 483 (1954) would be carried out and monitored. Like desegregation, concern for the environment is a national concern that is best handled by the lower courts. Great deference should, therefore, be accorded their judgments.
To the Corps a thing of beauty and professional enjoyment will be the new lock when it is completed, not the bluffs and river. That can be excused since the Corps, after all, is made up of professional and talented engineers, not artists, nature lovers, catfish fishermen, bikers, hikers, symphony directors, picnickers, joggers, local residents, students, or tourists driving peacefully along the Great River Road. ¹⁹⁴

Similarly, National Marine has little incentive to aggressively pursue environmentally preferable alternatives when its primary function is to make money, not grow flowers. “Permitting the company by itself and for itself to find and purpose an alternative site less convenient for its pocketbook is a little like consulting the fox about the best location for the chicken house.”¹⁹⁵

The dissent concludes by attacking the merits of the Corps’ assessment. Specifically, the dissent attacks the majority’s acceptance of the Corps conclusion that the project will have no significant impact on aesthetics, recreational activities, and aquatic life of the area.¹⁹⁶ With respect to the aesthetic impact of the project, the dissent criticizes the majority’s insensitivity toward the area that would be affected by the project.¹⁹⁷ Specifically, the dissent cannot fathom the rationality behind the majority’s claim that some individuals may in fact find the project aesthetically appealing.¹⁹⁸ The dissent also attacks the majority’s reasoning that the project’s impact is minimal,

¹⁹⁴ River Road Alliance, 764 F.2d at 455 (Wood, J., dissenting).
¹⁹⁵ Id. at 457-58.
¹⁹⁶ Id. at 455.
¹⁹⁷ Id.
¹⁹⁸ Id. In an unavoidably sarcastic tone, the dissent stated:

That particular scenic easement and others nearby will now be good for an unobstructed view of barges, about the most uninteresting things afloat, and not nearly as interesting as a piece of floating driftwood. For any barge enthusiasts there may be, as has been suggested, the heavy barge traffic and extensive commercial barge operations elsewhere along the river shore should provide more than ample barge-viewing opportunities.

Id. (emphasis added).
rationalizing that a driver's view of the river would be obstructed for only twenty-five seconds.

The majority measures the visual obstruction and impact of this commercial permit area only by the length of six barges in a row which a motorist going 40 mph would pass in 25 seconds. Some motorists, I think, would drive faster than that just to get past the barges. You can see the barges, tugboats, and related activity, however, on your approach long before you get there as long as you look up and down the river.¹⁹⁹

The dissent was also disturbed by the majority's insensitivity to the facility's probable impact on aquatic life.²⁰⁰ With respect to the facility's effect on the mussel bed, Judge Wood recognized that mussels are good for more than "cat food and buttons".²⁰¹ Citing the Attorney General's brief, Judge Wood described how the animal is an essential member of the riverine ecosystem.²⁰² In responding to the majority's rationale that the animals are not endangered, the dissent stated that "[t]his is one way things not now on the endangered list can get there."²⁰³

In the spirit of the Supreme Court's mandate in Strycker's Bay Neighborhood Council v. Karlen ²⁰⁴ and Kleppe v. Sierra Club,²⁰⁵ the dissent did not, however, suggest that his analysis should be substituted for that of the Corps.²⁰⁶ Instead, the dissent proposed that the considerations examined by the trial court "should have been enough to prompt the Corps, at least, to take a genuine 'hard look' [at the project]."²⁰⁷

Despite the fact that the majority holding of River Road Alliance delves a blow to environmental protection, it is an

¹⁹⁹ Id.
²⁰⁰ Id. at 456.
²⁰¹ Id.
²⁰² Id.
²⁰³ Id. at 457.
²⁰⁶ River Road Alliance, 764 F.2d at 458 (Wood, J. dissenting).
²⁰⁷ Id. at 457.
important case in NEPA analysis. Judge Wood’s dissent provides a good example of the role the judiciary should play when addressing NEPA-related issues. The judiciary can take an active role beginning at the district court level. It is here that the judiciary is closest to the action and can best determine whether agencies are fulfilling their obligations under NEPA or merely creating paper trails. At the appellate level, the judiciary can likewise play an important role. When appropriate, the appellate courts can give deference to district courts acting within the spirit of NEPA.

D. The Individual

Perhaps the most important, yet most overlooked player in NEPA analysis is the individual. In section 4331 of NEPA, Congress concludes its statement of environmental policy by stating that “[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”208 Upon reading this broad proclamation, the individual has both a right to a healthful environment and a duty to help achieve it. The question then becomes to what extent the individual can participate in the administration of NEPA. From the previous analysis of the weaknesses of NEPA, it would appear that the individual’s role in NEPA can be greatly outweighed by the interests of business and government. If one looks only at cases such as Citizens Against Burlington and Valley Citizens, this would indeed be true.

Despite these decisions, however, the individual is not insignificant. In the most obvious sense, the individual serves the primary purpose of bringing possible NEPA violations to the attention of the judiciary.209 The individ-

209 The EIS is an important aspect in this process. “Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency ‘has indeed considered environmental concerns in its decision-making process,’ and perhaps more significantly, provides a springboard for public comment.” Robertson v. Methow Valley Citizen’s Council, 490
ual is also important prior to court action - in the decision-making process of the agencies. In Methow Valley the Supreme Court emphasized the significance of individual action under NEPA in stating that “[NEPA] also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.”

For the individual to play a truly significant role, however, he must learn to look beyond his immediate surroundings. NEPA was meant to inspire a national environmental consciousness. Just as government agencies are charged with looking beyond the immediate effect of their actions under NEPA, individuals must likewise look beyond the actions that directly affect them. Similarly, individuals must be persistent in their fight for government compliance with NEPA. The subsequent case of Aldridge provides an example of the importance of maintaining the fight for the environment.

IV. CONCLUSION

In conclusion, NEPA, like any piece of legislation, is only words. It is up to individuals to give meaning to these words. From the cases outlined in this comment, individuals have given these words a cursory reading, similar to a pre-flight checklist. The combined effect of agency decision-making and the weak role of the judiciary in reviewing agency action has at times been detrimental to the professed mission of NEPA. Instead of an inspiring environmental awareness, NEPA, like many other acts, has become merely a procedural hurdle that businesses and the government must jump before continuing with


210 Methow Valley, 490 U.S. at 349.
211 969 F.2d 1315 (1st Cir. 1992).
212 See discussion supra notes 132-45 and accompanying text.
their race to expand. Consequently, new attitudes must be fostered to insure that NEPA does not become a dream without reality. These attitudes must exist at all levels of society and government.