

# COMMENT

## Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There Are Too Many Trees

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### I. INTRODUCTION

The National Environmental Policy Act (NEPA) altered federal cost and benefit analysis by requiring federal agencies to include environmental impacts and analysis in their decisionmaking process when contemplating major federal actions affecting the environment.<sup>1</sup> At first, agencies reluctantly complied with this new directive and it fell to the courts to mandate agency compliance.<sup>2</sup> As one court explained,

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1. See *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 89 (1983); *Calvert Cliff's Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

2. See Valerie M. Fogelman, *Threshold Determinations Under the National Environmental Policy Act*, 15 B.C. ENVTL. AFF. L. REV. 59, 59 (1987).

“[o]ur duty . . . is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>3</sup> Over time the circuit courts of appeal adopted differing strategies for reviewing an agency’s observance of NEPA requirements, particularly in the area of threshold determination of applicability.<sup>4</sup>

This Comment analyzes the current judicial review that is accorded an agency’s threshold determination of NEPA applicability. Part II analyzes the requirements of NEPA, Part III considers NEPA and the Administrative Procedure Act (APA), and Parts IV to VII examine the circuit treatment of these standards. This Comment concludes by analyzing whether the circuits’ treatments are consistent with the statutory mandate of NEPA and determining whether any disparate treatment is reconcilable.

## II. NEPA

NEPA is labeled “our basic national charter for protection of the environment.”<sup>5</sup> The Act was promulgated against a backdrop of growing concern in the United States about environmental damage attributable to the federal government.<sup>6</sup> During its legislative phase, Senator Henry Jackson called NEPA “the most important and far-reaching environmental and conservation measure ever enacted.”<sup>7</sup> The Act promotes efforts to “prevent or eliminate damage to the environment and biosphere and . . . enrich the understanding of the ecological systems and natural resources important to the Nation.”<sup>8</sup> For all its bluster, however, NEPA does not dictate certain substantive results; rather, the statute demands only an agency’s procedural compliance with its requirements.<sup>9</sup> Once a federal agency fully complies with NEPA’s procedural mandate, it may decide that the benefits of a project outweigh the environmental burdens. As the Supreme Court wryly noted in *Robertson v. Methow*

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3. *Calvert Cliffs’ Coordinating Comm.*, 449 F.2d at 1111.

4. See discussion *infra* Parts IV.A-VIII.

5. 40 C.F.R. § 1500.1 (2003).

6. See RONALD BASS ET AL., *THE NEPA BOOK* 3 (2001).

7. Nicholas C. Yost, *The Background and History of NEPA*, in *THE NEPA LITIGATION GUIDE* 1, 3 (Karin P. Sheldon & Mark Squillace eds., 1999) (citing 115 CONG. REC. 40,416 (1969)).

8. 42 U.S.C. § 4321 (2000).

9. See *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994) (citing *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)).

*Valley Citizens Council*, “NEPA merely prohibits uninformed—rather than unwise—agency action.”<sup>10</sup>

The procedural requirements of this “stunningly simple statute”<sup>11</sup> provide for the bulk of litigation.<sup>12</sup> NEPA mandates that a “detailed statement . . . on the environmental impact of [a] proposed action” be “include[d] in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>13</sup> This provision is the genesis of the Environmental Impact Statement (EIS). An EIS requires an agency to provide a summary of “environmental impacts of the proposed action, its alternatives, and any mitigation measures that might be available.”<sup>14</sup> An EIS can be extremely lengthy; it may stretch several hundred pages and take years to produce because of the detail required.<sup>15</sup> Preparing an EIS may also cost “hundreds of thousands of dollars.”<sup>16</sup> The purpose of the EIS is twofold: (1) ensuring that the agency has the relevant information when considering environmental effects, and (2) ensuring the public’s ability to “play a role in both the decisionmaking process and in implementation of the decision.”<sup>17</sup> Thus, the EIS process serves as a vehicle for both “focusing [an agency’s] attention on environmental consequences” and focusing the public’s attention on the environmental consequences of government action.<sup>18</sup> The EIS also “serves as a record for substantive review of challenges for noncompliance with NEPA.”<sup>19</sup>

In certain situations, an agency may prepare an Environmental Assessment (EA) instead of an EIS.<sup>20</sup> Specifically, when an agency

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10. 490 U.S. 332, 351 (1989).

11. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 909 (2002).

12. See Yost, *supra* note 7, at 4.

13. 42 U.S.C. § 4332(C) (2003).

14. Karkkainen, *supra* note 11, at 909.

15. See *id.* at 918-19. Karkkainen cites a study by the Federal Highway Administration which noted that an EIS requires an average of 3.6 years to complete, and can stretch as long as twelve years. See *id.* at 919.

16. *River Rd. Alliance v. Corps of Eng’rs of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985).

17. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Subsequent to the preparation of a draft EIS, regulations require the draft be circulated among the other appropriate federal, state, and local agencies as well as “the public generally. . . . In . . . the final EIS the agency must discuss at appropriate points . . . any responsible opposing view . . . not adequately discussed in the draft. . . .” *Id.* at 350 n.13 (internal citations and quotations omitted).

18. Karkkainen, *supra* note 11, at 910-12.

19. *Wisconsin v. Weinberger*, 745 F.2d 412, 416 (7th Cir. 1984).

20. See *Metcalf v. Daley*, 214 F.3d 1135, 1141-42 (9th Cir. 2000) (citing *Robertson*, 490 U.S. at 348; *Env’tl. Def. Fund v. Corps of Eng’rs of United States Army*, 470 F.2d 289, 298 (8th Cir. 1972)).

considers a major federal action and is uncertain of whether such action will significantly affect the environment, it prepares an EA.<sup>21</sup> An EA is basically “a mini impact statement” analyzing whether or not a proposed action significantly affects the environment.<sup>22</sup> The NEPA statute does not directly address the issuance of an EA but since NEPA’s inception, courts have demanded that an “agency . . . affirmatively develop a reviewable environmental record” for courts to scrutinize when agencies do not prepare an EIS.<sup>23</sup> The same principles of alternatives, impacts, and mitigation found under the EIS provisions were grafted onto the preparation of an EA, but on a smaller scale.<sup>24</sup> These court requirements, coupled with the Council on Environmental Quality (CEQ) regulations promulgated in 1981,<sup>25</sup> led to elaborate and stringent procedures for preparing an EA.<sup>26</sup> Based on the EA, an agency can either issue a Finding of No Significant Impact (FONSI), detailing why the impacts of a proposal are insignificant, or prepare an EIS.<sup>27</sup> Interestingly, agencies’ production of EAs leading to FONSI’s outnumber the preparation of EISs at a ratio of 10 to 1.<sup>28</sup> Additionally, the number of EISs prepared has decreased over the years, while “the number of EAs and FONSI’s [prepared] has soared.”<sup>29</sup> Thus, determining the proper level of scrutiny applied by courts when reviewing agency decisions to pursue an EA instead of an EIS is important for individuals seeking review of those determinations.

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21. See *Metcalf*, 214 F.3d at 1142.

22. Suzanne O. Snowden, *Judicial Review and Environmental Analysis Under NEPA: Timing Is Everything*, 33 ENVTL. L. REP. 10050, 10051 (2003) (internal quotations omitted).

23. Janie A. Johns, Comment, *Shall We Be Arbitrary or Reasonable: Standards of Review for Agency Threshold Determinations Under NEPA*, 19 AKRON L. REV. 685, 688 (1986) (citing *Hanly v. Kleindienst*, 471 F.2d 823, 827 (2d Cir. 1972), as the “first important circuit court decision . . . [requiring] the agency . . . develop a reviewable environmental record”).

24. See BASS ET AL., *supra* note 6, at 45.

25. See 40 C.F.R. § 1508.9 (2003).

26. *River Rd. Alliance v. Corps of Eng’rs of United States Army*, 764 F.2d 445, 450-51 (7th Cir. 1985); *Sierra Club v. United States Army Corps of Eng’rs*, 295 F.3d 1209, 1221 n.17 (11th Cir. 2002). Not addressed in this Comment is the view of the courts in both *Sierra Club* and *River Road Alliance* that the use of such comprehensive EAs obviates, in certain situations, the need for an EIS. See *River Rd. Alliance*, 764 F.2d at 450-51; *Sierra Club*, 295 F.3d at 1221 n.17.

27. See *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2002) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)).

28. See Karkkainen, *supra* note 11, at 909-10.

29. *Id.* at 920. Annually agencies produce only 500 EISs but “50,000 EAs leading to [FONSI’s].” *Id.* at 909-10.

## III. NEPA AND THE APA

Since NEPA does not explicitly articulate a standard of review, courts look to the provisions of the APA for guidance.<sup>30</sup> This “guidance” is only somewhat forthcoming, as the judicial review section of the APA has been described as “a disorderly mess of ambiguous and overlapping standards.”<sup>31</sup> The tensions within the APA are obvious: how does a court accord broad discretionary powers to an agency if the constitutionality of the administrative state is partially predicated on the proper level of judicial review?<sup>32</sup> If a court reviews agency decisions too closely, an agency becomes merely a conduit for court decisionmaking; conversely, if the court rubber stamps agency decisions, the regulated public is subject to the whim of the administrative state.<sup>33</sup> As will become clear, the circuits’ resolution of this process is far from consistent.

The APA provides that a “reviewing court shall decide all [issues] of law . . . and set aside agency action, findings and conclusions found to be arbitrary [and] capricious.”<sup>34</sup> The APA bifurcates issues of law and issues of fact, and courts apply different standards of review to each.<sup>35</sup> Issues of law are reviewed by a court de novo and issues of fact are reviewed under an arbitrary and capricious standard.<sup>36</sup> Issues of fact include scientific or technical determinations implicating substantial agency expertise.<sup>37</sup> Applying law to facts is generally accorded deferential review by the

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30. See Marion D. Miller, Note, *The National Environmental Policy Act and Judicial Review After Robertson v. Methow Valley Citizens Council and Marsh v. Oregon Natural Resources Council*, 18 *ECOLOGY L.Q.* 223, 233 (1991).

31. Gordon D. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record,”* 10 *ADMIN L.J. AM. U.* 179, 181-82 (1996); see also Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 *ADMIN. L.J. AM. U.* 1, 26 (1996) (noting that the judicial review section of the APA has “lent itself to sloppy handling by the Court . . . thereby engender[ing] imprecision and confusion”).

32. See Young, *supra* note 31, at 181; Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 *ADMIN. L.J. AM. U.* 89, 92 (1996).

33. See Paula A. Kelly, *Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969—Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 10 *B.C. ENVTL. AFF. L. REV.* 79, 79 (1982).

34. 5 U.S.C. § 706 (2000).

35. See Miller, *supra* note 30, at 233.

36. See *id.*; see also *Phillips Petroleum Co. v. FERC*, 786 F.2d 370, 373-74 (10th Cir. 1986) (explaining the differing standards applied by the courts under the APA). For a critique of the Supreme Court’s analysis of the law/fact distinction, see Anthony, *supra* note 31, at 1.

37. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

courts.<sup>38</sup> Thus, the very process of resolving law-fact distinctions affects the disposition of the case and determines the proper level of scrutiny.<sup>39</sup>

Circuit courts, faced with the ambiguity of the APA chose four standards for reviewing an agency's determination not to file an EIS after preparing an EA: an arbitrary and capricious standard, a standard of reasonableness, and in some cases combining one of the two with a third doctrine, known as the "hard look" doctrine.<sup>40</sup> Finally, one circuit remains demure, repeatedly declining to rule on the issue.<sup>41</sup> Complicating matters further, the Supreme Court did not directly address the issue when confronted with it in *Marsh v. Oregon Natural Resources*.<sup>42</sup> Instead, in *Marsh*, the Court ruled on the proper scope of review of an agency decision not to *supplement* an already prepared EIS, holding that "as long as the [agency's] decision not to supplement the [EIS] was not arbitrary and capricious, it should not be set aside."<sup>43</sup> The Court also examined the divergent standards of review currently used by federal courts when reviewing an agency's supplemental decision and explicitly rejected the reasonableness standard.<sup>44</sup> However, keeping the mystery in administrative law alive, the Court first limited its decision to the "narrow" facts before it, and then it explained that "the difference

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38. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 450 (2001). A proper examination of the application of law to fact and other mysteries of the law/fact application is beyond the scope of this Comment. Keep in mind, however, Justice Scalia's admonition that "[a]dministrative law is not for sissies." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 511, cited in Young, *supra* note 31, at 180 n.1.

39. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 848 (1994); Justice Scalia as a D.C. Circuit Judge (and former administrative law professor) explained that the arbitrary and capricious standard "is a catch-all picking up administrative misconduct not covered by the other more specific paragraphs." *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984).

40. See, e.g., *Northcoast Env'tl. Ctr. v. Glickman*, 136 F.3d 660, 666-67 (9th Cir. 1998) (noting the differential treatment among the circuits and affirming the reasonableness standard); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992) (replacing in the Fifth Circuit the standard of reasonableness with the arbitrary and capricious standard); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (employing a two-step process hard look review and then arbitrary and capricious standard); *Marsh*, 490 U.S. at 377 n.23 (examining the circuit court decisions not to pursue a supplemental EIS, or SEIS).

41. See, e.g., *Quinonez-Lopez v. Coco Lagoon Dev. Corp.*, 733 F.2d 1, 3 (1st Cir. 1984).

42. See *Gee v. Hudson*, 746 F.2d 1471 (4th Cir. 1984), cert. denied, *Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting) (noting the "disarray" of the lower courts on this issue); *River Rd. Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445 (7th Cir. 1985), cert. denied, 475 U.S. 1055, 1055 (1986) (White, J., dissenting).

43. *Marsh*, 490 U.S. at 377 (internal quotations omitted).

44. See *id.* at 377-78 n.23.

between the ‘arbitrary and capricious’ and ‘reasonableness’ standards is not of great pragmatic consequence.”<sup>45</sup>

Whether or not there is a difference is a continuing debate among the circuits.<sup>46</sup> Circuit courts noted the treatment of the Supplemental EIS (SEIS) in *Marsh* and in some cases modified their review of the threshold decision, while others distinguished the threshold decision from that of the decision to supplement the EIS.<sup>47</sup>

At the outset, two types of threshold determinations must be identified. The first threshold determination is whether NEPA attaches to a project in the first place. Under this NEPA nonapplicability paradigm, the agency simply decides against preparing an EA or an EIS. A second type of threshold determination is triggered after the agency prepares an EA and then must decide whether to prepare an EIS or issue a FONSI. Some courts apply different standards to each,<sup>48</sup> and some courts apply the same standard to each or else make no explicit differentiation.<sup>49</sup>

#### IV. THE ARBITRARY AND CAPRICIOUS STANDARD

When applying the arbitrary and capricious standard, the Supreme Court instructs reviewing courts to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>50</sup> Additionally, the Supreme Court explains that this “inquiry must ‘be searching and careful’ but ‘the ultimate standard of review is a narrow one.’”<sup>51</sup> Courts cannot examine the facts themselves, reach an independent judgment different from that

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45. *Id.* (internal quotations omitted).

46. *See River Rd Alliance*, 764 F.2d at 449; *Township of Lower Alloways Creek v. Pub. Serv. Elec. & Gas Co.*, 687 F.2d 732, 742 n.23 (3d Cir. 1982), *cited in* *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 692-93 n.8 (11th Cir. 1986). *But cf.* *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 n.7 (D.C. Cir. 2001) (indicating reasonableness review is the same as *de novo* review).

47. *See, e.g., Sabine River Auth. v. United States Dep’t of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992) (noting a distinction between the decision to supplement an EIS and the decision to pursue an EIS altogether); *Northcoast Env’tl. Ctr. v. Glickman*, 136 F.3d 660, 666-67 (9th Cir. 1998) (acknowledging the *Marsh* distinction, but upholding the reasonableness standard for the Ninth Circuit).

48. *See, e.g., Price Rd. Neighborhood Ass’n v. United States Dep’t of Transp.*, 113 F.3d 1505, 1508 (9th Cir. 1997) (describing the two standards of review used in reviewing agency actions).

49. *See, e.g., River Rd. Alliance*, 764 F.2d at 449.

50. *Marsh*, 490 U.S. at 378 (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

51. *Id.* (quoting *Citizens to Pres. Overton Park*, 401 U.S. at 416 (internal quotations omitted)).

of the agency, and then “substitute its judgment.”<sup>52</sup> Instead, courts must defer to agency judgment provided that the agency “articulated a rational connection between the facts found and the choice made.”<sup>53</sup>

Another level of review, similar in scrutiny to the arbitrary and capricious standard, is the “hard look” doctrine.<sup>54</sup> Hard look review emerged in the 1960s and described an agency’s role in properly scrutinizing “the views of interested parties under the APA.”<sup>55</sup> Courts adopted hard look review for environmental cases to describe: (1) how the agencies should examine the environmental effects of an action and (2) the court’s role in insuring that the agency took the requisite hard look.<sup>56</sup> Reviewing courts can use the doctrine of hard look to require that agencies explain and justify their actions to the courts.<sup>57</sup>

Determining the proper scope of review for a court is only the first step towards reviewing agency action. A court must also determine what arbitrary and capricious means and then apply it to the facts in each case. As the following analysis demonstrates, the arbitrary and capricious standard has a continuum all its own, from the highly deferential review of the United States Court of Appeals for the Seventh Circuit to the more searching review of the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Second Circuit. This not only leads to inconsistency among the circuits, it also leads to inconsistency within the circuits.

#### A. *Searching Arbitrary and Capricious Review*

The Second Circuit and District of Columbia Circuit demand more than simple consideration by an agency of environmental factors.<sup>58</sup> Each circuit incorporates the hard look doctrine into their review as a discrete

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52. *Citizens to Pres. Overton Park*, 401 U.S. at 416.

53. See Carla Mattix & Kathleen Becker, *Scientific Uncertainty Under the National Environmental Policy Act*, 54 ADMIN. L. REV. 1125, 1158 (2002) (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 104 (1983)).

54. See *id.*

55. *Id.*

56. See Miller, *supra* note 30, at 233 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1971); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.1, at 336 (2d ed. 1984)); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (“The only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences.” (citing *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972))).

57. See Mattix & Becker, *supra* note 53, at 1158-59.

58. See, e.g., *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340-41 (D.C. Cir. 2002).



step.<sup>59</sup> In these two circuits, the agency must convince the court that it did more than simply consider the environmental effects of its actions.

The Second Circuit was one of the first circuit courts to review the threshold applicability determination.<sup>60</sup> In *Hanly v. Kleindeinst*, the court reviewed a determination by the General Services Administration (GSA) that an EIS was not required for constructing a correctional center and office space for federal officers.<sup>61</sup> The issue was whether the correctional facility “significantly” affected the human environment, an analysis implicating “both a question of law—the meaning of the word ‘significantly’—and a question of fact—whether the [correctional facility] will have a ‘significantly’ adverse environmental impact.”<sup>62</sup> The court acknowledged that questions of law were reviewed de novo under the APA.<sup>63</sup> However, the court went on to explain that when facts and law were intertwined, as in the present case, “a neat delineation of the legal issues for the purpose of substituted judicial analysis has sometimes proven to be impossible or, at least, inadvisable.”<sup>64</sup> Furthermore, the court noted that even with de novo review an agency should be given some deference because “[an] agency’s determination reflects the exercise of expertise not possessed by the court[s].”<sup>65</sup> Based on these considerations, the *Hanly* court concluded that the proper standard of review for the threshold determination is the arbitrary and capricious standard.<sup>66</sup>

The court in *Hanly* was wary of vesting too much discretion to the agency, however, so it formulated “more precise factors that must be considered”<sup>67</sup> by the agency when making a threshold determination and required that the agency provide notice to the public as well as provide

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59. *Nat’l Audubon*, 132 F.3d at 14; *Grand Canyon Trust*, 290 F.3d at 340–41.

60. See *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972); see also Johns, *supra* note 23, at 688 (explaining the different approaches courts use in reviewing an agency’s threshold determination).

61. *Hanly*, 471 F.2d at 826.

62. *Id.* at 828.

63. *Id.*

64. *Id.* at 829.

65. *Id.*

66. See *id.* at 830–32.

67. *Id.* at 831. The “more precise factors that must be considered include”:

(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.

*Id.* at 830–31.

some type of quasi-hearing.<sup>68</sup> The court then remanded the case so that the agency could comply with the new procedural requirements meant to safeguard the regulated community.<sup>69</sup> The Supreme Court later struck down this type of court-created procedure in an unrelated case.<sup>70</sup> The *Hanly* court attempted to find a balance between the tensions in administrative law noted above; while the court was willing to defer to agency judgment, it was not completely willing to defer to the agency.

This type of balancing analysis is clearly visible in current Second Circuit jurisprudence. As the court explained in *National Audubon Society v. Hoffman*, determining if an agency action will significantly affect the environment is a discretionary decision committed to the agency.<sup>71</sup> While still employing the arbitrary and capricious standard of review, courts employ a two-step process. First, the court “must consider whether the agency took a ‘hard look’ at the possible effects of the proposed action” and then second, the court must decide “whether the agency’s decision was arbitrary or capricious.”<sup>72</sup> In *National Audubon*, the Forest Service issued an EA and then a FONSI for a proposed Forest Plan in Vermont.<sup>73</sup> The court examined the record prepared by the agency in support of a FONSI and held that the mitigation factors designed to “limit the negative environmental impact of a proposed project” were not supported by substantial evidence put forth by the agency.<sup>74</sup> Looking at the absence of records, the court held that the agency did not give the environmental impacts of the project the hard look required, and therefore, the agency did not comply with its obligation under NEPA.<sup>75</sup> Based on this finding, the court held that the agency’s decision that an EIS was unnecessary was arbitrary and capricious.<sup>76</sup> The hard look doctrine essentially became a proxy for requiring an agency to convince the court that a project’s impact will be insignificant. If a court is unconvinced, it remands to the agency for a fuller explanation.<sup>77</sup> The two-step process allows a court the final

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68. See *Hanley*, 471 F.2d at 836. The court explained that a “full fledged formal hearing” is not required “although it should be apparent that in many cases such a hearing would be advisable.” *Id.*

69. See *id.*

70. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 536 n.14 (1978), cited in *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 92-93 (1983).

71. 132 F.3d 7, 14 (2d Cir. 1997).

72. *Id.* (citing *Vill. of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991)).

73. *Nat’l Audubon Soc’y v. Hoffmann*, 132 F.3d 7, 10 (2d Cir. 1997).

74. *Id.* at 17.

75. See *id.*

76. See *id.* at 18.

77. See *id.*

determination of whether an agency properly analyzed the term “significant.”

The District of Columbia Circuit also reviews the decision by an agency that an EIS is not required under the arbitrary and capricious standard.<sup>78</sup> Under the “long-established standard in [the] circuit” the following test is used:<sup>79</sup>

First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a “hard look” at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.<sup>80</sup>

An agency must show that it complied entirely with this demanding test in “[order] to pass review in this circuit.”<sup>81</sup> However, a footnote in *Citizens Against Rails-to-Trails v. Surface Transportation Board* casts doubt on whether this is the proper standard used for all NEPA review.<sup>82</sup> The court noted that “*Marsh* did not resolve the precise question of what review is appropriate . . . [for] agency actions that raise the threshold legal question whether an action falls within NEPA in the first place.”<sup>83</sup> Not only does the D.C. Circuit have a difficult arbitrary and capricious test to overcome, but it also has not ruled out the possibility that the determination of NEPA application may be a legal question entitled to little or no agency deference.<sup>84</sup>

### *B. Strict Arbitrary and Capricious Review*

The United States Courts of Appeals for the Sixth and Seventh Circuits apply a highly deferential review to agency threshold determinations under NEPA. The test for these circuits is apparently only that an agency considered environmental impacts. The jurisprudence of

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78. See *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002).

79. *Id.*

80. *Sierra Club v. United States Dep’t of Transp.*, 753 F.2d 120, 127 (D.C. Cir. 1985) (citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983)).

81. Johns, *supra* note 23, at 693.

82. 267 F.3d 1144, 1150 n.5 (D.C. Cir. 2001).

83. *Id.*

84. See *id.* at 1150.

these circuits has modified over time.<sup>85</sup> Early NEPA review by the courts in at least the Seventh Circuit indicated a willingness to look beyond mere agency consideration of environmental factors.<sup>86</sup> Later courts, however, appeared to adopt a more deferential standard.<sup>87</sup>

Early on the Sixth Circuit indicated that the arbitrary and capricious standard required that courts “determine whether the agency has, in fact, adequately studied the issue and taken a ‘hard look’ at the environmental consequences of its decision.”<sup>88</sup> The Sixth Circuit does not bifurcate the tests like the Second Circuit; rather, it subsumes hard look review into the arbitrary and capricious test.<sup>89</sup> In *Friends of the Fiery Gizzard v. Farmer’s Home Administration*, the Farmer’s Home Administration (FmHA) was siting a dam on Big Fiery Gizzard Creek.<sup>90</sup> After preparing an EA, the FmHA determined that no significant impacts would result from building the dam.<sup>91</sup> Reviewing this determination, the court noted that the EIS process is time-consuming, costly, and may utilize resources of an agency better left to “truly important” actions.<sup>92</sup> In upholding the decision, the court noted a “loosening of the judicial reins on agency decisions not to require [an EIS].”<sup>93</sup>

The early Seventh Circuit case of *First National Bank of Chicago v. Richardson* dealt with an objection to the construction of a correctional facility in downtown Chicago.<sup>94</sup> Prior to the lawsuit, the agency prepared an EA of four pages.<sup>95</sup> After the circuit court entered an injunction, the agency supplemented the EA with 142 pages.<sup>96</sup> The court in *Bank of Chicago*, noting the factually similar case of *Hanly*, also demanded a “reviewable environmental record.”<sup>97</sup> When the court examined the supplemental statement, it noted that the supplement was “more

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85. Compare *First Nat’l Bank of Chi. v. Richardson*, 484 F.2d 1369, 1380-81 (7th Cir. 1973), with *River Rd. Alliance v. Corps of Eng’rs of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985).

86. See *Bank of Chi.*, 484 F.2d at 1377.

87. See *Friends of the Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 504 (6th Cir. 1995); *River Rd. Alliance, Inc.* 764 F.2d at 450.

88. See *Crouse Corp. v. Interstate Commerce Comm’n*, 781 F.2d 1176, 1193 (6th Cir. 1986).

89. See *Friends of the Fiery Gizzard*, 61 F.3d at 506 n.2.

90. See *id.* at 503.

91. See *id.*

92. *Id.* at 504 (quoting *Pres. Coalition, Inc. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982)).

93. *Id.* at 505 n.1 (quoting *River Rd. Alliance, Inc. v. Corps of Eng’rs of United States Army*, 764 F.2d 445, 451 (7th Cir. 1985)).

94. 484 F.2d 1369, 1371 (7th Cir. 1973).

95. *Id.*

96. See *id.* at 1372.

97. *Id.* at 1381.

penetrating and critical” than the EA allowed in *Hanly*.<sup>98</sup> Furthermore, the *Bank of Chicago* court observed that the agency considered all the factors eventually analyzed in the *Hanly* case, as well as additional factors.<sup>99</sup> Because of this extensive analysis, the court concluded that the agency’s decision not to pursue an EIS was not arbitrary and capricious, and was lawful.<sup>100</sup>

Compare this with the Seventh Circuit’s analysis in *River Road Alliance, Inc. v. Corps of Engineers of United States Army*.<sup>101</sup> First, the court began by noting the onerous burden the production of an EIS places on the agency.<sup>102</sup> Second, the court explained, “[i]f such a statement were required for every proposed federal action that might affect the environment, federal government activity . . . would pretty much grind to a halt.”<sup>103</sup> The court then determined the decision to pursue an EIS after an EA requires that the agency balance the burden of preparing an EIS against the “likely benefits . . . a more searching evaluation . . . provides.”<sup>104</sup>

Clearly this court heavily defers to an agency decision. This makes sense, the court explained, because earlier cases on NEPA threshold determinations were “the product of a time when environmental impact statements were less formidable than they have grown to be, when federal agencies were less sensitive than they mostly are today to environmental concerns” leading to the conclusion that “environmental assessments are thorough enough to permit a higher threshold for requiring [EISs].”<sup>105</sup> In this case, the EA issued by the Corps was a total of twenty-one pages; four original pages and seventeen supplemental pages.<sup>106</sup>

This is clearly a different analysis than the court used in *Bank of Chicago*. As the dissent in *River Road* noted, the court “recast the issue and then . . . proceed[ed] with its own de novo consideration of the problems.”<sup>107</sup> The language chosen by the courts in *River Road* and *Fiery*

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98. *Id.* at 1381 n.19.

99. *Id.* at 1381.

100. *Id.*

101. 764 F.2d 445, 449 (7th Cir. 1985); see Barry Kellman, *The Seventh Circuit on Environmental Regulation of Business*, 65 CHI-KENT L. REV. 757, 766-767 (1989) (providing a more in-depth analysis of Seventh Circuit jurisprudence on environmental issues).

102. See *River Rd. Alliance, Inc. v. Corps of Eng’rs of United States Army*, 764 F.2d 445, 448-49 (7th Cir. 1985).

103. *Id.*

104. *Id.*

105. *Id.* at 450-51.

106. *Id.* at 449.

107. *Id.* at 455.

*Gizzard* is no accident. The court in both cases defined the obligations of NEPA in terms of hardship on the agency instead of the agency's responsibility to the environment. Both the Sixth and the Seventh Circuits appear to apply the arbitrary and capricious standard to all agency action under NEPA irrespective of whether the agency determined that NEPA applied at all.

V. THE SUPREME COURT WORKS MISCHIEF ON REASONABLENESS  
REVIEW: THE FIFTH, ELEVENTH, AND THIRD CIRCUITS SWITCH  
SIDES

The *Marsh* decision changed the United States Court of Appeals for the Fifth Circuit's review of agency decisions. In one of the earliest and most cited decisions on the reviewability of the threshold determination, the Fifth Circuit reversed a lower court that applied the arbitrary and capricious standard.<sup>108</sup> The court concluded in *Save Our Ten Acres v. Kreger (SOTA)* that "[t]o best effectuate [NEPA,] this decision [to forego an EIS] should have been court-measured under a more relaxed rule of reasonableness."<sup>109</sup> Noting that the "spirit of [NEPA] would die aborning if a facile, ex parte decision . . . [was] too well shielded from impartial review," the court concluded that the threshold distinction was not a fact based question but a "jurisdiction type conclusion" and therefore was subject to "a more searching standard."<sup>110</sup> The court, relying on the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, noted that "*Overton Park* teaches . . . a more penetrating inquiry is appropriate for court-testing the entry-way determination of whether all relevant factors should ever be considered by the agency."<sup>111</sup> In *SOTA* the court bifurcated the review process; a substantive, factual determination of the agency was reviewed under an arbitrary and capricious standard, but the "entry-way" or threshold determination was reviewed under a less deferential standard.<sup>112</sup>

Post *Marsh*, the Fifth Circuit collapsed the standards in *Sabine River Authority v. United States Department of Interior*.<sup>113</sup> The court in *Sabine River* noted that in the Fifth Circuit "the legal standard for determining when a supplemental EIS is required is essentially the same

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108. See *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

109. *Id.* at 465.

110. *Id.* at 466.

111. *Id.*

112. See *id.*

113. 951 F.2d 669, 677-78 (5th Cir. 1992).

as the standard for determining the need for an original EIS.”<sup>114</sup> The court concluded that *Marsh* requires that the court apply the same arbitrary and capricious review to both situations.<sup>115</sup> In so holding, the court in *Sabine River* rejected the original bifurcation analysis used by the *SOTA* court because there, the agency argued that NEPA did not apply in the first instance.<sup>116</sup> In *Sabine River*, the court could have chosen a different standard of review for whether NEPA applies at all and still have been consistent with the Supreme Court in *Marsh*.<sup>117</sup> This bifurcated analysis is discussed later in this Comment.<sup>118</sup>

The United States Court of Appeals for the Eleventh Circuit similarly modified its standard of review after the Supreme Court decision in *Marsh*.<sup>119</sup> Prior to *Marsh*, the court applied a reasonableness standard, relying on earlier and current Fifth Circuit jurisprudence. The adopting court did not define the term reasonableness in any way other than “a more searching standard.”<sup>120</sup> Post-*Marsh*, however, the court held in *North Buckhead Civic Ass’n v. Skinner* that the decision in *Marsh* applied to all agency decisions under NEPA.<sup>121</sup> In *North Buckhead*, the court noted that the arbitrary and capricious standard only allows a reviewing court to determine if the agency considered the relevant factors.<sup>122</sup> However, the court did not articulate the requirements of the hard look doctrine, i.e., the agency does not have to convince the court of anything.<sup>123</sup> Some Eleventh Circuit courts continue this line of analysis, only requiring that an agency “consider[] the effects”<sup>124</sup> while others read

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114. *Id.* (citing *Fritioson v. Alexander*, 772 F.2d 1225, 1239 n.8 (5th Cir. 1985) (internal quotations omitted)).

115. *See Sabine River Auth. v. United States Dep’t of Interior*, 951 F.2d 669, 678-79 (5th Cir. 1992).

116. *See Save Our Ten Acres*, 472 F.2d at 465.

117. The court recognized in a footnote that the Eighth Circuit uses separate review for threshold analysis, but appeared to dismiss it. *Sabine River*, 951 F.2d at 678 n.2.

118. *See* discussion *infra* Part VI.

119. *See N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990).

120. *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 691 (11th Cir. 1986) (citing *Save Our Ten Acres*, 472 F.2d at 466; *Fritioson v. Alexander*, 772 F.2d 1225, 1237 (5th Cir. 1985)).

121. *See N. Buckhead*, 903 F.2d at 1538.

122. *Id.*

123. *See id.* Some courts have read the hard look doctrine into this decision. *See, e.g., Sierra Club v. United States Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (noting it is the duty of the court “to ensure that the agency took a ‘hard look’ at the environmental consequences”).

124. *See Pres. Endangered Areas of Cobb’s History, Inc. v. United States Army Corps of Eng’rs*, 87 F.3d 1242, 1248-49 (11th Cir. 1996). Illustrating a court reviewing an agency’s consideration are the following two sentences: “The plaintiffs may disagree with that conclusion, but the Corps considered their arguments, considered the effects on the district, and considered the county’s mitigation plan. The conclusion was based on those considerations.” *Id.* That is indeed deferential review.

stricter standards into the review by requiring an agency to “make a convincing case [in support of a FONSI].”<sup>125</sup> This schizophrenic review by the circuit illustrates the flexibility each court has in applying the standard, further blurring the lines between “reasonableness” and “arbitrary and capricious.”

The United States Court of Appeals for the Third Circuit explicitly adopted the arbitrary and capricious standard in *Society Hill Towers Owners’ Ass’n v. Rendell*.<sup>126</sup> The court relied primarily on the Supreme Court’s decision in *Marsh* but also it noted the subsequent treatment of *Marsh* in both the United States Courts of Appeals for the Fifth and Eighth Circuits.<sup>127</sup> Prior to this decision, the Third Circuit, on several occasions, refused to decide between arbitrary and capricious and the reasonableness standard<sup>128</sup> but reviewed agency action for reasonableness.<sup>129</sup> The use of the reasonableness standard prior to *Society Hill Towers* was based on three factors articulated in an early decision:

[F]irst . . . [reasonableness] appeared to be preferred by the district courts under [the court’s] supervision; second, because there was “much to be said in favor of subjecting these threshold determinations to the higher scrutiny on review,” and finally, because the particular agency decision under consideration ‘pass[ed] muster’ even under the “higher” measure of “reasonableness.”<sup>130</sup>

The court, after noting these factors, then declined to adopt a standard for the circuit.<sup>131</sup> Unaddressed by the court in *Society Hill Towers* is the proper standard for reviewing agency determinations that NEPA is wholly inapplicable; presumably some precedent still exists in that circuit to review that determination under a reasonableness standard.<sup>132</sup>

## VI. A MODIFIED STANDARD OF REASONABLENESS

All of the circuits in this section, with the exception of the United States Court of Appeals for the Fourth Circuit follow or potentially

125. See *Hill v. Boy*, 144 F.3d 1446, 1451 (11th Cir. 1998).

126. 210 F.3d 168, 179 (3d Cir. 2000).

127. *Id.*

128. See Citizens Advisory Comm. on Private Prisons, Inc. v. United States Dep’t of Justice, 197 F. Supp. 2d 226, 240 n.12 (W.D. Penn. 2001) (citing *Concord Township v. United States*, 625 F.2d 1068, 1073-74 (3d Cir. 1980)); *Township of Lower Alloways Creek v. Pub. Serv. Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982); *N.J. Dep’t of Env’tl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 415 n.21 (3d Cir. 1994).

129. *N.J. Dep’t of Env’tl. Prot. & Energy*, 30 F.3d at 415 n.21.

130. *Township of Lower Alloways Creek*, 687 F.2d at 742 (quoting *Concord Township*, 625 F.2d at 1073-74).

131. *Concord Township*, 625 F.2d at 1074.

132. See, e.g., *id.* at 1073-74.



follow a two-step process.<sup>133</sup> First, the court examines the challenge to the agency and decides whether the agency was alleging that NEPA was wholly inapplicable or whether the agency made a determination based on an EA that there was no significant impact.<sup>134</sup> If an agency determines, based on an EA, that the action would have no significant impact, the court reviews this determination under an arbitrary and capricious standard.<sup>135</sup> If, however, the agency alleges NEPA is not applicable at all, the court reviews this question under a reasonableness standard.<sup>136</sup> Additionally, these circuits adopted procedures similar to the Second Circuit and D.C. Circuit for arbitrary and capricious review, namely the requirement that the agency convince the court it truly examined the issues before it.<sup>137</sup>

In *Sugarloaf Citizens Ass'n v. FERC*, the Fourth Circuit reviewed the question of agency threshold determinations of NEPA applicability for “reasonableness under the circumstances.”<sup>138</sup> The court did not, however, explicitly adopt that standard for the circuit.<sup>139</sup> Prior Fourth Circuit jurisprudence held that the decision to pursue an EIS was reviewed under an arbitrary and capricious standard and was entitled to great deference by the courts.<sup>140</sup> Subsequently, courts have chosen to apply either both standards<sup>141</sup> or simply the more deferential standard.<sup>142</sup>

Arbitrary and capricious review in the Fourth Circuit, however, implicates the familiar two step process. First, the court must decide “whether the agency took a ‘hard look’ at a proposed project’s environmental effects before acting.”<sup>143</sup> Second, it must “then consider whether the agency’s conclusions are arbitrary or capricious.”<sup>144</sup> The Fourth Circuit exemplifies the disarray possible intra-circuit.

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133. See discussion *infra* Part VI.

134. *Id.*

135. See, e.g., *Goos v. Interstate Commerce Comm’n*, 911 F.2d 1283, 1291-92 (8th Cir. 1990).

136. See *id.*

137. See discussion *infra* Part VI.

138. 959 F.2d 508, 512 (1992).

139. See *id.*

140. See *Providence Rd. Cmty. Ass’n v. EPA*, 683 F.2d 80, 82 (1982); see also *Gee v. Hudson*, 746 F.2d 1471 (4th Cir. 1984), *cert. denied*, *Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting) (noting Fourth Circuit applies the arbitrary and capricious standard).

141. See *Mt. Lookout-Mt. Nebo Prop. Prot. Ass’n v. FERC*, 143 F.3d 165, 172 (4th Cir. 1998) (analyzing whether the decision of the agency was reasonable and noting the great deference accorded the agency decision).

142. See *South Carolina ex rel. Campbell v. O’Leary*, 64 F.3d 892, 896 (4th Cir. 1995) (finding the agency’s decision was entitled to great deference).

143. *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002).

144. *Id.*

The Eighth Circuit, beginning with *Minnesota Public Interest Research Group v. Butz* (*MPIRG*) held that the proper standard of review for the threshold determination by an agency to prepare an EIS is the standard of reasonableness under the circumstances.<sup>145</sup> The court in *MPIRG* noted that an agency is accorded less discretion because of the “Congressional command that agencies cooperate in attaining the goals of NEPA” and one of the goals of NEPA is full disclosure of environmental impacts.<sup>146</sup> The important consideration, as further clarified by *Goos v. Interstate Commerce Commission*, is the concept of threshold determination.<sup>147</sup> As *Goos* explained, in the Eighth Circuit “an agency’s determination not to prepare an EIS ‘will be upheld if the agency can support the reasonableness of its decision.’”<sup>148</sup> After *Marsh*, this is still the correct treatment when an agency alleges that NEPA is not applicable at all to its agency action.<sup>149</sup> This was the case in *Goos* where the Interstate Commerce Commission contended “that NEPA simply [did] not apply” to its action.<sup>150</sup> The trigger for the *Goos* court was whether a factual determination was made by an agency “under the assumption that NEPA applies.”<sup>151</sup> That factual determination occurs if an “agency determines not to prepare an EIS . . . when it has already prepared an EA and issues a [FONSI].”<sup>152</sup> This determination is reviewed under an arbitrary and capricious standard.<sup>153</sup> Subsequent Eighth Circuit cases indicate that the arbitrary and capricious standard is not a free pass to agencies.<sup>154</sup> When issuing a FONSI, courts require the agency to articulate a “convincing case for a FONSI” and require that the agency take a hard look at the project.<sup>155</sup>

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145. 498 F.2d 1314, 1320 (1974). In *MPIRG* the court stated:

The . . . Plan of the Forest service . . . refers to the area as ‘unique, pristine, endangered, rugged, primitive, beautiful and fragile.’ Highly prized by many . . . the Wilderness Area affords recreational, scientific, and educational opportunities. It is also highly regarded by others, . . . who value the thousands of acres of marketable timber it contains.

*Id.* at 1316-17. The sympathies of the court are not opaque. See also *Winnebago Tribe v. Ray*, 621 F.2d 269 (8th Cir. 1980).

146. *MPIRG*, 498 F.2d at 1320.

147. 911 F.2d 1283, 1291-92 (8th Cir. 1990).

148. *Id.* (quoting *Olmstead Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 204 (8th Cir. 1986)).

149. *Goos v. Interstate Commerce Comm’n*, 911 F.2d 1283, 1291-92 (8th Cir. 1990).

150. *Id.* at 1292.

151. *Id.*

152. *Id.*

153. See *id.*

154. See *Audubon Soc’y of Cent. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992).

155. *Sierra Club v. United States Forest Serv.*, 46 F.3d 835, 838-39 (8th Cir. 1995).

In *Village of Los Ranchos de Albuquerque v. Marsh*, the United States Court of Appeals for the Tenth Circuit held en banc that previous jurisprudence applying a reasonableness standard to agency decisionmaking under NEPA was overruled and that the proper review was the arbitrary and capricious standard.<sup>156</sup> The *Los Ranchos* court noted, however, that the question remained whether *Marsh* changed a court's review over an agency's threshold determination of whether NEPA was applicable at all.<sup>157</sup>

The *Los Ranchos* court, citing *Goos*, differentiated between factual determinations of whether significant impacts will occur, implicating an EIS, and the threshold legal requirement of major federal action.<sup>158</sup> The court in *Los Ranchos* went further than the court in *Goos*, and differentiated between the threshold issue of "major federal action" and "environmental impacts."<sup>159</sup> The court noted that the scope of "environmental impacts" implicated areas of agency expertise and was therefore reviewed under an arbitrary and capricious standard.<sup>160</sup> The court then noted that it was not addressing whether *Marsh* changed the review of the question of major federal action, but clarified that reasonableness controlled this issue prior to *Marsh*.<sup>161</sup> It is likely that, like in the Eighth Circuit, reasonableness review controls this determination.

The United States Court of Appeals for the Ninth Circuit adopted the reasonableness test in *City of Davis v. Coleman*, citing to the Fifth Circuit in *SOTA*.<sup>162</sup> Further decisions explained that an agency "must provide a reasoned explanation [for] its decision" not just "assert[] that an activity . . . will have an insignificant effect on the environment."<sup>163</sup> After *Coleman*, the Supreme Court ruled in *Marsh*. The Ninth Circuit essentially ignored the *Marsh* ruling for three years, applying "the reasonableness standard in three more cases."<sup>164</sup> However, in *Greenpeace*

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156. 956 F.2d 970, 973 (1992).

157. *Id.* at 973 n.4.

158. *Id.*

159. *Id.* at 972-73 n.4.

160. *Id.* at 972.

161. *Id.* at 973 n.4.

162. 521 F.2d 661, 673 (9th Cir. 1975) (citing *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973)).

163. *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (citing *Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985)).

164. Jennifer L. Byrne, Note, *Alaska Wilderness v. Morrison: The Return of Reasonableness to NEPA Review?*, 26 ENVTL. L. 1287, 1299 (1996). In *Greenpeace Action v. Franklin*, the Ninth Circuit noted that it did not adopt the reasonableness standard in *LaFlamme v. FERC*, 945 F.2d 1124, 1128-29 (9th Cir. 1991), or *Seattle Community Council Federation v. FAA*, 961 F.2d 829, 832 (9th Cir. 1992), but acknowledged in *Northwest Environmental Defense*

*Action v. Franklin (Greenpeace)* the Ninth Circuit, relying on *Marsh*, declined to continue application of the reasonableness standard.<sup>165</sup>

The plaintiffs in *Greenpeace* alleged that the Secretary of Commerce (Secretary) violated his NEPA obligation by not preparing an EIS when setting the total allowable catch of pollock in the Gulf of Alaska.<sup>166</sup> In deciding not to prepare an EIS, the Secretary relied on two EAs that concluded none of the options open to the Secretary “significantly affect[ed] the quality of the human environment.”<sup>167</sup> The court held that if an agency acknowledges that NEPA applies to its action but “an aggrieved party challenges its determination that the proposed action does not warrant an EIS, the case often presents a factual dispute . . . which implicates substantial agency expertise.”<sup>168</sup> The court examined the challenges brought by plaintiffs and determined they were all “factual disputes between the Service’s scientific conclusions and those of Greenpeace’s experts.”<sup>169</sup> The court concluded that the agency’s reliance on their experts was not arbitrary and capricious.<sup>170</sup>

Much like the Eighth Circuit, the Ninth Circuit, under the arbitrary and capricious standard, requires an agency to “supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant.”<sup>171</sup> The Ninth Circuit continues using the reasonableness standard when reviewing whether NEPA applies in the first instance.<sup>172</sup> In *Northcoast Environmental Center v. Glickman*, the court noted that “it makes sense to distinguish the strong level of deference we accord an agency in deciding . . . technical matters from that to be accorded . . . disputes involving predominately legal questions.”<sup>173</sup> The first threshold determination relies on “undisputed historical facts” not allegations that the agency’s experts are wrong, thus requiring a court to weigh the validity of scientific opinions that are properly left to the agency.<sup>174</sup>

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*Center v. Brennan*, 958 F.2d 930, 936 (9th Cir. 1992), that the “arbitrary and capricious standard might apply.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330-31 (9th Cir. 1992).

165. See *Greenpeace*, 14 F.3d at 1330-32. See *Byrne*, *supra* note 164, at 1299, for a fuller analysis of Ninth Circuit review in this area.

166. See *Greenpeace*, 14 F.3d at 1327.

167. *Id.* at 1328.

168. *Id.* at 1330 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376-77 (1989) (internal citations omitted)).

169. *Id.* at 1331.

170. *Id.* at 1332.

171. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)).

172. See *Ka Makani ‘O Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002), for a discussion on the Ninth Circuit’s disparate treatment of this issue.

173. 136 F.3d 660, 667 (9th Cir. 1998).

174. *Id.*

## VII. THE ENIGMATIC FIRST CIRCUIT

The United States Court of Appeals for the First Circuit's threshold determination jurisprudence further illustrates the complexity of the proper scope of review. One year after explicitly adopting the reasonableness standard of review for an agency's decision not to supplement an EIS,<sup>175</sup> the First Circuit then declined to "enter the luxuriant jungle of differing review" to review an agency's decision not to issue an EIS at all in *Quinonez-Lopez v. Coco Lagoon Development Corp.*<sup>176</sup> As the court later explained, the First Circuit does not rely on a specific "verbal formula," but instead relies on the "practical approach" to review.<sup>177</sup> In *Quinonez-Lopez*, the plaintiffs were challenging the Army Corps of Engineers' issuance of a permit, without an EIS, which allowed a private company to use wetlands for fill.<sup>178</sup> In upholding the decision of the agency, the court found "no basis for questioning the *reasonableness* of the Corps' determination" stating "[i]ts conclusion is not *arbitrary or capricious*."<sup>179</sup> In *Sierra Club v. Marsh*, the court appeared to move closer to a reasonableness standard, noting that "the court . . . must essentially look to see if the agency decision, in the context of the record, is too 'unreasonable' . . . for the law to permit it to stand."<sup>180</sup> However, in *City of Waltham v. United States Postal Service*, the court reiterated that Circuit's aversion to verbal formulas first articulated in *Quinonez-Lopez*.<sup>181</sup> In *Waltham*, a municipality was challenging the decision by the United States Postal Service that an EIS was not required for the construction of a large mail distribution facility.<sup>182</sup> The agency issued two EAs, then a FONSI; then, after the commencement of the lawsuit, the agency issued another EA "as an 'amendment' to its earlier assessments."<sup>183</sup> After examining the record, the court determined that the agency properly complied with its NEPA obligations.<sup>184</sup> The *Waltham* court indicated that it applied a heightened

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175. See *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983).

176. 733 F.2d 1, 3 (1st Cir. 1984).

177. *City of Waltham v. United States Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993).

178. See *Quinonez-Lopez*, 733 F.2d at 1-2.

179. *Id.* at 4. Earlier in the opinion, the court noted that the "[a]ppellants must show the . . . determination to be arbitrary, capricious, an abuse of discretion; in essence, they must show . . . that, in light of the factual circumstances, the . . . decision was unreasonable." *Id.* at 2 (internal citations omitted).

180. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985). Not within the scope of this Comment is whether unreasonable is the opposite of reasonable or has some other definition.

181. *City of Waltham*, 11 F.3d at 240.

182. *Id.* at 238.

183. *Id.* at 238-39.

184. See *id.* at 240.

level of scrutiny to the suspicious third EA but never articulated what type of scrutiny was warranted other than “the type of scrutiny for which the circumstances call.”<sup>185</sup>

### VIII. CONCLUSION

The bold purpose of NEPA is effectuated through the EIS process.<sup>186</sup> While the EIS process does not seem revolutionary today, in its infancy it forced agencies and courts to rethink their decisions in light of environmental concerns.<sup>187</sup> Courts began strictly reviewing NEPA decisions in light of the heightened emphasis on the importance of the environment, but the proper scope of review was never fully resolved.<sup>188</sup> This is a primary reason that courts appear to follow such disparate standards.

Comparing the circuits’ treatment of the arbitrary and capricious standard raises the specter of becoming hopelessly mired in multiple meanings of a single term. Proper treatment under NEPA, however, begins with a court not just superficially reviewing an agency decision but “insur[ing] that the agency has taken a ‘hard look’ at environmental consequences.”<sup>189</sup> The purpose of the EIS goes unfulfilled if agencies do not “carefully consider” the impacts of their action.<sup>190</sup> A linguistic reconciliation among the circuits is not the true issue; the true issue rather is “how rigorously the reviewing court” applies the standard.<sup>191</sup> Decisions in the Second and D.C. Circuits, with their emphasis on a two-step review, track closer to a reasonableness review than to a strict arbitrary and capricious review.

The bifurcation of review of threshold determinations is consistent with *Marsh* and administrative law principles. In fact, the D.C. Circuit may be correct when it indicates that reasonableness review requires de novo review.<sup>192</sup> Whether NEPA applies to an agency action at all is a legal question, and if NEPA applicability review does not warrant de novo review then it certainly requires the stricter treatment articulated by the Eighth and Ninth Circuits. Thus, effective NEPA implementation requires that the reviewing court (1) employ a two-step process when

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185. *Id.*

186. *See* Karkkainen, *supra* note 11, at 904-05.

187. *See* Byrne, *supra* note 164, at 1287-88.

188. *See* Kelly, *supra* note 33, at 85-88.

189. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

190. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

191. Kellman, *supra* note 101, at 766-67.

192. *See* Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 n.7 (D.C. Cir. 2001).

determining if an EA is adequate, similar to the D.C. Circuit's test and (2) review NEPA's applicability as a legal question requiring at least reasonableness review. When an agency determines that NEPA does not apply, there is little for the court to review in order to determine compliance, and NEPA becomes less "a procedural hoop . . . to jump through"<sup>193</sup> and is simply "lost . . . in the vast hallways of the federal bureaucracy."<sup>194</sup>

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193. See Byrne, *supra* note 164, at 1288.

194. Calvert Cliff's Coordinating Comm., Inc. v. United States Atomic Energy Comm., 449 F.2d 1109, 1111 (D.C. Cir. 1971).