The Decline of the Environmental Mandate: Stryckers' Bay - A Modern West Side Story

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Despite the occasional willingness of Louisiana courts to hear such matters, the political question doctrine nonetheless might have provided the supreme court with a more appropriate means of distinguishing League of Women Voters from prior taxpayer standing cases, particularly Bussie. Ordering the Tax Commission to equalize tax assessments, while giving them two years to comply with the legislative mandate,\(^5\) is not as politically volatile an action as compelling the City Council of New Orleans, a board of elected officials, to vote for an increase in taxes. From this perspective, the court was justified in not hearing the matter, for in the background lurked the problem of how the court would enforce its order should the City Council refuse to vote for a tax increase.

Although these factors may have justified a refusal to entertain the matter, the court could have avoided further confusion in the already inconsistent line of jurisprudence regarding taxpayer standing had the court disposed of the case by utilizing the political question doctrine.

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In October 1971, the Trinity Episcopal School Corporation (Trinity) sued in federal district court to enjoin the New York City Planning Commission (the Commission) and the Department of Housing and Urban Development (HUD) from constructing low-income housing at a site on Manhattan's upper west side.\(^1\) Trinity, which had

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\(^53\) 286 So. 2d at 706.

\(^1\) Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974). In 1969 the Commission, acting in conjunction with HUD, modified implementation of an urban renewal plan on the upper west side of Manhattan after substantial progress toward the plan's completion. Trinity, which had premised its investment in the pro-
participated in the urban renewal plan of which the proposed housing was part, was denied injunctive relief by the court for the Southern District of New York. The Court of Appeals for the Second Circuit affirmed all but the lower court’s treatment of the National Environmental Policy Act (NEPA) claim and remanded the case, requiring HUD to study possible alternatives to the proposed plan. On remand, the district court reaffirmed its original decision as to the validity of the agency action. On a second appeal, the Second Circuit vacated and remanded again, stating that, under NEPA, administrative delay could not become an overriding factor in HUD’s determination. The Supreme Court reversed and held that an agency’s mandate, under NEPA, is not substantive, but is essentially procedural; once the court finds that procedural requirements have been met and the environmental consequences of agency action considered, the courts can do no more. Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 100 S.Ct. 497 (1980).

The core concepts of NEPA are found in two statutes. 42 U.S.C. § 4331(a) recognizes “the profound impact of man’s activity on . . .

ject on the original plan, sued to enjoin the changes, which would have replaced planned middle-income housing units with the low-income units of a seventeen-story highrise.

2. Id. Trinity had participated in the plan by building a school and housing development at a nearby location. The court found that the changes would not endanger the plan’s objectives of racial and economic integration and held that HUD did not violate NEPA in failing to prepare an environmental impact statement.

3. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975).
(a) The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. . . ." The statute states that its goals, among others, are the maintenance "of the environment for succeeding generations," the assurance of safe, healthful, productive, and esthetically pleasing surroundings, and the attainment of "the widest range of beneficial uses of the environment without degradation." The statute mandates further that the "Federal Government. . . use all practical means, consistent with other essential considerations of national policy" to attain these objectives. Section 4331 concludes with the recognition that "each person should enjoy a healthful environment," and that each person has a corresponding responsibility to preserve and enhance the environment.

The goals of NEPA are stated by section 4331, and section 4332:

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

7. Id. at (a).
8. Id. at (b)(1).
9. Id. at (b)(2).
10. Id. at (b)(3).
11. Id. at (b).
12. Id. at (c).
13. Id.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

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

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
(i) the State agency of official has statewide jurisdiction and has the responsibility for such action,
(ii) the responsible Federal official furnishes guidance and participates in such preparation,
(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
directs implementation “to the fullest extent possible” through the utilization of an “interdisciplinary approach” and methods designed to insure that “unquantified environmental ... values ... be given appropriate consideration in decisionmaking along with economic and technical considerations.”

Section 4332 directs that federal agencies prepare and publish detailed environmental impact statements (EIS) analyzing the consequences of and alternatives to federal actions which significantly affect the human environment. Furthermore, section 4332 requires that federal agencies develop alternatives to proposed federal projects and “utilize ecological information in the planning ... of resource-oriented projects.” It is significant to note that section 4332 employs mandatory language in articulating this multifaceted directive.

Calvert Cliff's Coordinating Committee Inc. v. Atomic Energy Commission is an oft-cited and scholarly exposition of the proposition that, in enacting NEPA, Congress imposed upon federal agencies substantive duties. In that decision the federal appellate court of the District of Columbia held that an agency's task under NEPA is analytic, discretionary, and involves a high degree of careful consideration—in short, that “consideration of environmental matters must be more than a pro forma ritual.”

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16. Id.
17. Id. at (2)(A).
18. Id. at (2)(B).
19. Id. at (2)(C).
20. Id. at (2)(D).
21. Id. at (2). The statute employs the word shall.
22. 449 F.2d 1109 (D.C. Cir. 1971).
24. 449 F.2d at 1128. The court further held that administrative rules formulated by the Atomic Energy Commission precluding review of nonradiological environmental impacts unless specifically raised, or when these issues have been passed on by other agencies, and precluding such consideration between the grant of the construction
In elucidating the analytic function which the court understood NEPA to demand of federal agencies, the court stated the "NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." The court stated that the act compels "a case-by-case examination and balancing of discrete factors." If an administrative decision is reached without "individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." The court concluded that "NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties."

The decision in *Calvert Cliffs* is perhaps most significant for its suggestion that under NEPA the final administrative decision must bear a rational relationship to the assimilation and analysis of diverse environmental factors. The court reasoned that "[t]he point of the individualized balancing analysis is to ensure that . . . the optimally beneficial action is finally taken."

In *Environmental Defense Fund, Inc. v. The Corps of Engineers of United States Army,* the Eighth Circuit Court of Appeals expressly rejected the district court's holding that NEPA was a merely procedural enactment. The court adopted the view that NEPA imposed upon federal agencies supra-procedural analytic functions. The court recognized the requirements of NEPA as "substantive" and stated that these requirements could be satisfied not by mechanical adherence to procedural requirements but through a "careful and informed decisionmaking process." In concluding that

25. *Id.* at 1113.
26. *Id.* at 1122.
27. *Id.* at 1115.
28. *Id.*
29. *Id.* at 1117. As the court stated, "What possible purpose could there be in requiring the 'detailed statement' to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy." *Id.*
30. *Id.* at 1123.
31. 470 F.2d 289 (8th Cir. 1972).
32. *Id.* at 297.
33. *Id.* at 298. As the court succinctly asserted, "The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Id.*
34. Federal agencies, stated the court, have an "obligation to carry out the substantive requirements of the Act." *Id.* (emphasis added).
35. *Id.*
NEPA is substantive in principle, the court relied heavily on the notion that section 4331 is a statement of federal goals and that the "procedures included in [42 U.S.C. § 4332] of NEPA are not ends in themselves" but are means to achieving these federal objectives and were "intended . . . [as] . . . 'action forcing.'"

In his concurring opinion to National Helium Corp. v. Morton, Judge Breitenstein acknowledged that NEPA had done more than alter administrative procedures and had transformed the substance of the deliberative administrative function. Judge Breitenstein stated that "NEPA alters the decisionmaking process of the federal agencies and brings environmental factors to an equal footing with economic, technical, and other traditional considerations, all of which must be balanced by the decision-maker." National Helium Corp. is also important for indicating that substantive agency action taken pursuant to NEPA must reflect the prior analysis of environmental factors.

In Environmental Defense Fund, Inc., v. Corps of Engineers of United States Army, the Fifth Circuit Court of Appeals recognized in dicta the essential relationship between the weighing processes mandated by NEPA and the final substantive decision rendered by the administrative agency, stating that it is "obviously preferable that environmental studies and their evaluation occur before the agency becomes committed to a project." Rejecting a strictly procedural and mechanistic view of NEPA's mandate, the court stated that "NEPA commands 'full good faith consideration of the environment, not formalistic paper shuffling between agency desks.'"

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36.  Id. at 297.
37.  Id. at 298. The court also relied on Senator Henry Jackson's statement that "If an environmental policy is to become more than rhetoric . . . each of these agencies must be enabled and directed to participate in active and objective-oriented environmental management. Concern for environmental quality must be made part of every phase of Federal action." Id. at n.13.
38.  486 F.2d at 1005 (10th Cir. 1973) (Breitenstein, J., concurring).
39.  Id. at 1005-06.
40.  Id. at 1006. In implicitly rejecting a procedural model of NEPA's mandate, Judge Breitenstein recognized that the consideration of environmental factors ultimately must be reflected in any substantive action taken by the agency. Judge Breitenstein concurred in the majority's refusal to enjoin the Secretary of the Interior's cancellation of helium contracts since the Secretary's "action was not a mechanical compliance with NEPA but rather a full consideration of [the environmental impact statement] with an understanding and reasonable application of its comprehensive study. He balanced the environmental factors with the other pertinent factors. His final action was neither arbitrary, capricious, nor an abuse of discretion." Id. (emphasis added).
41.  492 F.2d 1123 (5th Cir. 1974).
42.  Id. at 1129.
43.  Id. The court also stated that at the heart of the question of whether the
One of the more explicit recognitions that NEPA imposes upon federal agencies analytic, supra-procedural duties was contained as dicta in Shiffler v. Schlesinger, wherein the Third Circuit Court of Appeals stated that Congress has imposed in section 4331 "a substantive obligation ... to balance the environmental considerations and goals of the Congress along with the traditional factors ... Thus, before undertaking any [project], the agency must determine whether its benefit is outweighed by negative environmental implications requiring modifications to, or abandonment of the proposed action."

There also have been indications from the Supreme Court that NEPA was designed to make an impact on substantive decisionmaking. In his dissenting opinion in Sierra Club v. Federal Power Com-

responsible federal agency had prejudged the problems presented it, contrary to the intent of NEPA, was the issue of whether "the Corps [had] acted perfunctorily in its compliance efforts." Id.

44. 548 F.2d 96 (3d Cir. 1977).

45. Id. at 100 (emphasis added). Other decisions rejecting the view that NEPA imposes solely procedural duties include the First Circuit Court of Appeals decision that stated in dicta that when construction proceeds before environmental analysis, such "chronology ... is far from that ordained by the letter and the spirit" of NEPA. City of Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972). In recognizing the vital relationship between the mandated consideration of environmental factors and the substantive administrative decision to approve or abandon an industrial project, as well as the proposition that NEPA has transformed federal agencies' substantive decision-making duties, the First Circuit Court of Appeals stated further that:

The concept of that Act was that responsible officials would think about environment before a significant project was launched; that what would be assessed was a proposed action, not a fait accompli; that alternatives to such action would be seriously canvassed and assayed. ... The executive branch guidelines [published by the Council on Environmental Quality] made even more clear that the purpose of the statute was to build into the agency decisions process environmental considerations. ... Id. (emphasis added).

Several other federal decisions have adopted the view that NEPA requires not merely pro forma adherence to procedural requirements, but that substantive administrative decisions be informed by and reflect the analysis of environmental factors. In Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973), the First Circuit Court of Appeals reversed a district court decision to dissolve an injunction against a housing development in which HUD participated, when HUD's drainage proposal did not appear reasonable or adequately explained, given the extant data. In Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972), the Second Circuit Court of Appeals stated that the primary purpose of the environmental impact statement and the analysis therein "is to compel federal agencies to give serious weight to environmental factors in making discretionary choices." Id. at 697 (emphasis added). And in Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), Judge Oakes, dissenting against a second circuit decision denying relief to those seeking to enjoin a hydroelectric project, stated that the project's proponents (the FPC) had violated NEPA because their final decision to proceed did not reflect the careful consideration of "relevant factors." 453 F.2d at 485 (Oakes, J., dissenting).
mission, Justice Douglas stated that NEPA’s mandate “was aimed partly at eliminating the excuse which had often been offered by bureaucrats that their statutory authority did not authorize consideration of [environmental] factors in their policy decisions.”46 Similarly, it was stated in New York v. Kleppe that “the essential requirement of the NEPA is that before an agency takes major action, it must have taken a ‘hard look’ at environmental consequences.”47

It is against this backdrop, analytic and jurisprudential, that courts have delineated a narrower, more restricted, and procedural model of federal administrative responsibility under NEPA. In Citizens Airport Committee of Chesterfield County v. Volpe,48 the federal court for the Eastern District of Virginia held, in denying an injunction against the construction of an airport, that the Secretary of Transportation need not take “affirmative substantive steps” to resolve environmental problems.49 Outlining a statutory mandate that fell short of requiring that substantive administrative decisions rationally reflect an analysis of environmental factors, the court stated that “NEPA does no more than require federal agencies to consider environmental effects in certain federal projects and to file a statement concerning these effects . . . . The act provides no substantive conditions that must be met before a federal project may be approved.”50 In Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army,51 the district court for the Eastern District of Arkansas held, in adopting a procedural view of NEPA’s mandate, that while citizens’ groups could demand that federal agencies cogently analyze environmental factors, these groups had no vested right to demand an administrative decision that would secure “the type of environment envisioned” by NEPA as an administrative objective.52 Ultimately, said the court, the final administrative decision, notwithstanding the requirements of NEPA, was within the executive prerogative of the responsible agency.53 Rejecting the contention that NEPA creates substantive rights, the court stated that “plaintiffs are relegated to the ‘procedural’ requirements of the Act.”54 In Conservation Council of North Carolina v. Froehlke,55 the court for the Middle District of North

47. 429 U.S. 1307, 1311 (1976).
49. Id. at 58.
50. Id.
52. Id. at 755.
53. Id.
54. Id.
Carolina held that when an agency has compiled an environmental impact statement which fully discloses all possible environmental effects, the agency has discharged its statutory responsibility under NEPA—even when expert testimony suggested strongly that the agency's final decision did not incorporate judiciously the analysis contained in the environmental impact statement.\(^{57}\)

The Tenth Circuit Court of Appeals also implicitly rejected a substantive model of NEPA's mandate and the notion that NEPA demands ecologically balanced administrative decisions, stating that NEPA's provisions "pertain to procedure and do not undertake to control decision making . . . ."\(^{58}\)

Decisions espousing a substantive view of NEPA's mandate have not been overruled expressly *en masse*. However, the prevalent view, as represented by recent Supreme Court decisions, is that NEPA's mandate is essentially procedural and that once the discrete procedures have been fulfilled there is no requirement that ultimate administrative decisions bear a rational relationship to the precedent analysis. Thus, in *Aberdeen & Rockfish Railroad Company v. Students Challenging Regulatory Agency Proceedings (S.C.R.A.P.)*,\(^{59}\) the Supreme Court, repudiating more substantive views of NEPA's mandate, implicitly rejected the criticisms of dissenting Justice Douglas\(^ {60}\) and of the lower court.\(^ {61}\) The district court had found that the Interstate Commerce Commission's (ICC) analysis of environmental factors constituted merely *pro forma* compliance with NEPA, that the agency did not in good faith analytically balance environmental factors, and that the agency's final substantive decision did not respond to cogent criticisms of other federal agencies.\(^ {62}\) In dissent, Justice Douglas found that the agency's final decision and supporting analysis had been thoroughly discredited by other agencies\(^ {63}\) and asserted that "NEPA is more than a technical statute of administrative procedure."\(^ {64}\) However, the majority opinion empha-

\(^{56}\) Id. at 226.

\(^{57}\) Id.

\(^{58}\) National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971) (emphasis added).

\(^{59}\) 422 U.S. 289 (1975).

\(^{60}\) 422 U.S. at 328 (Douglas, J., dissenting).

\(^{61}\) 371 F. Supp. 1291 (D.D.C. 1974). The lower court and Justice Douglas asserted in essence that the Interstate Commerce Commission had violated NEPA with a decision not to declare unlawful a railroad freight increase; the increase allegedly would have exacerbated the effect of a preexistent price discrimination against the transport of recyclable metals, thereby discouraging the use of such recyclables.

\(^{62}\) Id. at 1301-02.

\(^{63}\) 422 U.S. at 328 (Douglas, J., dissenting).

\(^{64}\) Id. at 331.
sized NEPA’s mandate as procedural and did not focus upon whether the final substantive decision was based upon, or reflected, careful, good faith analysis, but instead stressed the fact that the ICC’s published analysis complied with NEPA’s technical requirements of timing and scope. To similar effect is the recent Supreme Court decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., wherein the Court stated that while “NEPA does set forth significant substantive goals for the Nation . . . its mandate to the agencies is essentially procedural.”

Decisions describing the scope of judicial review of administrative acts made pursuant to NEPA and the interaction of the judiciary and administrative agencies in achieving NEPA’s mandates have largely determined NEPA’s process and reality. Judicial review of agency action taken pursuant to NEPA is generally recognized to be governed by the provisions of the Administrative Procedure Act (APA). However, there has been a variance in judicial approach in applying the review provisions of the APA to administrative actions taken pursuant to NEPA. Several decisions have espoused a substantive model of review in which the courts themselves engage in an analytic inquiry to ensure that environmental factors have been given good faith consideration and that the substantive administrative decision on the merits reflects the consideration of such factors. Nevertheless, the majority of the courts have viewed their review function as an extremely limited one.

65. Id. at 319.
66. Id. at 320-28.
68. Id. at 558.
The Supreme Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* appears to have established a narrower, more procedural model of judicial review under NEPA and the APA with its pronouncement that

[...c]ourts are to play only a limited role. . . . It is to insure a fully informed and well considered decision, not necessarily a decision the judges . . . would have reached . . . . Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.]

The approach taken by the *Stryckers' Bay* Court to the procedural/substantive duty question was that an agency's duties, under NEPA, are essentially procedural. The *Stryckers' Bay* Court found that HUD, which had compiled data on the project's probable impacts and had published an analysis of its costs and benefits after the initial determination to proceed, had thereby "considered" the project's environmental consequences, and discharged NEPA's essentially procedural requirements. The Court refrained from analyzing whether the responsible federal agency had resolved the conflict according to NEPA's decisional criteria, holding that courts cannot interject themselves into the sphere of agency discretion. Once an agency has considered a project's environmental consequences and performed NEPA's procedural tasks, the courts can require no more.

The administrative consideration of environmental factors which the *Stryckers' Bay* Court adjudged to be legally adequate consisted in

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73. *Id.* at 558.

74. 100 S. Ct. at 499-500.
of HUD's formulation and publication of a written analysis of the project's impacts and alternatives. However, the Court, insofar as it stopped short of requiring that this consideration of environmental factors be integrated into the ultimate decisional process, implicitly rejected the assertion of the appellate court that "'consideration' is not an end in itself," but a means to the end of a prudent decision. It appears that the court has sanctioned a model of administrative compliance with NEPA in which the consideration of environmental factors is isolated from the final substantive exercise of agency discretion.

The Supreme Court in Strycker's Bay did not disturb the agency's apparently mechanistic conception of NEPA's mandate. Perhaps the most illuminating aspect of HUD's treatment of the controversy was its formulation of the initial plan to proceed prior to a thorough analysis of the project's impacts and alternatives. Indeed, such an analysis was conducted only at the behest of the appellate court. Upon a second review of HUD's compliance efforts, the appellate court again rejected them, because of the court's belief that HUD's analysis had been done as a perfunctory gesture, with no genuine intent to implement its logic. Implicit in the Supreme Court's reversal of the appellate court's reasoning, and in the ratification of HUD's compliance efforts, is a repudiation of Environmental Defense Fund's chronology—thought before decision and action—and Sierra Club v. Morton's underlying theme: the purpose of the environmental analysis of the EIS is to inform and guide federal proposals—not merely to justify them.

By ratifying this mode of administrative action, the Court appears to have effectively ignored the criticisms of courts that have insisted that the consideration of environmental factors under NEPA must be construed as an analytic function that is part of the ultimate decisional process—and not merely a clerical, paper-shuffling task in which agency departments exchange detailed analy-

75. Id. at 499.
76. 590 F.2d at 44.
77. As the Court of Appeals for the Second Circuit noted, the analysis of alternatives conducted by HUD prior to its decision to proceed "was either highly limited or non-existent." 523 F.2d at 94.
78. Id. at 95.
79. As Justice Marshall noted in concurring with the appellate court, HUD itself conceded that its proposal raised serious sociological questions and that better alternatives existed from "the standpoint of social environmental impact." 100 S. Ct. at 501 (Marshall, J., dissenting).
80. See text at note 42, supra.
81. 514 F.2d 856 (D.C. Cir. 1975).
ses which the agency is free to ignore in formulating its final decision. As one court has inquired, "[w]hat possible purpose could there be in requiring the 'detailed statement' to be before hearing boards, if the boards are free to ignore entirely the contents of the statement?" The principal concern of these courts appears, in retrospect, to be that the consideration of environmental factors becomes a meaningless and perfunctory task unless undertaken with the intention to evaluate seriously a project's impacts and the possibility of its modification or abandonment. In holding that a court can only require of agencies that they at some point engage in a consideration of environmental factors, the Court has held, effectively, that once an agency has conducted this analysis, the agency is free to discard the analysis when formulating a plan of action. Thus, in the instant case, despite administrative findings that the long-range impacts of the housing project would be predictably and critically damaging to the urban environment and the fabric of urban life, and despite administrative findings that alternative sites would have been ecologically preferable, the Court did not disturb or question agency action that disregarded these substantive concerns and which was based instead on the consideration of administrative delay. The agency involved was allowed to "bootstrap," ultimately achieving administrative objectives through its own initial lethargy in analyzing alternative proposals. Although HUD itself recognized that better sites existed for the low-income housing, HUD's failure to identify these sites in the initial planning stages created a situation wherein a substantial delay would accompany any attempt to relocate the housing at alternative sites; thus, delay became the dispositive factor in HUD's decision to construct the housing at the initial site.

The Stryckers' Bay Court stated that procedural consideration itself was the essence of an agency's statutory function under NEPA. In so doing the Court repudiated the decisions articulating the link between procedural consideration of environmental factors and NEPA's admittedly substantive goals. The Stryckers' Bay per curiam decision held that an agency has discharged its statutory duty under NEPA once it has "considered" environmental factors.

82. See note 43, supra.
83. See note 29, supra.
85. Id.
86. 100 S. Ct. at 499-500.
87. Id. at 501.
88. Id. at 500.
89. Id.
The court did not require that the consideration of environmental factors be incorporated into the decisional process. The salient theme of several decisions to which the Supreme Court was thereby unfaithful is that agencies must not only consider environmental factors, but must integrate such consideration into the ultimate decisional process. As was stated in National Helium Corporation, NEPA did not merely alter agency procedures, but also transformed administrative agencies' substantive, deliberative functions.

Implicit in the integration of environmental considerations into the decisional process is the notion that the ultimate decision reached will reflect a rational evaluation of federal proposals according to NEPA's decisional criteria. However, in Stryckers' Bay the Court stated that NEPA required only that agencies consider environmental factors. The Court's formulation implies that NEPA does not require that agency action rationally reflect a consideration of environmental concerns. The holding apparently repudiates the holding in National Helium Corp. that final agency action under NEPA is to rationally reflect the precedent analysis of environmental factors and the holding in Sierra Club v. Morton, that agency action is to be guided by the analysis contained in the EIS. The holding in Stryckers' Bay also critically undermines the holding in Calvert Cliffs that NEPA mandates that the consideration of environmental factors is not isolated from decisionmaking, but is rather a careful balancing of a proposal's costs and benefits which is designed to ensure that the most beneficial action is finally taken.

It is worthwhile to note, in this context, that 42 U.S.C. § 4332(2)(B) appears to adopt the view that the consideration of environmental factors is not merely an isolated, procedural process that can be disregarded in the substantive formulation of administrative proposals. This subsection mandates that federal agencies develop methods "which will insure that . . . environmental . . . values may be given appropriate consideration in decisionmaking along with economic and technical considerations." The Court in Stryckers' Bay, by requiring HUD only to consider environmental values without also requiring that this consideration be incorporated into

91. See text at note 39, supra.
92. See note 40, supra.
93. See text at note 81, supra.
94. See text at note 30, supra.
96. Id. (emphasis added).
the final decisional calculus, has arguably circumvented the application of NEPA's clear statutory mandate.

An integral component of the holding in *Stryckers' Bay* is the limited concept of judicial review therein espoused, a notion closely related to the Court's concept of administrative function under NEPA. Corresponding to the theory that NEPA imposes an essentially procedural mandate is the view that the appropriate role of judicial review is limited to ascertaining that agencies have performed procedural tasks. Similarly, there is a logical relationship between the view that NEPA affects the substantive and analytic processes of agencies and the view that courts are legally compelled to *evaluate* federal administrative proposals to insure that agencies rationally assess their own projects according to NEPA's criteria.

In *Stryckers' Bay*, the Court pointedly refrained from analyzing either HUD's housing proposals or the issue of whether HUD had resolved the conflict according to NEPA's criteria. The Court perceived the judicial duty to be an extremely limited one: to ensure that the responsible federal agency had complied with NEPA's procedural requirements and had considered a project's environmental consequences. Insofar as the Court did not adopt a substantive model of NEPA's mandate, it was only logical that judicial enforcement of NEPA did not include ascertainment of whether federal agencies had exercised their discretion rationally: this issue would not arise within the scope of NEPA's allegedly procedural commands. However, the Court's notion of judicial review contradicts the decisions which assert that the courts themselves must engage in a substantive, analytic inquiry to ensure that agencies have not only evaluated environmental considerations but have incorporated them into the decisional process. The underlying theme of those decisions, to which the Court in *Stryckers' Bay* was impervious, is that judicial analysis is necessary to ensure that the consideration of environmental concerns will not be devoid of meaning but will be evident and reflected in agency decisions and proposals.

*Stryckers' Bay* raises the question of NEPA's ultimate impact. At the root of that question is the issue of whether NEPA requires of agencies an exercise of substantive discretion, or an exercise of duties that are mechanical and "essentially procedural." Under the former model, NEPA influences the agency's substantive decision-

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97. 100 S. Ct. at 500.
98. See note 71, supra.
100. 100 S. Ct. at 500.
making process, ensuring that any ultimate agency action will be
guided by environmental concerns; under the latter model, consider-
ation of environmental factors is merely another of many discrete
administrative procedures that need not be integrated into substan-
tive decisionmaking and which need not influence ultimate agency
action. The Stryckers' Bay Court required not that agency action
rationally reflect the agency's consideration of environmental factors
and alternative proposals, but merely that the agency at some time
engage in environmental analysis.\(^{101}\)

Of equal importance to the Court's definition of administrative
function under NEPA is the nature of judicial review employed in
Stryckers' Bay. The appellate court noted that HUD's analysis indi-
cated that more rational alternatives existed than the one ultimately
chosen.\(^{102}\) HUD itself recognized the negative impact on the urban
environment of the proposal's concentration of low-income families
in an already crowded area.\(^{103}\) Nevertheless, the Supreme Court
foreclosed substantial inquiry into the wisdom of HUD's decision
and into the issue of whether HUD's final action rationally reflected
a consideration of NEPA's ecological concerns. As dissenting Justice
Marshall noted, "[v]alid questions arise from the fact that 68% of all
public housing units would be sited on only one crosstown axis in
this area of New York City... [T]he resulting high concentration of
low-income housing would hardly further racial and economic inte-
gration."\(^{104}\)

The inherent flaw of the Court's approach is that it paves the
way for improvident resource commitments in the future and ren-
ders the courts powerless to intervene when agency analysis logi-
cally establishes the superiority of one proposal, but the agency
nevertheless chooses to implement another. Stryckers' Bay stands
for the proposition that courts can require no more than that the
agencies consider environmental factors. However, it is difficult to
perceive the significance of considering environmental factors if this
consideration is not rationally reflected in the agency's ultimate
decisions. The evaluation of federal proposals according to NEPA's
statutory criteria is insignificant unless integrated into the decision-
making process; resource determinations will often be imprudent if
the courts remain powerless to demand that agency decisions reflect,
and are the analytic products of, reasoned analysis. Translating envi-
ronmental factors into vital components of the decisionmaking pro-

101. Id.
102. 100 S. Ct. at 501 (Marshall, J., dissenting).
103. Id.
104. Id.
cess may be the greatest hope for achieving the intent of NEPA, which was not merely designed to superimpose procedures on agencies, but to achieve sound environmental planning and a healthy environment through intense administrative consideration of environmental concerns. As was succinctly stated by Justice Marshall in a dissenting opinion, "I do not subscribe to the Court's apparent suggestion that [reviewing courts are limited] to the essentially mindless task of determining whether an agency 'considered' environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion... Our cases establish that the arbitrary or capricious standard prescribes a 'searching and careful' judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner."

It is significant to note that the institutional objectives and biases of administrative agencies are often inimical to environmental goals. Furthermore, the requirements of procedural due process are often less stringent in an administrative than in a judicial arbitration. It is in this light that Justice Marshall's concern for the vitality of impartial judicial review of administrative determinations made pursuant to NEPA acquires special force.

It has been held that "NEPA is an authoritative repudiation of the notion that economy alone advances the public interest." NEPA does not "require particular substantive results in particular problematic instances" and does not "establish environmental protection as an exclusive goal"; NEPA mandates, instead, "a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations," and,

105. In Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), the court called for "consideration of environmental values 'to the fullest extent possible.'" Id. at 1128.
106. 100 S. Ct. at 502 (Marshall, J., dissenting) (emphasis added).
107. For a judicial recognition of institutional bias in the administrative process of making resource commitments, see Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 470 F.2d 289, 295 (8th Cir. 1972).
108. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), the Supreme Court reversed an appellate decision in which the District of Columbia Circuit Court struck down an Atomic Energy Commission (AEC) ruling. The Supreme Court overruled, as a matter of law, the appellate court's holding that an AEC ruling could be overturned because citizens' groups had been denied discovery and cross-examination by the AEC in a rule-making hearing.
110. 449 F.2d at 1112.
111. Id.
112. Id.
as some courts have argued, NEPA mandates also an integration of environmental concerns into the decisional process.\textsuperscript{113} Because the inherent complexity of resource determinations demands analytic balancing and not merely the discharge of clerical, mechanical functions;\textsuperscript{114} because NEPA requires agencies to consider and give effect to environmental goals and not merely to file impact statements;\textsuperscript{115} because the mandated consideration of environmental factors is a superfluous exercise unless it directly bears on substantive agency determinations,\textsuperscript{116} the view that NEPA is wholly procedural is perhaps less problematic than baffling.

The \textit{Stryckers' Bay} Court has erred, perhaps, in failing to comprehend the precise nature and complexity of resource determinations. The Court's views appear insusceptible of reconciliation with past judicial recognitions of Congressional intent to incorporate environmental values into the decisional process\textsuperscript{117} and with decisions that have acknowledged the inherently substantive nature of NEPA's mandate.\textsuperscript{118} However, the paramount danger of the \textit{Stryckers' Bay} formulation does not emanate from judicial inconsistency. The decision's most threatening implications arise from its apparent circumvention of the goals and processes critical to minimizing the expansive and ecologically damaging impacts of a technological society.

NEPA was drafted, arguably, in response to the concerns of the scientific community that Man is incrementally endangering the complex continuum of biological interactions essential to the regeneration of life.\textsuperscript{119} That NEPA's lofty goals may be made concrete

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\item \textsuperscript{114} Implicit in 42 U.S.C. § 4331 (2)(B)'s recognition of the interrelationship of all components of the natural and technological environment would appear to be a corollary recognition of the complex nature of the subject matter of environmental analysis.
\item \textsuperscript{115} \textit{Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army}, 470 F.2d 289, 298 (8th Cir. 1972).
\item \textsuperscript{116} 449 F.2d at 1117-18.
\item \textsuperscript{117} See note 40, \textit{supra}.
\item \textsuperscript{118} See text at notes 25, 35, and 45, \textit{supra}.
\item \textsuperscript{119} As a people we have been overly optimistic, careless, and at times callous in our exactions from the natural environment. The history of soil exhaustion and erosion, of cut-over forest lands, of slaughtered wildlife document a few of our early failures to maintain the restorative capacities of our natural resources. ... But our exploding population and technology have created more subtle dangers, less easily detected and more difficult to overcome.
\item These more recent dangers have been documented in testimony before the Congress and in the reports of scientific committees. They confront us with the possibility that the continuation of present trends affecting, for example, (a) the
\end{itemize}
under the law has been implicitly recognized by the decisions acknowledging that NEPA's mandated analysis of statutory considerations may appropriately lead, in some instances, to the abandonment or modification of federal proposals. This enactment created "'action-forcing' procedures" which were designed, not to be ends in themselves, but a means to insure "that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government." The Senate, recognizing that without certain procedures, NEPA's "lofty declarations are nothing more than that," created procedures to insure that "all federal agencies do in fact exercise the substantive discretion given them." But it is the careful and reasoned substantive analysis of resource commitments and environmental concerns itself that NEPA's redactors intended to be the critical, analytic bridge between NEPA's procedures and substantive goals. NEPA's procedures, as some courts

chemistry of the air, (b) the contamination of food and water, (c) the use of open land and living space, and (d) the psychophysical stress of crowding, noise and interpersonal tension on urban populations, may infinitely degrade the existence of civilized man before the end of this century. These are not the exaggerated alarms or unsubstantiated predictions of extremists; they are sober warnings of competent scientists supported by substantial demonstrable evidence. In summary, within the present generation the pressures of man and technology have exploded into the environment with unprecedented speed and unforeseen destructiveness.

SUBCOMMITTEE ON SCIENCE, RESEARCH AND DEVELOPMENT, 91ST CONG. 1ST SESS., REPORT ON MANAGING THE ENVIRONMENT 4-5 (Comm. Print 1969). For a sophisticated analysis of the biological, demographic, and technological dimensions of the global prospect, see D. MEADOWS, D. MEADOWS, J. RANDERS & W. PEHRENS III, THE LIMITS TO GROWTH (1974). In this scholarly exposition, a distinguished group of industrialists, scientists, civil servants, humanists, economists, and educators from the international scientific community concluded that Man tends now, more than ever before, toward accelerated growth and consumption, often "blindly assuming that his environment will permit such expansion, that other groups will yield, or that science and technology will remove the obstacles." Id. at 183. The global situation is such that "taking no action to solve these problems is equivalent to taking strong action. Each day of exponential growth brings the world system closer to [its] limits. A decision to do nothing is a decision to increase the risk of collapse." Id. at 185.

122. 115 CONG. REC. 40416 (1969).
123. 470 F.2d at 297-98.
125. 115 CONG. REC. 40416 (1969).
126. 449 F.2d at 1112.
have suggested, were not intended to be the enactment's essence;\(^{27}\) the duty of the courts and administrative agencies under NEPA was arguably designed to be a substantive one: to insure, through careful analysis, that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy"\(^{28}\)—to insure, in short, that NEPA's vital goals do not remain unattained—and unattainable.

The Stryckers' Bay Court has constructed a model of statutory compliance with NEPA that leaves these laudable goals as merely empty aims; and the Court has deprived these aims of realization by undermining the juridical definition of NEPA as a statutory directive which compels the substantive, analytic implementation of NEPA's objectives. The remnants of this decision are emasculated procedural, judicial, and administrative processes as well as a persistent legal query: Are solely procedural processes sufficient to bridge the gap between the aims of NEPA—and their reification?

John Milkovich

A FUNCTIONAL PURPOSE FOR COMPARING FAULTS:
A SUGGESTION FOR REEXAMINING "STRICT LIABILITY"

While working in a dimly lighted area on an offshore drilling rig owned by the defendant, the plaintiff was injured when he fell through a hole on one level to the floor of the next level. In plaintiff's suit against Dixilyn seeking recovery in strict liability\(^1\) based on Louisiana Civil Code article 2317,\(^2\) the trial judge instructed the jury as to the requirements of strict liability and also as to the availability of contributory negligence as a defense.\(^3\) A jury

\(^{127}\) Id.
\(^{128}\) 449 F.2d at 1111.

1. The plaintiff also brought an action in negligence. The jury found the defendant negligent, but also found the plaintiff contributorily negligent, thus barring recovery. While the negligence action is not at issue in this appellate opinion, it does provide an example of when, if contributory negligence is not allowed as a defense in the strict liability action, the plaintiff may avoid a denial of recovery by bringing the action under strict liability.

2. LA. CIV. CODE art. 2317: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

3. The instruction given to the jury provides in pertinent part: "any negligence on the part of the plaintiff which was a proximate cause of the accident bars the plain-