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THE JUDICIAL STANDARD FOR REVIEW OF ENVIRONMENTAL IMPACT STATEMENT THRESHOLD DECISIONS*

Thomas E. Shea**

I. INTRODUCTION

A. The EIS Requirement

The National Environmental Policy Act of 1969 (NEPA)\(^1\) requires responsible officials of all agencies of the Federal Government to include a detailed statement in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.\(^2\) The requirements for such environmental impact statements (EIS's) as they have come to be known, are outlined by section 102 of NEPA.\(^3\) Further binding guidance regarding the preparation of such statements is provided by the implementing regulations of the Council on Environmental Quality which were promulgated in an effort to establish uniform procedures for insuring agency compliance with the procedural provisions of NEPA.\(^4\)

The requirement for the preparation of an environmental impact statement is the cornerstone of NEPA's procedural requirements. Although the preparation of a legally sufficient impact statement is

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* The opinions expressed in this article are those of the author and do not necessarily represent those of any Federal agency.

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not the only mandate of NEPA, these statements do serve as the principal mechanism for insuring that the Federal Government complies with the underlying policy of the Act. In instances where an agency is not required by NEPA to prepare an environmental impact statement, it still has obligations under the Act to study and develop appropriate alternatives as well as to recognize the continuing responsibility of the Federal Government with regard to environmental considerations under section 101. As the Supreme Court has recognized, however, such environmental concerns need not necessarily be elevated over other appropriate considerations in the selection of a course of action by a federal agency.

Although the universe of NEPA is not inclusive in the impact statement provisions, preparation of an environmental impact statement is the procedural focus of the Act and has certainly proved to be the center of attention. The requirement for an environmental impact statement effects NEPA's express purpose to imbed an early formal consideration of environmental impacts in major agency decisions. Because of this, the threshold decision regarding the necessity for preparing an EIS is of profound importance.

It is not surprising that in light of the importance of such EIS threshold decisions, the issue has been heavily litigated. Courts have not hesitated to insure that "the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." It has been argued that without the full disclosure required by NEPA for major federal actions, there exists no sound basis to evaluate the environmental aspects of a project.

The EIS requirement is not, however, the only basis for environmental consideration of an action under NEPA. Agencies are required to prepare environmental assessments for proposed actions which are not covered by categorical exclusions.

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7 Id.
10 40 C.F.R. § 1501.4 (a) and (b) (1979). A categorical exclusion is one which normally does not require either an environmental impact statement or an environmental assessment. These categorical exclusions are defined by the agencies in their regulations implementing
tial assessment is then used to make a determination whether to prepare an environmental impact statement. If the agency determines that an environmental impact statement is required, the scoping process is commenced, leading to the preparation of the statement. If the agency determines that based upon the environmental assessment an EIS is not required, it must then prepare a finding of no significant impact (FONSI) which must be made available to the affected public. In certain limited circumstances where the proposed action is similar to one which normally requires the preparation of an environmental impact statement or the nature of the proposed action is without precedent, the FONSI must be made available for public review for thirty days before the agency makes its final determination. An environmental assessment also serves as an aid in assuring compliance with NEPA's other requirements, such as considering alternatives, when an EIS is not prepared.

The purpose of this article is to consider the standard for judicial review used by the courts in deciding whether an agency decision not to prepare an impact statement complies with the mandate of NEPA. Consideration of this question must first involve looking at the policy and purpose of the Act. Section II is a fundamental exploration into the requirements of NEPA and especially the meaning of the phrase “major Federal actions significantly affecting the quality of the human environment.” This discussion will be general, for the focus of this article is not on the interpretation of that phrase but rather on the standard which the courts have applied in reviewing agency compliance with the mandate. In order to explore that standard for review Section III will examine the Administrative Procedure Act (APA) for statutory guidance. Section IV will consider four Supreme Court decisions relating to the standard for judicial review of agency decisions in the context

the CEQ regulations. As an example, categorical exclusions for the U.S. Army Corps of Engineers are set forth in 33 C.F.R §§ 230.7 and 230.8. These exclusions include certain feasibility studies which may be sufficiently analyzed and reviewed through the preparation and circulation of an environmental assessment. Another categorical exclusion is required for responding to emergency situations where action is necessary to prevent or reduce risks to life, health, or property, or severe economic losses.

11 40 C.F.R. § 1501.4(c) (1979).
12 Id. § 1501.4(d).
13 Id. § 1501.4(e)(1).
14 Id. § 1501.4(e)(2).
15 Id. § 1508.9.
of the APA and environmental law. The views expressed by each of
the circuit courts on the appropriate standard for judicial review of
EIS threshold decisions will be discussed in Section V. Coming out
of this tangle of contradictory cases, the article will conclude with
some observations of the standard for review based upon the previ­
ous discussion.

B. The Policy and Purpose of NEPA

The main purpose for preparing an environmental assessment is
to insure that the agency makes an informed and conscious deci­
sion regarding the EIS threshold question. There are actually two
components of this purpose. First, the assessment assures that the
agency has given adequate consideration to the question at hand
and that it is correctly applying the statutory standard. Second, it
provides a focal point for judicial review of the decision, providing
the court with the benefit of the agency's expertise.16

The requirement for an environmental assessment underscores
the important nature of the threshold determination, but it does
more. The environmental assessment also forces the agency to in­
vestigate and analyze the environmental consequences of its ac­
tions even in many cases where a more extensive environmental
impact statement is not prepared. The requirement for an environ­
mental assessment therefore results in formal consideration of en­
vironmental factors in many proposed actions which do not consti­
tute major federal actions significantly affecting the quality of the
human environment.

The genesis of detailed and analytical environmental assess­
ments is found, at least in part, in Hanly v. Mitchell17 where the
court noted than in making the threshold determination under sec­
tion 102(C) of NEPA the agency must affirmatively develop a re­
viewable record in lieu of limiting itself to perfunctory
conclusions.18

An environmental impact statement performs two primary func­
tions: (1) to serve as an environmental disclosure statement by de­
tailing the environmental effects of a proposed federal action in
order to enable those who do not have a part in its compilation to

17 460 F.2d 640 (2d Cir. 1972), cert. denied, Hanly v. Kleindienst, 409 U.S. 990 (1972)
(Hanly I).
18 Id. at 647.
understand and consider meaningfully the factors involved, and;
(2) to compel the decisionmaker to give serious consideration to
environmental factors in making discretionary choices and to help
insure the integrity of the process of decision by precluding stub­
born problems or serious criticism from being swept under the
rug.

Consistent with this purpose, judicial review of agency compli­
ance with the procedural requirements of NEPA is consistently
rigorous. This judicial scrutiny is nowhere more apparent than in
the review of agency decisions regarding the necessity for the pre­
paration of impact statements. Because of the importance of these
threshold determinations, much effort has been given to develop­
ing law to guide the decision process. Before exploring the stan­
dard for judicial review in this area, it is first necessary to summa­
rize the substantive criteria which have emerged.

II. NEPA'S REQUIREMENT OF AN ENVIRONMENTAL IMPACT
STATEMENT FOR "MAJOR FEDERAL ACTIONS SIGNIFICANTLY
AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT"

NEPA requires the preparation of an EIS for major federal ac­
tions significantly affecting the quality of the human envi­
enment. The statute itself provides no guidance regarding the
meaning of this mandate and the legislative history is equally un­
informative. Although the basic mandate for the preparation of
an EIS has been called one of "uncommon clarity" the precise meaning of that mandate and its application are not clear. The language of NEPA has also been referred to as "opaque". It has been the responsibility of the courts to fashion and forge an interpretation in the context of the cases which have been litigated.

Because of the importance of the phrase "major Federal actions significantly affecting the quality of the human environment" the courts have found it necessary to parse the statutory language word by word. This section will consider the interpretation given to the words in this phrase by decisions of the courts and regulations of the Council on Environmental Quality.

A. Unity or Duality—Interpreting "Major" and "Significantly" Together or Independently

The phrase "major Federal actions significantly affecting the human environment" can be read in either of two ways. It can be approached as a unitary standard compelling the conclusion that a federal action is major so long as the action relates to a significant effect on the human environment. Alternatively, it can be interpreted as a dual standard requiring the determination of the magnitude of the federal action as well as the significance of the effect.

In support of the unitary approach, the court in Minnesota Public Interest Research Group v. Butz has stated that by bifurcating the statutory language, it would be possible to speak of a minor federal action significantly affecting the quality of the human environment and, therefore, to find the EIS requirement inapplicable. The thrust of the unitary approach is to concentrate attention on the significance of the action and to assume that if the effect is significant it is axiomatic that the action is also major.

On the other side, some courts have found that "major Federal actions significantly affecting the quality of the human environment" can be read in...
action" and "significantly affecting" are distinct requirements and that a proper analysis requires separate consideration of each. It is argued that the two-pronged approach follows the statutory language more closely and that since the unitary approach gives virtually no effect to the word "major," it runs contrary to the requirement that a court give meaning to all words of a statute when construing it.

The CEQ regulations adhere to the unitary approach although separately defining "major Federal action" and "significantly." This represents a reversal from the earlier CEQ guidelines which stated that major and significantly were "intended to imply thresholds of importance and impact that must be met before a statement is required." Since the Supreme Court has not yet addressed this issue there is no definitive answer to the unitary-duality controversy.

B. When Is an Action "Federal'? 

Under either the unitary or duality approach a determination must be made concerning whether the action is federal. This seemingly straightforward inquiry has proved to be less certain in its application. It has been determined that there is federal action within the meaning of NEPA not only where an agency proposes to build a facility itself, but also in some cases where an agency makes a decision which enables action by a private party which will affect the quality of the environment.

This enabling analysis has been applied to find sufficient involvement to trigger the EIS requirement where the federal government grants licenses and permits to private parties approves

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29 NAACP v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).
30 40 C.F.R. Parts 1500-08, Comments on § 1508.17 (1979).
31 40 C.F.R. § 1508.18 (1979).
32 40 C.F.R. § 1508.27 (1979).
33 40 C.F.R. § 1500.6(c) (1977).
34 Scientists' Inst. for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). It should be noted, however, that at least two recent cases have found that the necessity of obtaining a federal permit for a small part of a private project does not federalize the entire project. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980); Save the Bay, Inc. v. United States Corps of Engineers, 14 ERC 1456, _ F.2d _ (5th Cir. 1980).
35 See e.g., Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971).
a lease of land to private parties, or approves and funds a highway construction project. The nexus is sufficient to require an EIS even where an agency makes a decision which permits some other party to develop a technology which could affect the environment.

A significant factor in these federal enablement cases involves the question of an agency's discretion with regard to a proposed action. Section 102 of NEPA requires compliance "to the fullest extent possible." The courts have interpreted this narrowly, finding that the limit of this directive is reached when NEPA conflicts with an existing statutory scheme. Because of this limitation, compliance with NEPA is not required where an agency has no discretion to apply and is obligated to act by law. NEPA will not make discretionary an action which was mandatory prior to its enactment and where an individual has acquired rights that must be legally recognized, NEPA will not operate to remove those rights.

The premier case dealing with the question of statutory conflict in the NEPA arena is Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma. The petitioner was a land development company which filed a statement of record with the Department of Housing and Urban Development (HUD) under the Interstate Land Sales Full Disclosure Act. The statement of record was required under the Act before Flint Ridge could sell lots in interstate commerce. After the statement was filed respondents petitioned HUD to prepare an environmental impact statement before allowing the statement of record to go into effect. HUD rejected this request and the respondents filed suit. The district court found that HUD's action of allowing the statement of record to go into effect constituted major federal action requiring an

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87 See e.g., Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).
88 See e.g., Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1972).
43 Union Oil Co. of Cal. v. Morton, 512 F.2d 743 (9th Cir. 1975).
44 Jones v. Lynn, 477 F.2d 886 (1st Cir. 1973).
EIS.\textsuperscript{47} The Tenth Circuit agreed with the district court, reasoning that the real estate development would have substantial environmental consequences and finding that the case was similar to those in which a federal agency grants a license, approves a project, or supplies funding or financial guarantees.\textsuperscript{48}

The case was reversed by the Supreme Court in an opinion by Justice Marshall. The Court found no basis in the Disclosure Act to permit the Secretary to suspend the time demands of the statute in order to allow preparation of an impact statement.\textsuperscript{49} Because of this, there was a "clear and fundamental conflict of statutory duty," making NEPA's EIS requirement inapplicable.\textsuperscript{50}

The CEQ regulations attempt to define in general terms the boundaries of federal action, including new and continuing activities involving programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies.\textsuperscript{51}

Such actions generally fall into one of four categories: (1) adoption of official policy such as rules, regulations, interpretations under the APA, treaties and international conventions or agreements, and formal documents establishing policies which will result in or substantially alter agency programs; (2) adoption of formal plans, such as official documents prepared or approved by federal agencies which guide alternative uses of federal resources upon which future agency actions will be based; (3) adoption of programs, such as a group of concerted actions to implement a policy or plan and decisions allocating resources to implement a program or directive, or; (4) approval of specific projects such as construction or management activities including action approved by permit or regulatory decision and federally assisted activities.\textsuperscript{52}

Also of interest have been those cases in which it has been urged that a lack of action by the Federal Government should trigger the EIS requirement. In one instance the District Court for Alaska disagreed with an earlier decision of the District Court for the District of Columbia and held that the failure of a federal agency to object to a wolf hunt in Alaska did not constitute federal action and thus

\begin{itemize}
\item Scenic Rivers Ass'n of Okla. v. Lynn, 382 F. Supp. 69 (E.D. Okla. 1974).
\item Id.
\item Scenic Rivers Ass'n of Okla. v. Lynn, 520 F.2d 240 (10th Cir. 1975).
\item Id.
\item 40 C.F.R. § 1508.18(a) (1979).
\item Id. § 1508.18(b) (1979).
\end{itemize}
a environmental impact statement was not required.\textsuperscript{63} It has also been held that EPA's failure to object to the issuance of a state NPDES permit does not require an EIS.\textsuperscript{64} The reasoning behind this position is that the term "action" under NEPA only means affirmative action and thus refraining from taking action does not come within the purview of the Act.\textsuperscript{65} The Council on Environmental Quality has taken a contrary position, finding that actions "include the circumstance where responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."\textsuperscript{66}

\section*{C. What Is A "Major" Action?}

The threshold question as to whether there is a major federal action requiring NEPA compliance is not presented in the majority of cases; there is little question that when the federal government commits millions of dollars to build dams, nuclear power plants, or highways that there is a major federal action.\textsuperscript{67}

A significant minority of cases has, however, found it necessary to discuss the meaning of "major" in the NEPA context. For those courts that adhere to the duality approach in the interpretation of "major Federal actions significantly affecting the quality of the human environment," a determination must be made that the federal action is major as well as significant in order to necessitate an EIS. The search for usable standards to determine what is major has proven illusive. In general the resolution has depended on a case by case analysis guided by rather flexible standards.

In \textit{Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Development Commission},\textsuperscript{68} the court resorted to that

\begin{itemize}
\item \textsuperscript{63} \textit{Alas. v. Andrus}, 429 F. Supp. 958 (D. Alas. 1977). In \textit{Defenders of Wildlife v. Andrus}, 627 F.2d 1238 (D.C. Cir. 1980) the Circuit Court of Appeals for the District of Columbia agreed with the position of the Alaska court and reversed the decision of the District of Columbia District Court.
\item \textsuperscript{64} \textit{Chesapeake Bay Foundation, Inc. v. Va. State Water Control Bd.}, 453 F. Supp. 122 (E.D. Va. 1978). An NPDES permit is a National Pollution Discharge Elimination System permit issued by either a state or the Environmental Protection Agency under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1970). A NPDES permit is also known as a Section 402 permit. \textit{Id.} § 1342.
\item \textsuperscript{66} 40 C.F.R. § 1508.18 (1979).
\item \textsuperscript{67} \textit{Minnesota Pub. Interest Research Group v. Butz}, 498 F.2d 1314, 1319 (8th Cir. 1974).
\item \textsuperscript{68} 464 F.2d 1358 (3rd Cir. 1972), \textit{cert. denied}, 409 U.S. 1118 (1973).
\end{itemize}
ever-present judicial helper, the reasonable man, to set the standard for determining whether approval of the construction of a liquid natural gas facility by the Federal Power Commission was major action. The court first undertook a general factual analysis, taking into consideration that the facility had been in operation for a considerable period, that it was an expansion of an existing facility, that there was no expenditure of any federal funds and that there was no taking of any public lands. Having made these observations the court found that “approval of the construction of the facility is certainly not the type of ‘action’ which most reasonable men would conclude, without any guidelines, to be either ‘major’ or even an ‘action’.”

This type of general analysis is typical of the area. Because of the lack of guidance in NEPA and its legislative history the courts have had to develop an implementing common law based primarily on broad policy considerations, limiting the requirement of an EIS to those federal actions of “superior, larger and considerable importance . . . .” In large part the decision is a judgement based on the circumstances of the proposed action.

The original CEQ guidelines attempted to clarify the issue by equating major with controversial, stating that “[p]roposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases.” In Hanly v. Kleindienst, the Second Circuit Court of Appeals found that “controversial” refers to cases where a “substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed.” Judge Friendly disagreed in a dissenting opinion, stating that he found no basis for the limited reading which the majority applied. The “likely to be highly controversial” test did not, at any rate, prove to be useful and was dropped from the new CEQ regulations’ definition of “major” but has been retained as a

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**Id. at 1366.**

**Id. at 1367.**

**See NAACP v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).**

**Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972).**

**Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 n.7 (5th Cir. 1973).**

**40 C.F.R. § 1500.6(a) (1977).**

**471 F.2d 823 (2d Cir. 1972).**

**Id. at 830.**

**Id. at 838-39 (Friendly, J. dissenting).**

**40 C.F.R. § 1508.18 (1979).**
sub-factor in the consideration of what is "significant." 69

D. When Does an Action "Significantly" Affect the Environment?

The quest for the meaning of significant is most properly introduced with a quotation from Judge Friendly's dissent in Hanly v. Kleindienst.

While I agree that determination of the meaning of "significant" is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words may be "chameleons, which reflect the color of their environment," C.I.R. v. National Carbide Corp., 167 F.2d 304, 306 (2d Cir. 1948) (L. Hand, J.), "significant" has that quality more than most. It covers a spectrum ranging from "not trivial" through "appreciable" to "important" and even "momentous." 70

The fact that the chameleon-like creature is evasive has not prevented its being chased on a regular basis throughout the NEPA decisions. Agencies, lawyers, judges and commentators have launched campaign after campaign attempting to catch and define the "significant" chameleon only to later find it has again changed its color in the context of another case and slipped away. The basis of the problem arises from a lack of guidance from the Act and its legislative history. As with the term "major" the courts have found themselves pretty much on their own in deciding what is meant by "significantly affecting the quality of the human environment." 71

As a starting point, almost every major federal action, no matter how limited in scope, has some effect on the human environment. 72 While Congress could have imposed the EIS requirement on all major federal actions, it did not. The addition of the word "significantly" must mean something; but what? 73

One of the most influential statements concerning this question was proffered by the Second Circuit Court of Appeals in Hanly v. Kleindienst 74 which was on appeal to the circuit court for the sec-

69 Id. § 1508.27(b)(4).
70 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J. dissenting).
73 Id.
74 Id. at 830-31.
In that case the General Services Administration (GSA) was proposing to construct an annex including two twelve story buildings, one an office building and the other a jail, to the U.S. Courthouse in Manhattan. Appellants contended that GSA was required to prepare an impact statement. In its decision the Court of Appeals approached the question by formulating standards for determining whether an action significantly affects the quality of the human environment.

[T]he agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

Based upon these standards, the case was remanded for additional findings of fact.

The CEQ regulations take an even more detailed approach including standards for both the context and intensity of the effects of the proposed action. Context means that the significance of an action must be analyzed in several settings such as the society as a whole, the affected region, the affected interests and the locality. As a result, significance varies with the setting of the proposed action. Both short- and long-term effects are considered relevant as context.

The second consideration is intensity, which refers to the severity of the impact bearing in mind that more than one agency may make decisions about partial aspects of a major action. An evaluation of intensity should consider: (1) beneficial and adverse impacts; (2) the degree to which the proposed action affects the public health and safety; (3) unique characteristics of the geographic area; (4) the degree to which the effects are likely to be highly con-

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75 The first appeal was Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), cert. denied, Hanly v. Kleindienst, 409 U.S. 990 (1972) (Hanly I).
77 40 C.F.R. § 1508.27 (1979).
78 Id. § 1508.27(a).
79 Id.
80 Id.
81 Id. § 1508.27(b).
troversial; (5) the degree of uncertainty or the involvement of unique or unknown risks; (6) the degree to which the action may be a precedent; (7) the cumulative effects anticipated; (8) effects on significant scientific, cultural or historic resources; (9) adverse effects on any endangered or threatened species or its habitat, and; (10) violation of federal, state or local environmental laws.83

These criteria should be welcomed by the courts, agencies and public as an effort to bring some semblance of order to the threshold determination process. They do not constitute a magic formula which can be applied in an automatic and entirely objective manner because the underlying concepts of environmental protection do not lend themselves to such easy analysis. The CEQ approach does, however, offer a workable framework for thoughtful analysis which can assist the decisionmaker in reaching a threshold determination concerning the necessity of preparing an impact statement.

III. THE ADMINISTRATIVE PROCEDURE ACT

Because NEPA itself does not address the question of judicial review of agency procedures or determinations under the Act,84 it is necessary to look to the Administrative Procedure Act (APA) for guidance.84

Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”85 The actions judicially reviewable under the APA are agency actions which are made reviewable by statute and final agency action for which there is no adequate remedy in a court.86 By virtue of section 701 the review provisions apply to agency actions except to the extent that: (1) statutes preclude judicial review, or; (2) agency action is committed to agency discretion by law.87 It is particularly this mandate of section 701 which makes the APA provisions applicable to judicial review of agency actions under NEPA.88

83 Id. § 1508.27(b)(1)-(10).
84 See text at notes 21-22 supra.
The APA manifests a congressional intention that it cover a broad spectrum of administrative actions. Accordingly, the Supreme Court has held that the APA's "generous review provisions" must be given hospitable interpretation and that only upon a showing of clear and convincing evidence of contrary legislative intent should the courts decline to apply the APA's judicial review provisions. Section 559 of the APA provides that a subsequent statute may not be held to supersede or modify its judicial review provisions except to the extent that the subsequent statute does so expressly. The purpose of this section and the sections on judicial review was to remove obstacles to judicial review of agency actions under subsequently enacted statutes.

It is against this forceful backdrop that the applicable standards for judicial review of agency actions under NEPA must be viewed. The presumption is strongly in favor of the application of the APA to all agency actions including those under NEPA and unless there is a statutory prohibition or in cases where agency action is committed to agency discretion by law, the APA judicial review provisions apply to NEPA. Although the question of the applicability of the APA is easily answered, the determination of its applicability is fundamental to determining the appropriate standard for judicial review of agency threshold decisions under NEPA and the applicability of the APA to such cases must be recognized.

Once it has been determined that the APA is applicable, the next step is to explore the scope for judicial review which is set out in the statute. A reviewing court is empowered by section 706 to decide all relevant questions of law, interpret statutory provisions and determine the meaning or applicability of the terms of an agency action to the extent necessary. In fulfilling its responsibilities of review the court shall:

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be —

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(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.\(^{55}\)

This then is the standard for judicial review required by the APA. The inquiry does not, however, stop here. These standards must be applied to the NEPA process and examined to determine their significance with respect to the EIS threshold decision process.

Under section 706(1) a court can compel agency action unlawfully withheld or unreasonably delayed.\(^{56}\) When administrative inaction has the same impact on the rights of a party as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an affirmative decision denying relief.\(^{57}\) Thus action under section 706 is appropriate for those situations where the agency has failed to take appropriate action\(^{58}\) such as the preparation of an EIS.

In most instances, however, the agency will prepare an environmental assessment.\(^{100}\) Where the assessment results in a negative threshold determination judicial review would be more proper under section 706(2) which compels a court to hold unlawful and set aside agency action, findings and conclusions found not to meet any of six enumerated standards.\(^{101}\)

The first of these is the most important, encompassing actions which are arbitrary, capricious, an abuse of discretion, or otherwise

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\(^{100}\) See 40 C.F.R. § 1501.3 (1979).
not in accordance with law. This is a highly deferential standard which requires affirmance of the agency's decision if a rational basis exists to support that decision. In general terms this review standard has been interpreted as requiring the reviewing court to consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

From a different perspective, this standard does not mean that agency action may be set aside as arbitrary or capricious because the judge would have decided the matter differently. Where an official performs an act within the permissible limits of his authority, a court may not find that the act is arbitrary or capricious. To this end the arbitrary and capricious standard of judicial review should be applied flexibly, particularly where an agency is dealing with a question that is one of judgment or prone to uncertainty.

The second category to justify setting aside agency action under section 706(2) is where the action is contrary to constitutional right, power, privilege, or immunity. When a party brings suit under this provision the court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in the given procedural setting, and, if so, whether these rights have been and how they should be redressed. As far as the EIS process is concerned, this standard has less potential application because of the relative absence of constitutional issues in such cases.

There is also not much potential for the use of the third standard—in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights. The decision that an EIS is not required could be challenged under this standard by alleging that the decision is in excess of statutory limitation. Such an attempt

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110 Chrysler Corp. v. Dep't of Transp., 472 F.2d 659 (6th Cir. 1972); See also Bowman Transp., Inc. v. Ark.-Best Freight System, Inc., 419 U.S. 281 (1974); American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975).
would, however, probably fail because of the clearly accepted principle that under NEPA an agency does have the power to make the determination, at least initially, regarding whether an EIS is necessary. The real question is not whether the agency exceeds its authority under NEPA in making the threshold determination but rather whether that determination can stand in light of the other review standards of section 706.

The fourth standard, requiring observance of procedure required by law, is potentially a much more fruitful area of contention and deserves more judicial consideration than it has thus far received. While the courts have not hesitated to invalidate EIS threshold decisions because of a lack of procedural compliance, they have usually not articulated that they were doing so under authority of the APA. It has been noted, however, that this standard is applicable to NEPA in the context of determining the adequacy of an impact statement.

The fifth standard deals with agency actions which are unsupported by substantial evidence. Review under the substantial evidence test is authorized only when agency action is taken pursuant to a rulemaking provision of the APA or where the action is based on a public adjudicatory hearing. These are narrow and specifically limited situations.

The threshold determination regarding the preparation of an impact statement does not constitute either rulemaking or an action based on a public adjudicatory hearing. Under the APA, "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. Except when notice or hearing is required by statute, the rulemaking procedures do not apply to interpretive

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113 Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).
117 Id.; see also Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976).
rules.\textsuperscript{119} At most, EIS threshold determinations are interpretive rules exempt from the rulemaking provisions of section 553 of the APA since NEPA does not require notice or hearing for such determinations.

An EIS threshold determination also does not constitute an action based upon a public adjudicatory hearing. The CEQ regulations call for the involvement of environmental agencies and the public but there is no requirement in the regulations or in NEPA for a public adjudicatory hearing.\textsuperscript{120} Accordingly, there is no basis for the application of the substantial evidence test to EIS threshold determinations.

The sixth, and last, standard for review under the APA is for actions which are unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.\textsuperscript{121} De novo review of whether an agency decision is unwarranted by the facts is authorized in only two circumstances: (1) when the action is adjudicatory in nature and the agency factfinding procedures are inadequate, and; (2) when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.\textsuperscript{122} Since neither of these situations exists with respect to the threshold decision regarding an impact statement, the standard is not applicable.

The result of this analysis of the provisions of section 706 of the APA is that a court shall hold unlawful and set aside EIS threshold determinations which are found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or which are made without observance of procedure required by law. Other than under these standards for judicial review, the APA offers no applicable basis to set aside an agency EIS threshold determination.

\section*{IV. The Supreme Court: Review of the Reviewers}

\subsection*{A. Citizens to Preserve Overton Park, Inc. v. Volpe}

The question of judicial review of administrative action was addressed by the Supreme Court in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe}.

\textsuperscript{120} 40 C.F.R. § 1501.4(b) (1979).
The suit concerned a challenge to the decision of the Secretary of Transportation approving a route for construction of an interstate highway in Memphis, Tennessee. Under the Department of Transportation Act, section 4(f), the Secretary could not approve any program or project which required the use of any publicly owned land from a public park or recreation area unless there was no feasible and prudent alternative and unless the program included all possible planning to minimize the harm. In making his decision to approve the route through a park area, the Secretary did not indicate why he believed that there was no feasible and prudent alternative or why design changes could not be made to reduce the harm to the park.

The focus of the Court's decision concerned the standard for judicial review under the APA. As a preliminary matter the Court determined that the APA was applicable. Under the APA agency action is subject to judicial review except where there is a statutory prohibition or where agency action is committed to agency discretion by law. The decision summarily held that there was no indication that Congress sought to prohibit judicial review and that the decision of the Secretary did not fall within the "committed to agency discretion" exception since there was law to apply. As a result, the APA was applicable.

Justice Marshall then turned his attention to the question of the applicable standard for review under section 706 of the APA. The Court stated that even though de novo review of the case was not authorized and the decision did not have to meet the substantial evidence test, the standards of section 706 require a reviewing court to "engage in substantial inquiry." While the decision was entitled to a presumption of regularity, this "presumption is not to shield his action from a thorough, probing, in-depth review."

In explaining the correct posture of a reviewing court Justice Marshall stated that a court is first required to decide whether the decisionmaker acts within the scope of his authority. To do this the reviewing court must be able to find that the decisionmaker

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125 See text at notes 85-122 infra.
126 Id. at 415.
127 Id.
could have "reasonably believed" the conclusions reached.\textsuperscript{130} Scrutiny of the facts also requires a finding that the choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under section 706(2)(A) of the APA. The Court cautioned that although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one which does not empower a court to substitute its judgment for that of the agency.\textsuperscript{131}

In essence the Court adopted a reasonableness standard for determining whether the agency acted within the scope of its authority while simultaneously calling for the use of the APA's arbitrary, capricious standard for reviewing the actual decision. The distinction is important. Both involve an inquiry concerning the facts but the scope of authority question is tied to the statute while the actual decision is based on consideration of "relevant factors" and "judgment."\textsuperscript{132}

The final inquiry of the Court concerned whether the Secretary's action followed the necessary procedural requirements. The Court found that formal findings of fact were not required and the case was remanded to the District Court for a review of the administrative record.\textsuperscript{133}

Although the \textit{Overton Park} case does not involve NEPA, it is nevertheless relevant to the inquiry concerning the proper standard for judicial review of EIS threshold decisions. The focus of attention on the APA review standard demonstrates the Court's commitment to application of the standard to agency decisions involving environmental concerns. The broad language of the decision left little doubt that the APA governs the judicial review of such cases and that environmental concerns do not call for a different standard for judicial review.\textsuperscript{134}

\textbf{B. Flint Ridge Development Co. v. Scenic Rivers Association}

In \textit{Flint Ridge Development Co. v. Scenic Rivers Association}\textsuperscript{135} the Supreme Court had to decide whether an environmental impact statement was required before the Department of Housing

\textsuperscript{130} \textit{Id.} at 416.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 417.
\textsuperscript{133} \textit{Id.} at 420.
\textsuperscript{134} \textit{Id.} at 410-12.
\textsuperscript{135} 426 U.S. 776 (1976).
and Urban Development (HUD) could allow a disclosure statement filed by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act\(^\text{136}\) to become effective. Under the Disclosure Act such statements become effective automatically thirty days after filing unless the Secretary notifies the developer that the statement is incomplete or inaccurate. The Secretary has no power to evaluate the substance of the developer's proposal and if the statement is on its face complete and accurate, the Secretary must permit it to go into effect.\(^\text{137}\) The Tenth Circuit deemed it immaterial that the Secretary had only limited discretion to reject statements under the Disclosure Act and held that the preparation of an EIS was required by NEPA.\(^\text{138}\)

The Supreme Court reversed the circuit court, finding it inconceivable that an EIS could be filed within the thirty day limit for automatic effectiveness of disclosure statements under the Disclosure Act. Based upon this the Court found that the Disclosure Act leaves no discretion to the Secretary to suspend the effective date, thereby resulting in a "clear and fundamental conflict of statutory duty."\(^\text{139}\) Although the Court did not articulate a standard for judicial review, the decision demonstrates the attitude of the Court to be restrained in imposing the EIS requirement in cases where there is a clear conflict between NEPA and a statute under which agency action is taken.

Since this case was essentially one of statutory interpretation the Court was free to determine the issue for itself.\(^\text{140}\) It is apparent that because of this, the Court felt it had no reason to articulate the standard for judicial review. The review standards of section 706(2) of the APA are not applicable to such questions of statutory interpretation.\(^\text{141}\)

C. Kleppe v. Sierra Club

The Court also addressed the threshold EIS decision issue in *Kleppe v. Sierra Club*.\(^\text{142}\) Several environmental organizations sued


\(^\text{137}\) Id. § 1706(b).


\(^\text{139}\) Id.

\(^\text{140}\) 427 U.S. 390 (1976).
the Department of Interior and other federal agencies to compel
the preparation of a regional environmental impact statement
before allowing further development of federal coal reserves in the
Northern Great Plains region. The Department of Interior had
conducted studies of the potential for coordinated development of
electric power and resource development in the Northern Great
Plains. The Department had also recently prepared a Coal
Programmatic EIS to consider the environmental effects of the
ccoal leasing program on a national scope. No EIS had been pre­
pared, however, to cover the coal leasing program of the Northern
Great Plains region.

The action at bar arose over the Department’s approval of four
ccoal mining plans in the Powder River Coal Basin. Impact state­
ments had been prepared on these plans. The environmental orga­
nizations argued that an EIS of regional scope should have been
prepared. This comprehensive EIS would consider the cumulative
impacts of the coal leasing program on the entire region.

The Court found that there was no evidence of an action or pro­
posal for action of a regional scope and that a regional environ­
mental impact statement is required only where there is such a
proposal. The Court rejected the use of a balancing test in such
cases, holding that:

The procedural duty imposed upon agencies by this section is quite
precise, and the role of the courts in enforcing that duty is similarly
precise. A court has no authority to depart from the statutory language
and, by a balancing of court-devised factors, determine a point during
the germination process of a potential proposal at which an impact
statement should be prepared. Such an assertion of judicial authority
would leave the agencies uncertain as to their procedural duties under
NEPA, would invite judicial involvement in the day-to-day decision-
making process of the agencies, and would invite litigation.

The emphasis on limiting judicial involvement was manifested
by the Court in its statement of the standard for judicial review.
Discussing this issue the Court noted that the determination with
respect to an EIS threshold decision requires the weighing of a
number of relevant factors and that resolving these issues requires
a high level of technical expertise which is properly left to the in-

\[144\] Id. at 406 (emphasis in decision).
formed discretion of the responsible federal agencies. 145

Justice Powell directly addressed the standard for judicial review, stating:

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree.

... Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately. 146

D. Vermont Yankee Nuclear Power Corp. v. NRDC

The general attitude of the Supreme Court with regard to the scope of judicial review of agency actions affecting the environment was demonstrated in *Vermont Yankee Nuclear Power Corp. v. NRDC*. 147 The case involved two separate decisions of the Court of Appeals for the District of Columbia. In the first the court remanded a decision by the Atomic Energy Commission (AEC) to grant a nuclear power plant operating license to Vermont Yankee Nuclear Power Corp. (Vermont Yankee). 148 In the second case the court remanded to the AEC its decision to grant a construction permit to Consumers Power Co. (Consumers Power) for two nuclear reactors. 149

At the hearing on the Vermont Yankee operating license the AEC excluded from consideration the issue of the environmental effects of operations to reprocess fuel or dispose of wastes. 150 Later, the AEC instituted rulemaking procedures to deal with the question of the fuel cycle effects on the environment and a spent fuel cycle rule was adopted. The AEC also ruled that since the environmental effects of the fuel cycle were shown to be relatively insignificant it was unnecessary to apply the spent fuel cycle rule to environmental reports submitted prior to its effective date or a final environmental impact statement for which a draft EIS was circulated prior to the effective date of the rule. 151 The court of appeals invalidated the spent fuel cycle rule because of perceived inade-

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145 Id. at 412.
146 Id.
148 NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976).
149 Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976).
151 Id. at 528-30.
In the Consumers Power case the AEC issued a final EIS which did not consider the fuel cycle issue and also did not consider energy conservation as an alternative to the proposed project. After the final EIS had been filed the CEQ issued new guidelines which mentioned for the first time the necessity of considering energy conservation as one of the alternatives to be addressed in an impact statement. The Commission declined to reopen the proceedings to consider energy conservation alternatives on the grounds that they did not meet a threshold test of reasonableness. The circuit court rejected the position of the AEC, holding that the EIS was fatally defective for failing to examine energy conservation as an alternative and that the fuel cycle issue was controlled by the Vermont Yankee case, requiring remand.

Speaking for all seven participating justices, Justice Rehnquist expressed concern that the circuit court had "seriously misread or misapplied the statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." In strong, unequivocal language the Court reversed and remanded both cases.

The Supreme Court sounded the continually repeated theme that absent constitutional constraints or extremely compelling circumstances, agencies should be free to fashion their own rules of procedure and methods of inquiry. The Court also held that the APA establishes maximum, not minimum, procedural requirements in conducting rulemaking procedures. Justice Rehnquist concluded that nothing in the APA or NEPA permits a court to review and overturn a rulemaking proceeding so long as the agency employs at least the "statutory minimum" procedures.

Turning to a broader framework, the Court left no doubt that it viewed agencies, not courts, as the primary decisionmakers in the NEPA-APA arena.

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188 NRDC v. NRC, 547 F.2d 633, 641, 655 (D.C. Cir. 1976).
191 Aeschliman v. NRC, 547 F.2d 622, 622 (D.C. Cir. 1976).
193 Id. at 543-44.
194 Id. at 524.
195 Id. at 548.
NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is 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 decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.  

These cases reveal a cautious attitude of the Court with respect to judicial review of agency decisions. It is evident that the Court is concerned with insuring that agencies comply with the requirements of law in their decisional processes which affect the environment. Equally clear, however, is the fundamental recognition by the Court of the authority and latitude in decisions delegated to the agencies by Congress. The Court sends an unmistakable signal that it is the role of the agency and not the reviewing court to make the decisions as long as the agency complies with the statutory requirements. The fact that a court would make a different decision in a situation is not sufficient justification for reversing the agency's determination. The function of a reviewing court is important but limited.

V. TOURING THE CIRCUITS

Before delving into an exploration of the various positions adopted by the circuit courts of appeals it is only fair to alert the reader that disagreement is the order of the day. There is a definitive and irreconcilable split in authority. Not only have the circuits reached different conclusions regarding the appropriate standard for judicial review of EIS threshold decisions, but even among those circuits which have adopted similar standards there are a variety of rationales used to reach those conclusions.

A. The First Circuit

Although the Court of Appeals for the First Circuit has not taken a stand on the question of the standard for review of EIS threshold decisions, some of the district courts have. In Essex County Preservation Association v. Campbell the court adopted...
the standard of reasonableness noting only that: "The 'rule of reason' should prevail judicial construction of NEPA." The same judge, sitting in New Hampshire instead of Massachusetts, subsequently reaffirmed this position, noting that he would continue to apply this standard until told otherwise by the First Circuit or Supreme Court. The court's reasoning was apparently based on general policy considerations and the court's concern with the environment. The decision emphasized that the preparation of an impact statement is, perhaps, the most essential and vital stage of the NEPA process and that the determination that a statement is not required must be closely scrutinized because of the possibility of avoiding the intensive environmental examination directed by Congress through NEPA.

In Aersten v. Landrieu it was noted that the Supreme Court's decision in Kleppe v. Sierra Club might foreclose the use of the reasonableness standard. In view of the weight of authority at the district level in the First Circuit, however, the court chose to apply the reasonableness standard.

B. The Second Circuit

The Second Circuit has extensively discussed the standard for judicial review issue in Hanly v. Kleindienst (Hanly II). Essentially, the court adopted the arbitrary, capricious standard and elaborated on the specific criteria to be applied by a reviewing court.

In Hanly II the court distinguished the meaning of the word "significantly" in NEPA as a question of law and the issue of whether a proposed action will have a significantly adverse environmental impact as a question of fact. Accordingly, the court viewed its function as a reviewing court to determine de novo all relevant questions of law, and with respect to the agency's factual determinations, "to abide by the Administrative Procedure Act, which limits us in matters not involving any agency's rule-making

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182 Id. at 216.
184 Id. at 145-46.
189 Id. at 828.
or adjudicatory function to determining whether its findings are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or ‘without observance of procedure required by law’ . . . ”

The essential question is whether an EIS threshold determination is a question of law or of fact. The decision pointed out that where a court’s interpretation of statutory language requires some appraisal of the facts, a neat delineation of the legal issues for the purpose of judicial review may prove impossible or, at least, inadvisable. The Supreme Court has authorized a simpler, more practical standard for the review of such mixed questions of law and fact—the “rational basis” test under which the decision of the agency is upheld if it has “warrant in the record” and a “reasonable basis in law.”

Notwithstanding the availability of the rational basis standard the court adopted the arbitrary, capricious standard of the APA since the meaning of the term “significantly” as used in NEPA can be isolated as a question of law. Finding support in Overton Park, the court saw no reason for applying a different approach since the APA standard permits effective judicial scrutiny of agency action while also permitting the agency to have some discretion to use its expertise in applying the law to specific factual contexts.

This approach solves the mixed question of law and fact problem by bifurcating it into its two components. The analysis leaves the question of interpreting the meaning of NEPA to the court to determine de novo while allowing the agency wide discretion in applying that meaning, as judicially interpreted, to a specific factual situation. As long as an agency uses the court’s interpretation of the law in making its threshold EIS decisions, it will be given broad discretion and its determination will be reviewable only under the arbitrary, capricious standard. Even where the proposed action is within the “grey area” where the meaning of NEPA is insufficient to provide a clear and absolute standard of decision, an

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170 Id.
171 Id. at 829.
174 Id. at 829-30.
agency threshold determination will be upheld.\textsuperscript{175}

\textbf{C. The Third Circuit}

Acknowledging the sharp split of authority fueled by the mixed fact and law nature of the question, the Eastern District of Pennsylvania has faced the standard of review issue\textsuperscript{176} without benefit of guidance of its circuit court, which has not squarely addressed the question. The opinion of the district court gave note to the curious nature of the law-fact problem:

The definition of the terms “major” and “significant” is a matter of law; all well and good! The rabbit in the hat is that the findings which are the \textit{sine qua non} before deciding that question of law, are of necessity \textit{Findings of Fact which we must make}. Hence, the circle goes round.\textsuperscript{177}

The Third Circuit Court of Appeals had previously skirted the threshold standard issue, stating in dictum that the approval for construction of a facility was not the type of action which “most reasonable men would conclude, without any guidelines to be either ‘major’ or even ‘action’. ”\textsuperscript{178} The district court interpreted this as at least an indication that the circuit court leaned toward the reasonableness standard.\textsuperscript{179}

The district court also analyzed the \textit{Overton Park} decision, arguing that although the Supreme Court recited the APA standard it had actually applied a reasonableness standard.\textsuperscript{180} It is true that the Court did use a reasonableness standard but only with respect to determining whether the agency had acted within the scope of its authority—a question of law.\textsuperscript{181} For review of the actual decision of the agency, a question of fact, the Court adopted the APA arbitrary, capricious standard.\textsuperscript{182}

\begin{thebibliography}{99}
\bibitem{175} Cross-Sound Ferry Servs., Inc. v. United States, 573 F.2d 725 (2d Cir. 1978).
\bibitem{177} \textit{Id.} at 444 (emphasis in decision).
\bibitem{179} In Concord Township v. United States, 625 F.2d 1068, (3rd Cir. 1980), the court stated that it had not resolved the standard of review issue but noted that there is much to be said in favor of “higher scrutiny” or review. The court found it unnecessary, however, to resolve the question in the case at bar.
\bibitem{181} \textit{Id.}
\bibitem{183} \textit{Id.}
\end{thebibliography}
D. The Fourth Circuit

The Fourth Circuit has addressed the function of judicial review under NEPA, adopting the standard of the APA. Interpreting Overton Park, the court summed up the review process by stating that a court is to consider first whether the agency has acted within the scope of its authority and, second, whether the ultimate decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Fourth Circuit explained that in applying this standard a court must engage in substantial inquiry, determining whether the agency made a good faith judgment after considering all relevant factors.

Because the court addressed the standard of review issue in the context of a decision to issue a permit after an environmental impact statement had been prepared, it did not specifically address the EIS threshold question. The court appears to favor a narrow scope of review under NEPA and does not indicate that it would apply a different review standard to other NEPA contexts such as threshold determinations.

E. The Fifth Circuit

In Save Our Ten Acres v. Kreger the Court of Appeals for the Fifth Circuit determined that the spirit of NEPA "would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." Accordingly, the court found that the threshold decision must be subject to a more searching standard under which a court must determine whether the plaintiff has alleged facts which, if true, would show that the project would meet the NEPA criteria. If so, a reviewing court should examine and weigh the evidence of both the plaintiff and the agency to determine if the decision was reasonable. This inquiry is not limited to consideration of the administrative record. The court has a further duty to consider other evidence including supplemental affidavits and depositions if it can be shown there was an inadequate

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183 Coalition for Responsible Regional Dev. v. Coleman, 555 F.2d 398 (4th Cir. 1977).
184 Id. at 399.
185 Id. at 400.
186 Id. at 400.
187 472 F.2d 463 (5th Cir. 1973).
188 Id. at 466.
189 Id. at 466-67.
In developing this standard the Fifth Circuit stated that it found solid support for its position in the *Overton Park* decision. Noting that the Supreme Court had made it clear that the ultimate merit decision should be reviewed under the arbitrary, capricious, abuse of discretion standard, the *Save Our Ten Acres* court found that a thorough study of *Overton Park* teaches that a more penetrating inquiry should be used for determining the entryway determination of whether all relevant factors have been considered by the agency. The Fifth Circuit rejected as overly formalistic the argument that the reasonableness standard is applicable only if the statute expressly conditions the exercise of authority upon a determination that certain prerequisites are met. In a later decision, however, the court indicated that its adoption of the reasonableness standard was made necessary by its concern for the spirit of NEPA, without reference to *Overton Park*.

**F. The Sixth Circuit**

Contrary to the position adopted by the Fifth Circuit, the District Court for the Northern District of Ohio, in the Sixth Circuit, relied upon *Overton Park* to reject the reasonableness standard. In *Faircrest Site Opposition Committee v. Levi* the district court stated that the APA standards as defined in *Overton Park* have been consistently applied in environmental cases and that under the APA, judicial review is limited to determining whether there was substantial evidence in the administrative record and whether the decision was arbitrary, capricious or an abuse of discretion.

The decision did not explain the rationale for the application of the substantial evidence test. As noted by the Court in *Overton Park*, review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the APA or where the action is based on a public adjudicat-

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180 Id. at 467.
180 See text at notes 123-33 * supra.*
181 *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).
182 *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973).
185 Id. at 467.
ing hearing,188 neither of which situations existed in the *Faircrest* case. The district court's adoption of the arbitrary, capricious standard is in line with one of the two main approaches to the threshold review issue, the other main approach being the reasonableness standard. The court's use of the substantial evidence test, however, stands alone and without support.

G. The Seventh Circuit

The position of the Seventh Circuit Court of Appeals is very similar to that of the Second Circuit. In fact, in *First National Bank of Chicago v. Richardson*,187 the court expressly patterned its decision after the earlier and factually similar Second Circuit case of *Hanly v. Kleindienst (Hanly II)*.188 Like *Hanly II*, the *National Bank of Chicago* case developed from a proposed federal detention center, this one in Chicago. On the basis of an environmental assessment, GSA had concluded that its construction would not significantly affect the quality of the human environment. The Seventh Circuit was considering a challenge to this agency decision.

After detailing the factual similarities between the Chicago center and the center in *Hanly II*, the court considered the general policies behind NEPA, finding that environmental considerations mandate a balancing and weighing of multiple factors in order to determine the cumulative and absolute effects of the project.189 The court's discussion of the law was very brief in comparison to its discussion of the facts, indicating that it considered the threshold decision to be essentially a factual one. This was confirmed by the the review standard which it adopted, holding that the agency "determination must stand unless its findings are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or without observance of procedure required by law."190 Although this is the same standard used in *Hanly II*, to which the court had made constant reference in its factual analysis, the court did not cite *Hanly II* or any other authority and offered no discussion of the issue. The Seventh Circuit stands at the high water mark in regarding the EIS threshold determination as a purely factual matter.

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186 See text at notes 114-17 supra.
187 484 F.2d 1369 (7th Cir. 1973).
188 See text at notes 168-74 supra.
189 First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1380 (7th Cir. 1973).
190 *Id.* at 1381.
H. The Eighth Circuit

The Eighth Circuit, not impressed by the factual nature of the EIS threshold decision, holds that such a decision should be reviewed on the grounds of its reasonableness. Although adopting the arbitrary, capricious standard for reviewing substantive decisions to proceed with a project after an EIS has been prepared, it has rejected this standard for the EIS threshold decision.

In reaching this position the court rightly states that not only is NEPA an environmental full disclosure law but that it was also intended to effectuate substantive changes in decisionmaking. The court is primarily concerned with the action-forcing effect of an EIS, without which there is no basis for evaluation of the environmental effects of a proposed action. In view of such preclusion and because of the concern for environmental disclosure present in NEPA, the Eighth Circuit holds that an agency's discretion as to whether an impact statement is required is properly exercised only within narrow bounds.

To upset an agency's determination not to prepare an EIS, a plaintiff must show that the determination was not reasonable under the circumstances. This requires only a showing that a project could have significant effects.

I. The Ninth Circuit

The emphasis in the Ninth Circuit is on a low threshold test, review of which is under the reasonableness standard. City of Davis v. Coleman exemplifies the concern which the Court of Appeals for the Ninth Circuit has for assuring that federal agencies properly exercise their role in determining whether an impact statement is necessary. The appeal related to a proposed freeway interchange which had been planned by the State of California and was being built with the help of federal funding under the authority of the Federal Highway Administration.

Although the avowed purpose of the interchange was to replace a temporary access to meet safety standards, the court determined

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302 Id. at 1320.
303 Id.
304 Id.
305 521 F.2d 661 (9th Cir. 1975).
that the real purpose was to stimulate and service future industrial development in the area. The court showed no hesitation in delving into the history and mechanics of the project in order to look behind the administrative record and satisfy itself with regard to the facts. In this pursuit the decision labeled the negative declaration as cursory, inadequate, a mere accessory accommodation to inevitable development and finally, as "bureaucratic doubletalk."

The court reviewed this negative declaration in light of a review standard which "does not require the courts to determine whether a challenged project will in fact have significant effects. Rather, we are to determine whether the responsible agency has 'reasonably concluded' that the project will have no significant adverse environmental consequences."

The case is informative, not only because of its holding on the standard of review issue, by virtue of which it is in the mainstream of the "reasonableness" proponents, but also because it so well illustrates the concern of the court in considering decisions which affect the environment. To such courts environmental challenges are not simply run of the mill cases. Instead, they merit special attention and a probing, in-depth review. The articulation in such decisions of the reasonableness standard, as opposed to the arbitrary, capricious standard, is not simply a matter of academic interest. It stands for something: the activist attitude of the court.

J. The Tenth Circuit

An activist attitude is also evident in the Tenth Circuit Court of Appeals. The Tenth Circuit maintains that a threshold EIS decision is not one of discretion such as agencies have in innumerable matters and which is referred to in the general terms of section 706(2)(A) of the APA. Stressing that the sweep of NEPA is extraordinarily broad, the court has stated that it is convinced that the compass of an agency's judgment is narrow and a threshold determination must be reasonable in light of the mandatory re-

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307 City of Davis v. Coleman, 521 F.2d 661, 667 (9th Cir. 1975).
308 Id. at 669.
309 Id. at 673 (emphasis in decision).
311 This language is from Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1122 (D.C. Cir. 1971).
quirements and high standards set by NEPA.\textsuperscript{213}

Explaining this conclusion, the court reasons that the discretion given to agencies under section 706 of the APA, although applicable to some other agency decisions, does not apply to an EIS threshold determination under NEPA.\textsuperscript{213}

Under the specific terms of NEPA we feel that the proper standard, as stated earlier, is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute so as to be “in accordance with law”—another ground of review in 706(2)(A) which may be applied consistently with the procedural demands of NEPA.\textsuperscript{214}

Unfortunately the court did not divulge the “specific terms of NEPA” it was referring to. Without such guidance it is difficult to find them.

\textit{K. The District of Columbia Circuit}

Consistency and clarity have not been the touchstones of the District of Columbia Circuit regarding the threshold review standards to be applied. The circuit court's initial analysis of the question is found in \textit{Maryland-National Capital Park and Planning Commission v. United States Postal Service},\textsuperscript{215} a case involving a suit to stop the construction of a bulk mail center because an impact statement had not been prepared. In addressing the review of the environmental assessment, which found no significant environmental effects, the court outlined three criteria to be applied: first, whether the agency took a hard look at the problem as opposed to making bald conclusions unaided by preliminary investigation; second, whether the agency identified the relevant areas of environmental concern, and; third, whether the agency made a convincing case that the impact is insignificant.\textsuperscript{216} The court also held that an agency must provide convincing reasons why a project with arguably potentially significant impact does not require an EIS. Stressing that in cases involving genuine issues of environmental effects there is a relatively low threshold for impact statements,

\begin{itemize}
\item \textsuperscript{213} Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973).
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id. at 1029 (D.C. Cir. 1973).
\item \textsuperscript{217} Id. at 1040.
\end{itemize}
the court remanded the case for additional findings.\textsuperscript{217} Although discussing the threshold review question in terms of the burden of proof, the D.C. Circuit did not state what the standard of the review should be.

In \textit{Committee for Auto Responsibility v. Solomon}\textsuperscript{218} the court did address the review standard issue. In fact, it addressed it twice in the opinion, arriving at a different conclusion on each occasion. In its first analysis of the EIS threshold issue the court relied upon \textit{Kleppe v. Sierra Club}\textsuperscript{219} to state: “An initial agency determination on this matter is judicially vulnerable only when the agency has abused its discretion or acted arbitrarily.”\textsuperscript{220} A page later the court adopted a different posture: “NEPA’s call for an EIS is governed by the rule of reason,”\textsuperscript{221} this time citing \textit{Vermont Yankee Power Corp. v. NRDC} as authority from the Supreme Court. The contexts of these quotations does not provide a basis for distinguishing the choice or use of the two standards.

The only consistent explanation to reconcile this opinion is to say that there is no difference: that the arbitrary, capricious standard is the same as the rule of reason or reasonableness standard. This is precisely what the District of Columbia District Court did in \textit{Peshlakai v. Duncan}.\textsuperscript{222} Faced with a challenge to an agency decision not to prepare an impact statement the district court held: “Such a decision will be reversed by a court only if it is unreasonable or arbitrary and capricious.”\textsuperscript{223} It is of interest to note that the court cited decisions from circuits other than its own in support of each of the standards.\textsuperscript{224} The court did, however, cite the D.C. Circuit case of \textit{Maryland-National Capital Park and Planning Commission v. U.S. Postal Service}\textsuperscript{225} when it stated that there does not seem to be any significant practical difference between the two standards.\textsuperscript{226} It did not mention \textit{Committee for
Auto Responsibility v. Solomon, which was really more on point because it was confusing by commission rather than omission. The Maryland-National case had simply avoided the question by ignoring the difference between the two standards while in Committee for Auto Responsibility v. Solomon the court recognized the issue but failed to resolve it because it adopted both standards.

VI. Conclusion

A perusal of the many cases which have dealt with the correct standard for judicial review of EIS threshold decisions reveals a basic difference in approach and attitude of the courts. Although it would be an oversimplification to attempt to neatly divide the decisions into a reasonableness side and an arbitrary, capricious side, it is inescapable that at least there are two major lumps under the wool sack. As has been seen, many of the courts have attempted to support their positions by analyzing the APA, and to an even greater extent, the previous case law. This is not surprising. What is surprising is the number of decisions that have avoided any attempt at such analysis or have not actually relied upon the analysis they had made.\footnote{See e.g., text at notes 165-66 and 200 supra.} It is apparent that in such cases legal analysis is less of a factor in the actual choice of the standard of review than is the general philosophical outlook of the courts toward environmental protection.\footnote{See e.g., Aersten v. Landrieu, 488 F. Supp. 314, 321 (D. Mass. 1980); Mount Vernon Preservation Soc'y v. Clements, 415 F.Supp. 141, 145-46 (D. N.H. 1976).}

In the absence of any guidance from NEPA itself, the standard for review is determined by the APA. Under the APA questions of law such as the meaning of “significantly affecting the quality of the human environment” are determined by the courts and these interpretations of the meaning of NEPA must be followed by the agencies.\footnote{5 U.S.C. § 706 (1970).} In this the agencies have no discretion after the courts have “laid down the law.” The action of an agency with regard to applying that law is a different matter and the APA provides wide discretion for such agency actions. This is especially true with respect to EIS threshold decisions since the APA’s formal rulemaking and adjudicatory hearing provisions are not applicable. The result is that aside from legal questions, under the APA threshold decisions can only be reversed if arbitrary, capricious, an abuse of

\footnote{\textsuperscript{217} See e.g., text at notes 165-66 and 200 supra.}
\footnote{\textsuperscript{218} It is apparent that in such cases legal analysis is less of a factor in the actual choice of the standard of review than is the general philosophical outlook of the courts toward environmental protection.\textsuperscript{228}}
discretion or not in accordance with required procedures. Otherwise, under the APA the court must accept the agency's determination whether or not it agrees with it.

The only legal escape from this narrow standard of review is for mixed questions of law and fact. By characterizing an EIS threshold decision as involving an inseparable question of law and fact the court's freedom to review the decision broadens. The problem with this, however, is that a threshold decision may not properly be considered as a mixed question of fact and law.

The Supreme Court has not been inclined to view agency decisions as mixed questions but rather has tended to view them as factual determinations. The Court has often held that because of practical considerations, particularly the expertise of an agency, a decision is a question of fact. In some contexts, however, especially those concerning very broad questions of policy, the Court has not hesitated to allow a wide standard for judicial review.

Because of the contextual nature of the Court's decisions regarding the APA and the scope of judicial review it is necessary to focus on the attitude it has taken in the environmental area. Overton Park demonstrates that the APA is applicable to the environmental context. The Court bifurcated the question of judicial review, adopting a reasonableness standard for determining if an agency acts within the scope of its authority, and the arbitrary, capricious standard for reviewing the actual decision. Since Overton Park did not involve NEPA it offers no direct answer for the threshold standard of review question. Because the scope of agency authority is rarely a question in such threshold decisions the case does offer support to the application of the arbitrary, capricious standard. Nevertheless, Overton Park has also been cited as authority for the reasonableness standard.

Kleppe v. Sierra Club, on the other hand, has not been cited in support of the reasonableness standard; nor could it be, for it clearly calls for the application of the arbitrary, capricious standard to judicial review of comprehensive EIS threshold decisions.

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233 Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).
The language could scarcely be more definite and unequivocal. Justice Powell's words bear repeating:

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree.

... Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.\(^{55}\)

There is no discernable basis for distinguishing the decision to prepare a regional or comprehensive impact statement from more specific statements. In light of Kleppe the mixed law-fact argument loses its punch.

It is understandable that many courts feel a deep concern for environmental issues and it is understandable, too, that because of this concern they wish to insure that the agencies live up to their obligations under NEPA. This is especially true in light of the broad policy mandate which NEPA proclaims. It is apparent that this policy concern is the real reason for adoption of a more strict standard for judicial review. While this is understandable, it is not legally justified. Environmental cases are often hard cases but they do not justify bad law. As broad as the objectives of NEPA are, the statute offers no review standard. Under the APA, especially when considered with Kleppe, the standard for judicial review is limited to setting aside decisions which are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or which are made without observance of procedure required by law.

\(^{55}\) Id. at 412.