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Judicial Review and Environmental Analysis Under NEPA: "Timing Is Everything"

by Suzanne O. Snowden

The timing of environmental analysis and judicial review presents critical issues of interpretation under the National Environmental Policy Act (NEPA).[1] Courts must be able to review an agency's compliance with NEPA before the agency makes major decisions, and before it invests significant resources that can compromise environmental review. Agencies must not be allowed to delay environmental review just because necessary data and research are difficult to obtain, or environmental impacts are uncertain. This Article discusses how the courts have handled these timing problems.

The following hypothetical case provides a contextual situation for examining both of these issues. The U.S. Forest Service has prepared a forest management plan for the Katchikan National Forest in West Dakota under the National Forest Management Act (NFMA).[2] The forest covers 3,000 square miles, contains mountains and numerous lakes and rivers, and provides habitat for several listed endangered species. A revision to the plan designates areas for wolf reintroduction into the forest and lists guidelines that might apply. The Forest Service's later decision to reintroduce the wolves will be tiered to the forest plan. Wolves had previously lived in the forest, but they disappeared at the turn of the last century. The Forest Service alleges the wolves will be a positive addition to the wildlife now in the forest.

The Forest Service prepared an environmental assessment (EA)[3] on the forest management plan and plan revision that discussed the environmental impacts the plan might have, including any impacts resulting from the reintroduction of the wolves. The EA states that the wolves may have a negative effect on some of the endangered species living in the forest because they may hunt these species, impair or destroy some of their habitat, or reduce their food supply by hunting animals and other species that they eat. However, although the EA discusses these environmental impacts, it also concludes that the effect the wolves may have on endangered species is uncertain because they have not inhabited the forest for some time, and because studies on the habitat required by the endangered species do not provide the needed information. The Forest Service intends to approve the forest management plan without doing any additional studies on the effect the wolves could have on the endangered species. The Forest Service also intends to adopt a finding of no significant impact (FONSI)[4] stating that the adoption of the forest management plan will not have significant impacts, which means it will not prepare an environmental impact statement (EIS or impact statement)[5] on the plan.

The questions raised by this hypothetical case are: (1) whether NEPA requires an agency to take a "harder look" at the uncertainties in its EA by preparing an impact statement on the forest management plan; and (2) whether a failure to prepare an impact statement on the forest management plan is "ripe"[6] for judicial review.

The Ripeness Issue

An agency's action must be "ripe" in order to be subject to judicial review. Under NEPA, the time at which an agency's decision is ripe for judicial review depends on whether the statute contains both procedural and substantive requirements, or whether it is solely procedural. If NEPA has substantive requirements, a court could compel an agency to abandon or significantly modify a proposal if it does not satisfy these requirements. Conversely, if NEPA's requirements are only procedural, a court can direct an agency to take any actions necessary to achieve compliance with the agency's procedures, but cannot compel it to abandon or modify a proposal. The U.S. Supreme Court has held that NEPA does not contain substantive requirements and is a wholly procedural statute.[7] This conclusion has important implications for the ripeness of agency decisions under the statute.

The NEPA Environmental Review Process

NEPA was the U.S. Congress' first and most broadly encompassing environmental statute.[8] As technology, innovation, and the human population all grew rapidly throughout the first half of the 20th century, many people became concerned about the environmental harm and damage that was occurring.[9] Congress was troubled because most federal agencies did not always analyze the potential environmental effects of their actions before enacting environmentally sig-

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1. 42 U.S.C. §§4321-4370d, ELR Stat. NEPA §§2-209.
2. 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
3. *See infra* note 18 and accompanying text.
4. *See infra* note 22 and accompanying text.
5. *See infra* note 15 and accompanying text.
6. *See infra* subsection entitled NEPA Is a Procedural Statute.
7. *See infra* subsection entitled The NEPA Environmental Review Process.
8. Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. Envtl. L.J. 99, 99 (1994).
9. Mary K. Fitzgerald, *Small-Handles, Big Impacts: When Should the National Environmental Policy Act Require an Environmental Impact Statement?*, 23 B.C. Envtl. Aff. L. Rev. 437, 438 (1996).

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nificant plans.[10] To remedy this problem, Congress adopted NEPA in 1969, and President Richard M. Nixon signed it into law in 1970.[11] The Act was designed to catch potential environmental problems and dangers before they reached the critical levels.[12] In the words of Sen. Henry M. Jackson (D-Wash.), the chairman of the Senate Interior and Insular Affairs Committee, NEPA was designed to intercept the kinds of federal agency actions that would lead to environmental degradation "before they got off the planning board."[13]

Along with requiring agencies to consider the significant environmental impacts of their decisions, NEPA encourages well-informed agency decisions by allowing public scrutiny of agency actions that have significant environmental effects.[14] NEPA is essentially a full disclosure statute. It mandates federal agencies to disclose their environmentally significant proposals, and the potential consequences of those proposals, before carrying them out. Disclosing the environmental impacts of a proposed agency action allows other concerned agencies and the public to review an agency's action and object if they believe the discussion of environmental impact is inadequate.

NEPA attempts to ensure full disclosure by requiring agencies to prepare an EIS discussing the potential environmental impacts of an environmentally significant proposal before acting on the proposal. The preparation of an impact statement is one of the most important requirements in NEPA. It is addressed in §102(2)(C), which states that federal agencies must prepare an impact statement for "every recommendation or report on proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment . . . ."[15] The "threshold requirement" for preparation of an impact statement, therefore, is that the proposal is likely to *significantly* affect the environment.[16]

Because NEPA does not define "significance," agencies look to Council on Environmental Quality (CEQ) regulations for guidance in determining which proposals satisfy the threshold requirement.[17] Agencies prepare EAs[18] to determine whether an impact statement is necessary. According to CEQ regulation on EAs, an agency should use its EA to determine whether or not its proposal meets the threshold requirement of "significance" that would require the agency to issue an impact statement.[19] When an agency decides not to prepare an impact statement for a proposal that arguably will significantly affect the environment, a plaintiff can sue it in federal court for failure to comply with the procedural requirements of NEPA.

An agency may decide immediately to prepare an impact statement for its specific proposal, or it may prepare an EA to determine whether it should spend the time and resources to prepare an impact statement. An EA essentially is "a 'mini' impact statement."[20] An EA does not contain as detailed an analysis of the environmental effects of a proposal as an impact statement. Rather, an EA merely reflects an agency's preliminary investigation of the environmental issues implicated by its proposal.[21] At the EA stage, an agency merely decides whether or not its action will have a "significant" impact on the environment. If an agency answers this question in the affirmative and prepares an impact statement, it then evaluates the significance of the environmental impacts its proposal will cause. If the agency concludes from its EA that preparation of an impact statement is unnecessary, it must explain the rationale underlying this decision in a FONSI.[22] The reviewing court will analyze the FONSI if the agency's decision to forego preparation of an impact statement is challenged in court.[23]

NEPA Is a Procedural Statute

As noted above, NEPA is a procedural statute.[24] It mandates compliance with environmental review procedures, under

10. Daniel R. Mandelker, NEPA Law and Litigation §2.02[3] (2001); Nicholas C. Yost, NEPA Deskbook 5 (Envtl. L. Inst. 2d ed. 1995).
11. Fitzgerald, *supra* note 9, at 438.
12. *Id*. at 438-39.
13. *Id*. at 439 (quoting 115 Cong. Rec. S29055 (1969)).
14. *Id*. at 440.
15. 42 U.S.C. §4332(2)(C), ELR Stat. NEPA §102(2)(C). *See* Matthew C. Porterfield, *Agency Action, Finality, and Geographical Nexus: Judicial Review of Agency Compliance With NEPA's Programmatic Environmental Impact Statement Requirement After* Lujan v. National Wildlife Federation, 28 U. Rich. L. Rev. 619, 623 (1994).
16. Mandelker, *supra* note 10, §2.04.
17. Title II of NEPA houses the CEQ in the executive office of the president. *Id*. §2.01. The CEQ was put in charge of implementing NEPA. Porterfield, *supra* note 15, at 627 (citing Protection and Enhancement of Environmental Quality, Exec. Order No. 11514, 3 C.F.R. 902 (1966-1970), *reprinted as amended in* 42 U.S.C. §4321 (1988), ELR Admin. Mat. 45001). Presidents Nixon and Jimmy Carter issued Executive Orders giving the CEQ the authority to adopt regulations detailing the requirements for compliance with NEPA. Mandelker, *supra* note 10, §2.01. The Court has acknowledged that courts should give substantial deference to CEQ regulations. Porterfield, *supra* note 15, at 627 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 19 ELR 20749 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 19 ELR 20743 (1989); Andrus v. Sierra Club, 442 U.S. 347, 9 ELR 20390 (1979)).
18. The CEQ's regulation defining EAs is §1508.9, which states, that "Environmental Assessment":

    (a) Means a concise public document for which a Federal agency is responsible that serves to:
    (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. . . .

    40 C.F.R. §1508.9. *See also id*. §1501.4.
19. Mandelker, *supra* note 10, §7.04[3].
20. *Id*. §8.01.
21. *Id*.
22. *See* 40 C.F.R. §§1501.4, 1508.9.
23. Mandelker, *supra* note 10, §8.01.
24. Initially, there was a question whether NEPA was a substantive as well as a procedural statute. One of the major reasons why the lower courts initially interpreted NEPA to include a substantive element was because of the language of the Act itself. Weinberg, *supra* note 8, at 99. For example, §101(a) of NEPA states that its goal is "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. §4331(b), ELR Stat. NEPA §101(b). *See* Mandelker, *supra* note 10, §2.03. This language suggests that NEPA contains the substantive element of mandating certain ways in which the federal agencies can actively improve the relationship between humans and the environment. Furthermore, §101(b) states that it is "the continuing responsibility of the Federal Government to use all practicable means . . . to attain the widest range of beneficial uses of the environment without degradation." 42 U.S.C. §4331(b), ELR Stat. NEPA §101(b). *See* Weinberg, *supra* note 8, at 99. Some early interpretations of NEPA left open the possibility that this language imposed a substantive "nondegradation" duty on federal agencies. Mandelker, *supra* note 10, §2.03. The plain language of the statute thus suggests that a reviewing court could force an agency to abandon or significantly alter its proposal if the court believed such a proposed action would cause environmental degradation. *Id*. In 1972, the U.S. Court of Appeals for the Eighth

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which an agency must prepare an impact statement when the environmental impacts of a proposed action are significant.[25] It is not the actual environmental effects that a court reviews when considering whether or not the agency complied with NEPA's procedures, but rather the manner in which the agency described the environmental effects likely to occur. If an agency merely guesses or speculates about the environmental effects, rather than basing its analysis on reliable scientific studies and accurate data, a court likely will hold the agency failed to comply with NEPA's procedural requirements. This Article focuses on whether or not an agency complies with NEPA's procedural requirements when it prepares an EA containing high levels of uncertainty and then issues a FONSI. In other words, the focus is on the procedural requirements preceding the impact statement stage.

Judicial decisions by the late 1970s began to indicate that NEPA does not have a substantive effect. The first of these cases, decided in 1976, was *Kleppe v. Sierra Club*.[26] The Court described the judicial power of review under NEPA in a way that excluded the possibility of a court being able to force an agency to abandon or modify its decision if the court disagreed with the substantive merits of that decision.[27] The Court held that NEPA does not provide a court with the power to "substitute its judgment for that of the agency" regarding the substantive environmental effects of the agency's proposal.[28]

Two years later, in the 1978 case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[29] the Court held that the federal licensing agency did not have to discuss energy conservation as an alternative to licensing a nuclear power plant.[30] Though the court of appeals believed it could force an agency to modify its decision to comply with NEPA's supposed substantive requirements, the Court disagreed and characterized the lower court's decision as "judicial intervention run riot."[31] The Court noted that just because a reviewing court disagrees with the substantive result reached by the agency, or might have reached a different result had it been the one making the decision, it does not have the right to overturn the agency's decision.[32] Finally, in the 1980 case of *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[33] the Court explicitly held that NEPA does not contain a substantive component, but instead is merely procedural. It held that the only power a reviewing court has is to ensure that the agency followed NEPA's procedural requirements by sufficiently evaluating the potential environmental effects of its decision because that is all that NEPA requires.[34]

Anyone who still remained unconvinced that NEPA lacked any substantive components was surely persuaded by the Court's subsequent decision in *Robertson v. Methow Valley Citizens Council*.[35] The Court agreed that NEPA procedurally requires an agency to discuss mitigation of adverse environmental impacts in its EIS, in order to show that the agency took the requisite "hard look" at the consequences of its action. However, it explicitly held that NEPA does not impose a substantive requirement that the mitigation plan must actually be implemented.[36] Rather, said the Court, "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[37] The Court dealt a major blow to the hopes that many environmentalists had placed in NEPA by stating that an agency is free to balance the environmental harms against the nonenvironmental benefits of its proposal and to decide that the benefits outweigh the environmental harms.[38] While "[o]ther statutes may impose substantive environmental obligations on federal agencies," explained the Court, "NEPA merely prohibits uninformed—rather than unwise—agency action."[39] The Court's conclusion that NEPA is only a procedural statute is a major factor in deciding when agency actions under the statute are ripe for judicial review.

The Ripeness Doctrine

The ripeness doctrine focuses on the proper time at which a court will review an administrative agency's action. Timing is the key to the doctrine because courts are disinclined to interfere with an agency's process before it has made a concrete decision. Courts hesitate to intrude if an agency is merely at a preliminary stage in its decisionmaking and could change its course readily. Instead, a court will hold that the agency's decision is not yet sufficiently final or concrete to be ripe for judicial review.[40]

The ripeness doctrine was judicially created. Judges founded the doctrine on the "case or controversy" requirement contained in Article III of the U.S. Constitution.[41] In *Abbott Laboratories v. Gardner*,[42] the leading case, the

Circuit handed down an influential decision in Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289, 2 ELR 20740 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973), ruling that NEPA imposes substantive duties on federal agencies. According to the court, in addition to NEPA's procedural requirements, the Act "was intended to effect substantive changes in [decisionmaking]." *Id.* at 295, 2 ELR at 20743. The Eighth Circuit also stated that NEPA requires courts to evaluate the merits of substantive agency decisions. *Id.*

25. Mandelker, *supra* note 10, §10.01.
26. 427 U.S. 390, 6 ELR 20532 (1976).
27. Mandelker, *supra* note 10, §10.04[3].
28. Furthermore, the Court stated that NEPA only allows a court to make sure that the agency took a "hard look" at the environmental effects. The court cannot go beyond this kind of procedural review to "interject itself within the area of discretion" of the agency. *Kleppe*, 427 U.S. at 411, 6 ELR at 20536.
29. 435 U.S. 519, 8 ELR 20288 (1978).
30. *Id.* at 556, 8 ELR at 20296. *See* Weinberg, *supra* note 8, at 103.
31. 435 U.S. at 557, 8 ELR at 20297. *See* Weinberg, *supra* note 8, at 103.
32. 435 U.S. at 558, 8 ELR at 20297.
33. 444 U.S. 223, 10 ELR 20079 (1980).
34. Mandelker, *supra* note 10, §10.04[4]; Weinberg, *supra* note 8, at 104.
35. 490 U.S. 332, 19 ELR 20743 (1989).
36. Mandelker, *supra* note 10, §10.04[6].
37. *Methow Valley*, 490 U.S. at 332, 19 ELR at 20747.
38. *Id.*
39. *Id. See also* Weinberg, *supra* note 8, at 107-08.
40. In the words of the Court, the essential purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967) (quoted in Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33, 28 ELR 21119, 21121 (1998)).
41. Barton J. Birch, Ohio Forestry *and What It Means for the Future*, 37 Idaho L. Rev. 141, 150 (2000).
42. 387 U.S. 136 (1967).

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Court created a "two-part ripeness test" to determine whether an allegedly harmful agency decision has matured to the point where it would be appropriate for a court to intervene.[43] The first step evaluates the "fitness" of the issues to be judicially determined, and the second step evaluates the "hardship" to the parties of postponing judicial review.[44] One of the principal factors courts consider in deciding the "fitness" prong is whether the agency's decision is sufficiently final or concrete to warrant judicial intervention.[45] Whether the agency's decision is sufficiently "final" has been described as the most important factor in the court's ripeness determination.[46] The finality decision is fact-specific and dependent on the court's discretion. The judge will make a fact-dependent decision either that the agency action is not final and therefore not yet "ripe," or is sufficiently final to be subjected to judicial scrutiny. When it applies the "hardship" prong of the two-step test, the court attempts to balance the opposing interests of the litigants.[47] If the "hardship" that one of the parties will suffer from delayed judicial review heavily outweighs the benefit the other party will enjoy from delayed review, the court will be more inclined to decide that the matter is ripe for judicial review.

The NFMA

Unlike NEPA, which has been judicially deprived of any substantive elements, the NFMA has been judicially recognized as containing substantive obligations. The NFMA directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System."[48] It prescribes a two-step statutory framework for the Forest Service to follow.[49] First, it requires the Forest Service to prepare a land resource management plan (LRMP) and an accompanying impact statement on the management plan.[50] Second, once the LRMP is prepared, the Forest Service must assess the environmental effects of site-specific projects.[51] When preparing an LRMP, the Forest Service is required to consider the environmental effects (such as the environmental consequences of logging and clearcutting) in addition to the commercial goals of its plan (such as the financial benefits of logging and clearcutting).[52] When the plan is at the implementation stage, the Forest Service must use the LRMP as a guide for all of its natural resource management decisions concerning the forest in question.[53] The statute states that natural resource management activities include using the land for "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness purposes."[54] In addition, the NFMA requires the Forest Service to demonstrate that every site-specific project is consistent with the overall LRMP.[55] Significantly, the Court has held that the NFMA does not permit preimplementation judicial review of forest plans under the NFMA.[56] It only requires site-specific impacts that were not addressed in the overall forest plan to be disclosed at the point in the planning process when the Forest Service makes "critical decisions."[57]

Ripeness Under the NFMA and NEPA

The Court considered the ripeness of a forest management plan for judicial review in a 1998 decision, *Ohio Forestry Ass'n v. Sierra Club*.[58] The Court drew a major distinction between the time at which a claim based on a *substantive* statute becomes ripe, and the time at which a claim based on a *procedural* statute becomes ripe.

In *Ohio Forestry*, the Forest Service adopted an LRMP for the Wayne National Forest in Ohio.[59] The NFMA mandates that the Secretary of Agriculture "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System."[60] These plans set long-term goals and standards for logging, but the plans themselves do not authorize any specific timber cutting or harvesting.[61] When the Forest Service is ready to engage in timber cutting, it first must comply with several regulations, including preparation of an EA pursuant to NEPA.[62] Because the Forest Service was not yet ready to permit logging under its plan in *Ohio Forestry*, it had not yet prepared an impact statement under NEPA. The Sierra Club challenged a number of provisions in the Forest Service's plan, alleging substantive violations of the NFMA. Its major complaint was that the plan improperly favored logging and clear-

43. Eacata Desiree Gregory, *No Time Is the Right Time: The Supreme Court's Use of Ripeness to Block Judicial Review of Forest Plans for Environmental Plaintiffs in* Ohio Forestry Ass'n v. Sierra Club, 75 Chi.-Kent L. Rev. 613, 614-15 (2000).

44. *Id.* at 615 (citing *Abbott Labs.*, 387 U.S. at 149).

45. *Id. See also* Mandelker, *supra* note 10, §4.08[2] (describing how NEPA requires agencies to prepare an impact statement on their "proposals," and noting that courts have interpreted "proposal" to mean that the agency decision must be sufficiently "final" before the court will require preparation of an impact statement) (citing NEPA §102(2)(C)); Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976).

46. Gregory, *supra* note 43, at 615 (citing E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 Yale L.J. 643, 647 n.31 (1991) ("stating that finality is an essential precondition to ripeness and courts look to finality to determine ripeness")).

47. *Id.* at 616.

48. 90 Stat. 2949, *as renumbered and amended*, 16 U.S.C. §1604(a), ELR Stat. NFMA (quoted in Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 728, 28 ELR 21119, 21120 (1998)).

49. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376, 28 ELR 21073, 21074 (9th Cir. 1998).

50. The *Code of Federal Regulations* mandates preparation of an impact statement whenever any kind of resource management plan (RMP) is prepared. *See* 43 C.F.R. §1601.0-6 ("Approval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment. The environmental analysis of alternatives and the proposed plan shall be accomplished as part of the resource management planning process . . . .").

51. *Cuddy Mountain*, 137 F.3d at 1376, 28 ELR at 21074; 36 C.F.R. §219.10(a), (b), (e).

52. *See generally* Christian Stegmaier, Recent Development, *Trouble in the Forest: Citing Lack of Ripeness, the United States Supreme Court Vacates Sixth Circuit Decision in* Ohio Forestry Ass'n v. Sierra Club, 7 S.C. Envtl. L.J. 277, 278 (1998).

53. 36 C.F.R. §219.1(b).

54. 16 U.S.C. §1604(e)(1), ELR Stat. NFMA §6(e)(1).

55. *Cuddy Mountain*, 137 F.3d at 1377, 28 ELR at 21074; 16 U.S.C. §1604(i), ELR Stat. NFMA §6(i); 36 C.F.R. §219(e).

56. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737, 28 ELR 21119, 21122 (1998).

57. Robert Breazeale, *Is Something Wrong With the National Forest Management Act?*, 21 J. Land Resources & Envtl. L. 317 (2001).

58. 523 U.S. 726, 28 ELR 21119 (1998).

59. *Id.* at 728, 28 ELR at 21120.

60. 16 U.S.C. §1604(a), ELR Stat. NFMA §6(a).

61. *Id.* §1604(k), (f)(2), ELR Stat. NFMA §6(k), (f)(2).

62. *See* 40 C.F.R. §§1502.14, 1508.9(b).

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cutting.[63] The Court applied its two-part ripeness test, adopted in *Abbott Laboratories*,[64] and held the plan was not yet ripe for judicial review.[65]

Significantly, the *Ohio Forestry* Court held the Sierra Club's claims were not yet ripe under the *substantive* provisions of the NFMA. In dicta, however, it explicitly stated that the *substantive* claims at issue were different from certain *procedural* claims that are often available to plaintiffs. The Court stated that the failure to prepare an impact statement when procedurally required by NEPA is an example of such a procedural claim.[66] Though the ripeness doctrine has a strict "finality" requirement when applied to substantive claims, the Court in *Ohio Forestry* indicated the doctrine does not have the same stringent requirements when it is applied to procedural claims.[67] It noted that many statutes provide procedural mandates that, if violated, create an immediate cause of action.[68] The cause of action is immediate because a plaintiff asserting a procedural violation need not wait until the agency actually implements the proposal that violates a statutory procedure. The *Ohio Forestry* Court explained that the NFMA requires agencies to comply with certain substantive provisions in their forest management plans, but that "NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result."[69] Because of this major difference, the Court concluded, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper."[70]

This language strongly implies that an agency's final, concrete, and ripe action under a procedural statute like NEPA is the agency's *decision* either to follow the statutorily mandated procedure or not to follow that procedure. For example, NEPA imposes the procedural requirement that agencies must prepare an impact statement for their environmentally significant proposals. An agency's *decision* not to prepare an impact statement when NEPA requires one is a final agency action that violates a procedural statute and, therefore, is ripe at the time the agency *decides* not to prepare an impact statement.[71] This ripeness rule that applies to NEPA decisions contrasts sharply with the ripeness rule under the NFMA that an agency's action is not ripe until the agency initiates a site-specific action. The reason for this major difference, according to the Court in *Ohio Forestry*, is that NEPA is a procedural statute, while the NFMA is a substantive one.[72]

Although preimplementation judicial review is not available for alleged substantive violations of the NFMA, it is available for alleged procedural violations of NEPA, even if those procedural violations do not threaten the environment with immediate or substantive adverse consequences.[73] While the threats may, at the preimplementation stage, be immediate, they are no less serious or important. A poignant metaphor used to explain the importance of preimplementation review in such circumstances is that judicial review at the early planning stages is necessary to prevent the "bureaucratic steamroller" from progressing further and further along a path that becomes ever more difficult to alter.[74] According to then-Judge Stephen G. Breyer:

> [A]s time goes on, it will become ever more difficult to undo an improper decision . . . . The relevant agencies and the relevant interest groups . . . may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy[,] and money that would be needed to undo the earlier action and to embark upon a new and different course of action . . . . Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice . . . will prove an exercise in futility.[75]

As increasing amounts of time and money are devoted to the development of an initial agency proposal, environmental plaintiffs have an increasingly difficult time trying to convince the agency to change its course. In other words, "once the bureaucratic steamroller starts lumbering forward, resources may be depleted or ecosystems destroyed, undermining the utility of future judicial review."[76] The ripeness doctrine is the key to effective preimplementation judicial review. As noted earlier, the two major stages of agency action are: (1) the issuance of a proposal, accompanied either by an EA and FONSI or an EIS; and (2) the implementation of site-specific actions when these are included in the proposal. Then-Judge Breyer's words suggest that if a court has to wait until the agency reaches the second stage before it can address a *procedural* statute's violation, judicial review will occur at a point in time that is too late to be effective. Preimplementation judicial review is necessary in these situations to ensure that the agency follows the correct procedure at the correct time, before the agency expends too much time and money for the court reasonably to be able to require the agency to go back and examine its original rationale.[77]

63. *Id*.

64. 387 U.S. at 136.

65. *Ohio Forestry*, 523 U.S. at 732, 28 ELR at 21120.

66. *Id*. at 737, 28 ELR at 21122.

67. *Id*.

68. Amanda C. Cohen, Recent Development, *Ripeness Revisited: The Implications of* Ohio Forestry Ass'n v. Sierra Club *for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547, 554 (1999).

69. *Ohio Forestry*, 523 U.S. at 737, 28 ELR at 21122.

70. *Id*. Because the forest management plan had been completed, it was apparently a final agency action under the finality doctrine. However, there is a possible implication in the Court's decision that an action is final under NEPA if NEPA's procedural requirements are violated, even if the underlying agency action is not final.

71. *See* Kern v. Bureau of Land Management, 284 F.3d 1062, 32 ELR 20571 (9th Cir. 2002).

72. *See Ohio Forestry*, 523 U.S. at 737, 28 ELR at 21122.

73. Cohen, *supra* note 68, at 554.

74. *Id*. at 555.

75. Sierra Club v. Marsh, 872 F.2d 497, 503, 19 ELR 20931, 20934 (1st Cir. 1989).

76. Cohen, *supra* note 68, at 555. It is extremely important that agencies follow NEPA's procedure by preparing an impact statement for environmentally significant proposals because the statement will require the agency to give careful and detailed *preimplementation* consideration to the environmental effects of its proposal and then will subject those findings to public scrutiny. These "checks" on the agency's discretion can be described as tollbooths in the path of the "bureaucratic steamroller" that force the steamroller to slow down and reconsider its destination before it travels too far down a path that will be difficult to reverse.

77. *See* Thomas P. Rowland, Metcalf v. Daley: *The Makah Get Harpooned by NEPA*, 36 GONZ. L. REV. 395, 412 (2001) ("Ultimately, NEPA's effectiveness depends on agencies incorporating environmental considerations in their initial [decisionmaking] process. An assessment must be prepared early enough so it can serve as an important contribution to the [decisionmaking] process and will not be used to rationalize or justify decisions already made."); 40 C.F.R. §1502.5.

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A number of federal courts have interpreted the Court's dicta in *Ohio Forestry* as supporting a claim that procedural statutory violations of NEPA are ripe for judicial review at the time the alleged procedural violation occurs.[78] In *Kern v. Bureau of Land Management*,[79] for example, environmental plaintiffs sued an agency for failure to prepare an adequate impact statement under NEPA. The U.S. Court of Appeals for the Ninth Circuit held that the agency's issuance of an impact statement was a final agency action that was ripe for judicial review. The court clarified the ripeness distinction between procedural and substantive claims by noting that

> [b]ecause the plaintiffs here bring a NEPA challenge to an EIS, rather than a[n] NFMA (or a FLPMA [Federal Land Policy and Management Act of 1976]) challenge to an RMP, they are able to show an imminence of harm to the plaintiffs and a completeness of action by the agency that the Court held were missing in *Ohio Forestry*.[80]

The court explained that "[a] NEPA challenge to an EIS is fundamentally unlike a[n] NFMA (or FLPMA) challenge to an RMP . . . [because] [t]he rights conferred by NEPA are procedural rather than substantive. . . ."[81] In other words, the fact that the plaintiffs in *Kern* made procedural challenges under NEPA, rather than substantive challenges under the NFMA or FLPMA, their NEPA challenges were immediately ripe. In support of its conclusion, the Ninth Circuit quoted the Court's statement that "NEPA, unlike the NFMA, simply guarantees a particular procedure [a plaintiff who alleges] failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper."[82]

Although an impact statement, rather than an EA, was the agency action being challenged in *Kern*, an agency's preparation of an EA and FONSI also constitute final agency actions that likewise can be challenged for failure to comply with the procedures mandated by NEPA. Because NEPA is a procedural statute, the same judicial analysis should be applied when an agency allegedly fails to comply with any of the mandated procedures, regardless of which particular procedure is at issue. Accordingly, the alleged failure to comply with NEPA's procedure in preparing the EA and FONSI should be held ripe at the moment that failure occurs, just as an alleged failure to comply with NEPA's procedure in preparing an impact statement has been held ripe at the moment the failure occurs.[83]

The Duty to Comply With NEPA When There Is Uncertainty

The EA Stage

Timing issues arise under NEPA in a related context when an agency must decide whether the environmental effects of its action are certain enough to require discussion. A number of federal courts, both at the appellate and district levels, have addressed this issue. They have consistently held an agency must prepare an EIS when it prepares an EA that contains substantial uncertainties about the potential effects of a proposal. For example, in the hypothetical case posed in this Article, the Forest Service's EA contains substantial uncertainties about the potential effects of the management plan and the level of significance of those effects. The question is whether the agency must prepare an impact statement.

The "threshold requirement" for preparation of an impact statement turns on the "significance" of the proposal.[84] NEPA does not define "significance," so agencies look to the CEQ regulations for guidance in determining which proposals satisfy the threshold requirement. According to the CEQ regulation governing EAs,[85] an agency should use its

78. In Kentucky Heartwood, Inc. v. Worthington, 20 F. Supp. 2d 1076 (E.D. Ky. 1998), for example, the court held that a NEPA claim asserted by environmental groups against the Forest Service was procedural in nature and, therefore, ripe. *Id*. at 1090. *See* Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of* Ohio Forestry, 21 PUB. LAND & RESOURCES L. REV. 81, 92 (2000). The plaintiffs' one remaining claim against the forest plan at issue in the case was based on the substantive provisions of the NFMA. The court held that, unlike the procedural claims, this substantive claim was not yet ripe for judicial review. *Kentucky Heartwood*, 20 F. Supp. 2d at 1090; Baker, *supra*, at 93. The district judge used the Court's reasoning in *Ohio Forestry* as the basis for his decision that the procedural claim was ripe, but that the substantive claim was not. *Kentucky Heartwood*, 20 F. Supp. 2d at 1090; Baker, *supra*, at 93.

Another district court reached a similar result in Oregon Natural Resources Council Action v. U.S. Forest Serv., 59 F. Supp. 2d 1085, 30 ELR 20021 (W.D. Wash. 1999) [hereinafter *ONRC Action*]. *ONRC Action* involved the Northwest Forest Plan that was created in 1994 as an attempt to improve the management of federal forests comprising the habitat of the northern spotted owl. *Id*. at 1087, 30 ELR at 20022. The plan was designed to protect rare species by mandating that surveys be conducted for those species prior to the implementation of any ground-disturbing activities. Among the plaintiffs' claims was an allegation that the Forest Service violated NEPA by failing to prepare a supplemental EIS, under the procedural requirements of NEPA, when significant new information arguably had come to the Forest Service's attention. *Id*. at 1088, 30 ELR at 20022. The agencies attempted to defend themselves by arguing that the plaintiffs' claims were not based on "final" agency actions and, therefore, were not ripe. 59 F. Supp. 2d at 1090, 30 ELR at 20025. Judge Dwyer of the Western District of Washington disagreed with the agencies and held that the plaintiffs' claims of procedural violations of NEPA were ripe because procedural violations can be ripe even before the point at which an agency is ready to implement a specific part of its proposal. NEPA is thus an exception to the strict ripeness rule that is applied to violations of substantive statutes. *Id*. (citing *ONRC Action*). *See* Baker, *supra*, at 94.

In addition to the courts that have held procedural challenges under NEPA ripe at the time the failure to comply with NEPA's procedure occurs, CEQ regulation §1500.3 states that judicial review of an agency's compliance with NEPA should not occur before an agency has (among other possibilities) issued a FONSI. The regulation states that "[i]t is the [CEQ's] intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or *has made a final finding of no significant impact (when such a finding will result in action affecting the environment)*, or takes action that will result in irreparable injury." 40 C.F.R. §1500.3 (emphasis added).

79. 284 F.3d 1062, 32 ELR 20571 (9th Cir. 2002).

80. *Id*.

81. *Id*.

82. *Id*. (citations omitted).

83. *But see ONRC Action* (A Ninth Circuit decision preceding the 2002 Ninth Circuit panel decision in *Kern*, suggesting that *Ohio Forestry* calls into doubt a plaintiff's ability to challenge agency adoption of forest management plan without site-specific actions as the focus of the challenge).

84. MANDELKER, *supra* note 10, §2.04.

85. The regulation governing EAs is 40 C.F.R. §1508.9, which states that

> "Environmental Assessment":
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. . . .

Id.

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EA to determine whether or not its proposal meets the threshold requirement of "significance" that would require the agency to issue an impact statement.[86] Another CEQ regulation helps the agency determine whether its proposal is sufficiently "significant" to require the preparation of an impact statement.[87] This regulation states that an agency must consider both the "context" and the "intensity" of the effects of its proposal on the environment to determine its significance. The regulation explains that "intensity" refers to the severity of the impact on the environment. Sufficient intensity can be shown by a number of different factors that are listed in the regulation. One of the factors is described as "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[88] This regulation implies that if the potential effects of the proposal are highly uncertain or involve unique or unknown risks, the potential severity of the impact on the environment could be sufficiently intense to make those effects "significant." The Forest Service's EA in the hypothetical case posed in this Article is replete with language indicating the agency lacks even a minimal amount of information or scientific data regarding the outcome of its experimental reintroduction of wolves to the forest. The effects of its proposal are entirely uncertain.

A number of courts have held that the existence of significant uncertainties in an agency's EA mandates the preparation of an impact statement.[89] The most striking example of such a holding is the recent decision in *National Parks and Conservation Ass'n v. Babbitt*,[90] in which the Ninth Circuit held that "[a]n agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain."[91] The National Park Service (NPS) decided to dramatically increase the number of times that 1,000-passenger cruise ships would be permitted to enter Glacier Bay National Park and Preserve during each summer season.[92] Glacier Bay is located in the Alaskan panhandle and is one of the few remaining pristine and unspoiled environments characterized by astounding natural beauty. Among the exotic variety of wildlife inhabiting Glacier Bay are the Stellar sea lion and humpback whale, both of which are classified as endangered species.[93]

In response to the rapid increase in the number of tourist cruise ships entering Glacier Bay each season, the National Marine Fisheries Service (NMFS) issued a biological opinion (BO) in 1978 predicting that these increases in vessel traffic could jeopardize the existence of the humpback whales in that area.[94] In response, the NPS decided to regulate the number of cruise ships and other vessels that are permitted to enter Glacier Bay each day.[95] The NMFS issued another BO in 1983, which stated that the humpback whales were still at risk of suffering from the cumulative impacts of high numbers of vessel traffic, but suggested that a slight increase in the number of permitted vessels would probably be innocuous.[96] Shortly thereafter, the NPS issued a vessel management plan (VMP) allowing the number of vessel entries to increase by 20%.

Then, in 1992, the NPS produced a new VMP that proposed increasing the permitted vessel entries by an additional 72%.[97] In its third BO, the NPS, in 1993, discussed the decline in the number of humpback whales in Glacier Bay, but noted that no existing studies proved that the decline was

86. Mandelker, *supra* note 10, §7.04[3].

87. 40 C.F.R. §1508.27 provides that:

> "Significantly" as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

88. 40 C.F.R. §1508.27(b)(5).

89. According to the CEQ, "[b]ecause NEPA is silent on the problem of uncertainty resulting from missing information, the courts have been forced to grapple with the issue case by case and have established a 'rule of reason' approach." 50 Fed. Reg. 32234, 33237 (Aug. 9, 1985) (quoting Sierra Club v. Sigler, 695 F.2d 957, 13 ELR 20210 (5th Cir. 1983)).

90. 241 F.3d 722, 31 ELR Digest 20436 (9th Cir. 2001). Unfortunately, the Ninth Circuit's decision to issue an injunction against the Glacier Bay National Parks Service recently was compromised by the Department of the Interior and Related Agencies Appropriations Act of 2002 (Pub. L. No. 107-63), §130, which initially was attached as a rider by Sen. Ted Stevens (R-Alaska) on behalf of the Alaska cruise ship industry. Nevertheless, the Ninth Circuit's rationale and holding in the case may be an extremely important harbinger for the outcome of similar cases that are brought before the court in the future.

91. *Id.* at 731.

92. *Id.* at 725.

93. *Id.* at 725-26.

94. *Id.* at 727.

95. *Id.*

96. *Id.*

97. *Id.*

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caused by the increased amount of vessel entries.[98] The NPS supplemented its new VMP proposal with a revised EA, which briefly described the likely impacts of the new VMP. The EA listed numerous different wildlife species, including Stellar sea lions and humpback whales.[99] With regard to the effects of the new VMP on each of these wildlife species, the EA repeatedly stated that "little is known" or the "effects are unknown."[100]

The NPS admitted in its EAs that its proposal would subject the Glacier Bay wildlife to more vessel encounters, noise and air pollution, and a greater risk of vessel collisions and oil spills, but stated it was unsure of the level of significance these dangers would pose to the environment and did not know if other dangers existed as well.[101] The NPS was aware of the effects of allowing cruise ships to enter the park at the current limit per season, but was uncertain about the degree of intensity of the effects that would result from a large increase in the limit on entries. Furthermore, the agency was uncertain whether or not such an increase in the limit on entries would create new and additional environmental effects.

Despite all of this admitted uncertainty, the NPS issued a proposed FONSI and asserted that preparation of an impact statement was unnecessary.[102] One of the NPS' reasons for asserting an impact statement was not needed was that its proposed mitigation strategies arguably would sufficiently decrease the environmental effects of the increased vessel entries.[103] The National Parks and Conservation Association (NPCA) objected to the proposed VMP, EA, and FONSI.[104] Nonetheless, the NPS adopted the VMP, EA, and FONSI on the plan.[105] In response, the NPCA brought a lawsuit, requesting declaratory and injunctive relief prohibiting the implementation of the new VMP until the NPS complied with NEPA by issuing an impact statement.[106]

The Ninth Circuit used the arbitrary and capricious standard of judicial review adopted by the Court in *Marsh v. Oregon Natural Resources Council*[107] to review the NPS' decision not to prepare an impact statement.[108] It also applied the well-established "hard look" doctrine, under which a court must decide whether or not an "agency has taken a 'hard look' at the consequences of its actions, 'based [its decision] on a consideration of the relevant factors,'[109] and provided a 'convincing statement of reasons to explain why a project's impacts are insignificant.'"[110] In applying the "hard look" doctrine, the Ninth Circuit explained that "[i]f the EA establishes that the agency's action '*may* have a significant effect upon the . . . environment, an EIS must be prepared.'"[111] The court noted that the threshold significance determination should be made by examining the CEQ regulation that lists the significance factors. According to the court, even the presence of the "uncertainty" factor alone could, in some situations, be enough to require the agency to prepare an impact statement.[112] Furthermore, noted the court, "[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data."[113] The major reason for this is that "[t]he purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action."[114]

Importantly, the Ninth Circuit in *National Parks* stated in clear terms that the NPS' lack of knowledge was not a valid excuse for refusing to prepare an impact statement. The court explained this lack of knowledge meant that the agency must perform the necessary studies, gather the missing data, and then present the results in an impact statement.[115] The court emphasized that the lack of supporting data undermined the NPS' EA, which was supposed to convince the reviewing authority that an impact statement was unnecessary.[116] Furthermore, the Ninth Circuit found entirely unconvincing the NPS' statement of reasons why the necessary information could not reasonably be obtained before instituting the new VMP.[117] Instead, the court declared that "there is a *substantial possibility* that the new VMP *will significantly* affect Glacier Bay Park."[118]

Finally, the one means of escaping the requirement to prepare an impact statement that was available to the NPS would have been a demonstration that the agency could offset the environmental impact of its new VMP through proposed mitigation measures described in its EA.[119] However, the court found that this escape route was not open to the NPS because its description of the proposed mitigation measures was unclear and uncertain about whether the mitigation measures were likely to be successful.[120] Ultimately, the court held that "[h]ere, the [NPS'] repeated generic statements that the effects are unknown does not constitute the requisite 'hard look' mandated by the statute if preparation of an EIS is to be avoided."[121]

A number of federal cases, both before and after *National Parks* was decided, held that: (1) the existence of substantial uncertainty about the significance of *known* environmental effects (whose intensity may or may not be known); or (2) the existence of substantial uncertainty about the significance of *unknown* environmental effects in an EA makes a FONSI unacceptable and, instead, mandates the agency's

98. *Id*.
99. *Id*. at 728-29.
100. *Id*.
101. *Id*.
102. *Id*. at 729.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. 490 U.S. 360, 19 ELR 20749 (1989).
108. National Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722, 730, 31 ELR Digest 20436 (9th Cir. 2001) (citing Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 29 ELR 20424 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999)).
109. *Id*.
110. *Id*. (citing Metcalf v. Daley, 214 F.3d 1135, 30 ELR 20637 (9th Cir. 2000)).
111. *Id*. (quoting Foundation for N. Am. Wild Sheep v. Department of Agric., 681 F.2d 1172, 12 ELR 20968 (9th Cir. 1982)) (emphasis added).
112. *Id*. at 731 (citing Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 18 ELR 20749 (9th Cir. 1988)).
113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*. at 732, 31 ELR Digest 20436.
117. *Id*. at 733, 31 ELR Digest 20436.
118. *Id*. (emphasis added).
119. *Id*.
120. *Id*. at 734, 31 ELR Digest 20436.
121. *Id*. at 733, 31 ELR Digest 20436.

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preparation of an impact statement.[122] Though the two situations described above involve different kinds of uncertainty, the rationale of the courts that held an impact statement is required where there is uncertainty about the significance of the *known* effects applies equally to cases in which there is uncertainty about the significance of *unknown* effects. The difference between the two is that in the first situation, we know what the effects will be, but we do not know whether those effects will be significant, whereas in the second situation, we do not know what the effects will be, *and* we do not know whether those effects will be significant. The *National Parks* case is important because of its implication that uncertainty about the environmental significance of an agency's action may be enough to compel the preparation of an impact statement, even though the CEQ regulations list uncertainty as only one factor agencies must consider.

Just as the timing issue was central to the ripeness problem discussed in this Article, the issue is also central to the uncertainty problem. If an agency prepares an EA that is replete with substantial uncertainties, but wants to proceed with its action nonetheless, that very moment is the appropriate time to require the agency to stop and reconsider the effects of its decision through the preparation of an EIS.[123] One of the reasons agencies are required to prepare an impact statement in situations of total uncertainty is that an EIS requires a more fully researched "significance" explanation based on verifiable scientific studies than does an EA. One of NEPA's purposes is to prevent agencies from taking the easy way out by preliminarily deciding not to invest the necessary time and effort into gathering the studies and data that will make their prediction about the significance of their action more certain.

In fact, a number of federal cases illustrate that the key to whether a court will uphold an agency's FONSI depends on whether the agency took a sufficiently "hard look" at all of the environmental implications of its proposal.[124] If the agency issues a FONSI, it must give a "convincing statement" of reasons explaining that the decision is based on verifiable facts discovered during the agency's "hard look," rather than based on mere speculation.[125] By definition, an EA is not as "hard" a "look" as is an impact statement.[126] If significant uncertainties appear in the EA, the agency should be required to take an even "harder look" at those issues by preparing a deeper exposition of the issues in an impact statement.[127]

For example, an agency could take a "hard look," before implementing its potentially significant action, by conducting studies of prior agency actions containing similarities to its proposal and by gathering data from resources such as

122. The following Ninth Circuit cases were decided before *Foundation for N. Am. Wild Sheep*, 681 F.2d at 1178-79, 12 ELR at 20970 ("A determination that significant effects . . . *will in fact occur* is not essential. If substantial questions are raised whether a project may have a significant effect . . . an EIS must be prepared." (emphasis added). Furthermore, "the very purpose of NEPA's requirement that an EIS be prepared for actions that *may* significantly affect the environment is to obviate the need for such speculation by [e]nsuring that available data is gathered and analyzed prior to the implementation of the proposed action") (emphasis added); Save the Yaak Comm. v. Block, 840 F.2d 714, 717, 18 ELR 20608, 20609 (9th Cir. 1988) ("If substantial questions are raised regarding whether the proposed action *may* have a significant effect upon the . . . environment, a decision not to prepare an EIS is unreasonable.") (emphasis added); *Sierra Club*, 843 F.2d at 1193, 18 ELR at 20751 ("The standard to determine if an action will significantly affect the quality of the . . . environment is whether 'the plaintiff has alleged facts which, if true, show that the proposed project *may* significantly degrade some . . . environmental factor' . . . 'If substantial questions are raised whether a project may have a significant effect upon the . . . environment, an EIS must be prepared.'") (emphasis added); Conner v. Burford, 848 F.2d 1441, 1450, 18 ELR 21182, 21186 (9th Cir. 1988) ("[A]n EIS must be prepared as long as 'substantial questions' remain as to whether the measures will completely preclude significant environmental effects." The court held inadequate as an excuse to avoid an EIS from the agency's complaint that "the uncertain and speculative nature of oil exploration makes preparation of an EIS untenable until lessees present precise, site-specific proposals for development."); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50, 28 ELR 21044, 21045 (9th Cir. 1998) (If the plaintiff raises "substantial questions whether a project [described in an EA] may have a significant effect," that is sufficient to require the agency to prepare an impact statement. That court also said that "[i]n light of the failure to provide adequate data to the public, we conclude that an EIS is necessary to explore the substantial questions in respect to whether and what significant effects the [proposal] may have."); *Blue Mountains*, 161 F.3d at 1216, 29 ELR at 20427 ("An EIS is required of an agency in order that it explore, more thoroughly than an EA, the environmental consequences of a proposed action whenever 'substantial questions are raised as to whether a project *may* cause significant [environmental] degradation.'") (emphasis added); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380, 28 ELR 21073, 21076 (9th Cir. 1998) ("General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.").

The following cases were decided after *National Parks*: National Audubon Soc'y v. Butler, 2001 WL 1002083, 4-7 (W.D. Wash. 2001) ("uncertainty requires an EIS." The court noted that the agency's EA did not sufficiently analyze potential effects of tern relocation plan and, instead, merely revealed that effects on terns and salmon were entirely uncertain. Ultimately, the district court held that the agency's "EA does not provide a 'convincing statement of reasons' for avoiding an EIS" and, therefore, the agency must prepare an EIS in order to comply with NEPA.); Kern v. Bureau of Land Management, 284 F.3d 1062, 32 ELR 20571 (9th Cir. 2002) ("An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to the RMP.").

The earlier cases cited above were decided when the Ninth Circuit applied a "reasonableness" standard of review to an agency's decision not to prepare an EIS, and the later cases were decided under the "arbitrary and capricious" standard. According to the court in *Idaho Sporting*, however, "this 'reasonableness' review does not materially differ from an 'arbitrary and capricious' review." 137 F.3d at 1149, 28 ELR at 21044. The *Idaho Sporting* court quoted the U.S. Supreme Court's statement in *Marsh*, 490 U.S. at 377 n.23, 19 ELR at 20753 n.23, that the "difference between the 'arbitrary and capricious' standard and the 'reasonableness' standard is not of great pragmatic consequence."

123. NEPA's purpose is to ensure that "the agency will not act on incomplete information, only to regret its decision *after it is too late to correct*." *Marsh*, 490 U.S. at 371, 19 ELR at 20752 (emphasis added).

124. For example, in *National Parks*, the NPS planned to implement its proposal without preparing an impact statement containing scientific studies and data relating to the uncertainties. According to the Ninth Circuit, "[t]he Parks Service proposes to increase the risk of harm to the environment and then perform its studies. This approach has the process exactly backwards . . . the 'hard look' must be taken before, not after, the environmentally-threatening actions are put into effect." 241 F.3d at 732, 31 ELR Digest 20436.

125. "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains*, 161 F.3d at 1212, 29 ELR at 20425. Moreover, "[t]he statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id*. (citing *Save the Yaak*, 840 F.2d at 717, 18 ELR at 20609).

126. *See* 40 C.F.R. §1508.9.

127. "NEPA's 'hard look' requires some hard data—the 'look' is only as hard as the data that backs it up." Loretta V. Chandler, *Taking the "Hard Look": 9th Circuit Review of Forest Service Actions Under NEPA, NFMA, and NHPA*, 4 GREAT PLAINS NAT. RESOURCES J. 204, 215 (2000).

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computer-simulated programs designed to help the agency prospectively predict the effects of its action. The results of those extra measures would likely decrease the level of uncertainty inherent in the agency's proposed action and should be presented in an impact statement.[128] In fact, a number of courts have held that reliable scientific data and studies are part of the requisite "hard look" procedure.[129] Many cases expressly state that agencies must not delay their scientific studies and collection of data until after their actions have already been implemented.[130]

The EIS Stage

The uncertainty issue again arises at the EIS stage. If an agency that claims the environmental effects of its action are uncertain must write an EIS, the question is whether it agency may refuse to resolve this uncertainty in the statement. If the answer to this question is "yes," then compelling agencies to prepare an EIS when their EAs reveal uncertainties about the significance of their actions may be a meaningless requirement.

In several cases, courts have upheld an agency's decision to proceed with a proposal notwithstanding uncertainties about its environmental effects that appeared in its EIS. For example, in the 1978 case of *Alaska v. Andrus*,[131] both the CEQ and EPA challenged an agency's decision to sell over one million acres of oil and gas leases off the coast of Alaska.[132] The agency prepared an EIS, but the CEQ and EPA claimed the impact statement did not satisfy NEPA's requirements because the environmental effects of the sale were uncertain.[133] The environmental plaintiffs wanted the agency to delay the sale until the necessary environmental studies could be performed that would reduce or resolve those uncertainties. The agency had already implemented its action at the time this case arose, and exploratory drilling was under way in the area.[134]

The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld the agency's refusal to delay its action until the unknown information had been gathered. According to the court, "[o]ne of the costs that must be weighed by decisionmakers is the cost of uncertainty—i.e., the costs of proceeding without more and better information."[135] The court agreed with the environmental plaintiffs that NEPA definitely does impose on agencies an affirmative duty to attempt to gather the information needed to resolve uncertainties and predict the environmental effects before implementing an action. However, the court indicated that NEPA does not provide a bright line for when the agency has gathered "enough" information to proceed.[136] Because it could not find this bright line, the court declined to substitute its judgment for that of the agency's on whether or not enough information had been gathered.

About the time of this decision, in its 1978 regulations, the CEQ adopted a requirement that agencies prepare a "worst-case analysis" in an impact statement when there is incomplete or unavailable information concerning the significance of an action's environmental impacts.[137] Diffi-

128. According to the Ninth Circuit, for an agency to properly consider the potential adverse effects of its proposal, "some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide." *Cuddy Mountain*, 137 F.3d at 1379-80, 28 ELR at 21076. *See also* Chandler, *supra* note 127, at 215.

129. *See, e.g.*, *Idaho Sporting Congress*, 137 F.3d at 1150, 28 ELR at 21045

> we conclude that NEPA requires that the public receive the underlying environmental data. . . . NEPA's implementing regulations require agencies to "identify any methodologies used and [to] make explicit reference by footnote to the scientific and other sources relied upon for conclusions" used in any EIS . . . . In light of the failure to provide adequate data to the public, we conclude that an EIS is necessary to explore the substantial questions in respect to whether and what significant effects the sale may have.

Blue Mountains, 161 F.3d at 1214, 29 ELR at 20426 ("The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found."); Foundation for N. Am. Wild Sheep v. Department of Agric., 681 F.2d 1172, 1181, 12 ELR 20968, 20971 (9th Cir. 1982) ("The [Forest] Service provided no basis for its assumption in the EA. Evaluation of . . . this assumption is doubly difficult because of the Service's failure to provide data . . . . The absence of this crucial information renders a decision regarding the [environmental effects] necessarily uninformed.").

130. *See, e.g.*, *Foundation for N. Am. Wild Sheep*, 681 F.2d at 1181, 12 ELR at 20971 ("NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer acceptable." The kind of procrastination whereby the agency makes a "decision to act now and deal with the environmental consequences later . . . is plainly inconsistent with the broad mandate of NEPA."); Conner v. Burford, 848 F.2d 1441, 1450-51, 18 ELR 21182, 21186 (9th Cir. 1988) ("Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind [decisionmaking] NEPA was designed to avoid."); *Save the Yaak*, 840 F.2d 714 at 718, 18 ELR at 20610 ("inflexibility may occur if delay in preparing an EIS is allowed: 'After major investment of both time and money, it is likely that more environmental harm will be tolerated.'") (Citations omitted).

131. 580 F.2d 465, 8 ELR 20237 (D.C. Cir. 1978), *vacated in nonpertinent part sub nom*. Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

132. *Id*. at 466, 8 ELR at 20238.

133. *Id*.

134. *Id*. This case is also an excellent illustration of the "bureaucratic steamroller" problem, discussed earlier. *See supra* notes 74-76 and accompanying text. As increasing amounts of time and money are devoted to the development of an initial agency proposal, environmental plaintiffs have an increasingly difficult time trying to convince the agency to change its course or to convince the court to order the agency to delay further action.

135. 580 F.2d at 473, 8 ELR at 20242.

136. *Id*.

137. The CEQ issued NEPA regulations on November 29, 1978. 40 C.F.R. §§1500-1508 (cited in 50 Fed. Reg. at 32234, 32235). According to the CEQ,

> [e]arly in the history of interpreting NEPA, it was decided that an agency cannot avoid drafting an EIS because some information regarding the potential environmental impacts is unknown; indeed, "one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown." Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092, 2 ELR 20641 (D.C. Cir. 1973).

50 Fed. Reg. at 33236. The CEQ explained that

> [s]ection 1502.22 attempts to address the difficulty of analyzing in an [EIS] the consequences of a proposed action in the face of incomplete or unavailable information. The regulation requires an agency to disclose the fact that information is lacking or that scientific uncertainty exists, and to obtain that information if it is essential to a reasoned choice among alternatives and the overall costs of doing so are not exorbitant. If the agency is unable to obtain the information because of overall costs or because the means to obtain it are not known, and the agency proceeds in the face of uncertainty, it must include a "worst case analysis" in the EIS. Although nothing in the official regulatory record reveals the reason that the

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culties with this regulation[138] prompted the CEQ to amend it in 1986.[139] As amended, the regulation provides guidance on the problem the court faced in *Andrus*.

The amended regulation establishes a fairly bright line on when an agency has gathered "enough" of the information needed to reduce or resolve any uncertainty about the environmental effects it is required to consider in its EIS. Under the amended regulation, an agency may be excused from obtaining information that would resolve important uncertainties only in the very rare circumstance where it faces exorbitant costs and unknown means of obtaining the missing information. As the CEQ's regulation explains, if the information pertaining to significant adverse effects would be (1) exorbitantly expensive for the agency to obtain, or (2) practically impossible for the agency to obtain because there are no known ways of finding the information, the agency writing the EIS will not actually be required to obtain the information necessary to *resolve* the uncertainty. However, the agency's EIS must still include a list of statements and summaries explaining the uncertainty.[140] Under this regulation, the agency must always explain in its EIS the information it lacks and the reasons why the information that was necessary to resolve the uncertainty was exorbitantly expensive or nearly impossible for the agency to obtain.[141]

Importantly, the regulation also states that if the lack of information necessary to resolve the uncertainty: (1) relates to potentially significant adverse effects; (2) is essential to a reasoned choice among alternatives; and (3) would not be exorbitantly expensive for the agency to obtain, the agency *is affirmatively required* to obtain that information and include it in its impact statement.[142] In other words, if an agency's proposal *could* have potentially significant adverse effects, and the lack of information is essential to a reasoned choice, the agency must obtain the information necessary to resolve the uncertainty if the cost of so doing is not exorbitant. Had *Andrus* been decided under this regulation, the D.C. Circuit would have based its decision on whether the difficulty and costs of obtaining the incomplete information before proceeding further with the action would have justified the agency's refusal to obtain the information despite its importance to the environmental decisionmaking process. Notably, the agency's impact statement in that case contained "no information whatsoever on the costs of such a delay,"[143] and in those circumstances the court might have found the refusal to obtain the information unjustified.

Apart from the CEQ's regulation, there are persuasive reasons for requiring agencies to prepare an EIS when environmental effects are uncertain, even though they may not have to include a discussion of those uncertain impacts. If agencies were excused from having to address uncertainty issues in their EAs merely because they did not *always* have to *resolve* those uncertainties in their impact statements, the EA could become a convenient means for agencies to "take the easy way out" when faced with complex scientific questions. Courts have long held that "agencies cannot shirk their responsibilities by labeling a discussion of future environmental effects a 'crystal ball inquiry.'"[144]

One of NEPA's major goals was to eliminate uncertainty and speculation.[145] The decision on whether to prepare an impact statement, based on the findings in the EA, is a crucial threshold decision. Agencies should not be permitted to escape discussion of uncertainty at the EA stage in order to avoid the preparation of an impact statement. They should be required to move on to the impact statement stage where the balancing test adopted by CEQ regulations, that takes

> Council chose the "worst case analysis" construct, which was not required by previous judicial opinions construing NEPA or by CEQ guidelines, it was apparently created as a device to require agencies to complete the analysis in the EIS, rather than allowing agencies to disregard uncertainties as having no weight in the balancing process.

Id.

138. According to the preamble of the CEQ's proposed amendment:

> After an intensive review of the regulation, the Council has concluded that the "worst case analysis" requirement is an unsatisfactory approach to the analysis of potential consequences in the face of missing information. The requirement challenges the agencies to speculate on the "worst" possible consequence of a proposed action. Many respondents to the [c]ouncil's [a]dvance [n]otice of [p]roposed [r]ulemaking [(ANPRM)] pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse "worst case" by adding an additional variable to a hypothetical scenario. Experts in the field of risk analysis and perception stated that the "worst case" analysis lacks defensible rationale or procedures, and that the current regulatory language stands "without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis. . . .," Slovic, P., February 1, 1985, Response to ANPRM.

50 Fed. Reg. at 32234, 33236. "Moreover, in the institutional context of litigation over EIS(s) the 'worst case' rule has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose." *Id*. "The 'worst case analysis' requirement has been interpreted to require agencies to present a discussion of a particular disastrous impact even when the agency believes that no credible scientific data has indicated that the particular impact could be caused by the proposed action . . . ." *Id*. at 33236-37.

139. *See* 40 C.F.R. §1502.22; 51 Fed. Reg. 15618 (Apr. 25, 1986).

140. 40 C.F.R. §1502.22 (emphasis added).

141. *Id*. §1502.22(b) sets forth the following detailed requirements for information that must still be included in the EIS in those kinds of situations:

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. . . .

142. "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency *shall* include the information in the environmental impact statement." *Id*. §1502.22(a) (emphasis added).

143. 580 F.2d at 475, 8 ELR at 20243.

144. *Id*. at 473, 8 ELR at 20242. Similarly, courts have warned agencies that an impact statement must not be used to "sweep under the rug" the problems and questions that have come to the agency's attention. MANDELKER, *supra* note 10, §10.05 (citations omitted). Finally, courts have also said that judicial review is not completely deferential to agency decisions, like a "rubber stamp," but rather that judicial review seeks to ensure that the agency has taken the requisite "hard look" at the environmental effects. *Id*.

145. National Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722, 732, 31 ELR Digest 20436 (9th Cir. 2001).

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into account the importance of uncertain information to the environmental analysis, will govern whether the agency must discuss uncertain effects.[146]

Conclusion

In conclusion, the potential tension between the timing of agency decisionmaking and the timing of judicial review can impair the effectiveness of NEPA. If the ripeness doctrine postpones judicial consideration of an agency proposal, such as a forest management plan, an agency can prevent effective environmental review by making irreversible commitments at a time when judicial review is unavailable. Further, if an agency is able to avoid the preparation of an EIS in which it must defend its decision not to discuss uncertainties, important (though uncertain) impacts of an agency proposal will not receive the necessary environmental review. Courts must ensure that agency actions with potentially significant environmental impacts are brought up for judicial review early enough in the environmental review process to be meaningful. They must also prevent agencies from relying on EAs as a basis for refusing to prepare an EIS when environmental effects are uncertain.

146. The regulations governing EAs are incomplete and do not address the issue of uncertainty. In the absence of adequate CEQ regulations governing EAs, the ultimate resolution of the crucial timing questions under NEPA regarding both the ripeness doctrine and the uncertainty issue will depend on the expertise of the courts.