



Summer 1991

An Adequate EIS under NEPA: Deference to CEQ; Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy

Jennifer R. Bartlit

Recommended Citation

Jennifer R. Bartlit, *An Adequate EIS under NEPA: Deference to CEQ; Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 Nat. Resources J. 653 (1991).

Available at: <https://digitalrepository.unm.edu/nrj/vol31/iss3/8>

This Student Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

NOTE

AN ADEQUATE EIS UNDER NEPA: DEFERENCE TO CEQ; MERELY CONCEPTUAL LISTING OF MITIGATION LEADS US TO A MERELY CONCEPTUAL NATIONAL ENVIRONMENTAL POLICY

INTRODUCTION

*Robertson v. Methow Valley Citizens Council*¹ establishes two general propositions: first, the Council on Environmental Quality's (CEQ) interpretation of environmental impact statement (EIS) requirements supersedes conflicting judicial interpretations. Secondly, the National Environmental Policy Act (NEPA)—through the EIS—imposes procedural duties even less stringent than previously interpreted.

In *Robertson*, citizens groups challenged the Forest Service's issuance of a special use permit² for the development of a ski resort in a pristine national forest. Petitioners alleged that the EIS prepared by the Forest Service did not meet the requirements of NEPA.³ The Supreme Court, in reversing the decision of the Ninth Circuit Court of Appeals, held that the EIS was adequate. The Court found that NEPA does not require agencies to include in each EIS a fully developed mitigation plan, nor to actually mitigate; nor does it impose a duty on an agency to handle uncertainty with a "worst case analysis" in its EIS.⁴

1. 490 U.S. 332, 104 L.Ed.2d 351, 109 S.Ct. 1835 (1989).

2. A special use permit is necessary whenever a private party seeks to use lands owned by the federal government. The Forest Service issues special use permits under authority of 16 U.S.C. § 497 (1982).

3. National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852 (1970), 42 U.S.C. §§ 4321-70(b) (1970).

42 U.S.C. § 4332 mandates completion of an EIS, a detailed statement analyzing the environmental impacts of "major" governmental actions. The Act states, in pertinent part, that all agencies of the Federal Government shall:

(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.

42 U.S.C. § 4332(C)(1970).

4. *Robertson*, 109 S.Ct. at 1837. The Court also held that the U.S. Forest Service's failure to develop a complete mitigation plan did not violate its own regulations, reversing the Ninth Circuit's holding. *Id.* at 1837-38. Forest Service regulations require, *inter alia*, that "[e]ach special use authorization . . . contain . . . [t]erms and conditions which will . . . minimize damage to . . . the environment." *Id.* at 1847-49.

By its holding, the Court first approved CEQ final regulatory authority, reiterating the principles of substantial deference to agency regulations and decisionmaking. The Court focused on the issue of whether NEPA imposes any substantive duty to reduce environmental harm, proclaiming that NEPA does not. And the Court deemphasized an important issue concerning the procedural duty under NEPA. By also affirming a “merely conceptual”⁵ mitigation plan as adequate, the Court’s holding is inherently inconsistent with its own interpretation of EIS purposes—to fully inform agencies and the public during the decisionmaking process. A merely conceptual mitigation plan does not serve either purpose. Because an EIS has been the most important mechanism for implementing NEPA, the Court’s holding dilutes the power of NEPA to protect the environment. In addition, by choosing to affirm CEQ’s regulation (rejecting worst case analysis) with only cursory review and increased deference, and in spite of conflicting judicial principles, the Court subjects NEPA to greater susceptibility to political whim. Thus, the *Robertson* decision weakens the power of NEPA to achieve “significant substantive goals for the Nation.”⁶

THE FACTS IN *ROBERTSON*

Sandy Butte, overlooking the Methow Valley, is a 6,000-foot mountain located in the Okanagoan National Forest of Washington. In May 1989, Sandy Butte was still distinctive as “an unspoiled, sparsely populated area that the trial court characterized as ‘pristine.’”⁷

In 1978, Methow Recreation, Inc. (MRI) applied for a special use permit to develop and operate its proposed “Early Winters Ski Resort.” The proposed resort was to employ approximately 3,900 acres of Sandy Butte and 1,165 acres of surrounding land. Pursuant to NEPA, and in conjunction with state and county officials, the Forest Service produced an EIS, the Early Winters Alpine Winter Sports Study, in the first stage of a three-stage process of environmental assessment unique to the Forest Service.⁸

In the first stage of this process, the Forest Service must examine the general environmental and financial feasibility of a proposed project and an EIS must be prepared.⁹ The second stage ordinarily consists of selecting

5. *Robertson*, 109 S.Ct. at 1837.

6. Quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558, (1978).

7. *Robertson*, 109 S.Ct. at 1839.

8. See 36 C.F.R. § 251.54(f) (1988).

9. 42 U.S.C. § 4332 (1969). Issuing the permit would qualify as a major federal action.

the developer and reaching agreements on the development. Then a special use permit may be issued. However, the special use permit does not give the developer the right to begin construction; rather, it verifies the suitability of the site for development of a predetermined type.¹⁰ In the third and final stage, the Service evaluates the "master plan" for development, construction, and operation of the project. Construction may begin only after completion of an additional environmental analysis—a full-blown EIS if necessary—and final approval of the developer's master plan.¹¹

This case challenges the issuance of the special use permit by challenging the EIS in the initial stage in the Forest Service's three-stage process. Curiously, the Forest Service drafted its EIS with an eye toward a particular developer (MRI) and a particular development plan (ski resort Master Plan) already in its first stage.¹² The EIS goal, however, was stated more generally:

to provide the information required to evaluate the potential for skiing at Early Winters [and] to assist in making a decision whether to issue a Special Use Permit for downhill skiing on all or a portion of approximately 3900 acres of National Forest System land.¹³

The EIS discussed the effects of five levels of development that would ensue both on-site and off-site.¹⁴ However, the EIS merely identified ways to mitigate adverse effects, which were predicted to occur primarily off-site.¹⁵ CEQ regulations require an EIS to identify, discuss, and analyze steps that mitigate adverse impacts.¹⁶ The EIS at issue conceded that the proposed mitigation steps were "merely conceptual" and reported they "would 'be made more specific as part of the design and implementation stages of the planning process.'" ¹⁷ Plaintiffs challenged the adequacy of this reporting of mitigation steps.

Plaintiffs also challenged the EIS for its treatment of effects of ski development on wildlife and on air quality. In regard to wildlife, the EIS concluded that the only effect on sensitive species would be the loss of

10. See 36 C.F.R. § 251.56(c) (1988).

11. *Id.*

12. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104 L.Ed.2d 351, 109 S.Ct. 1835, 1839-40.

13. *Id.* at 1840.

14. As required by CEQ regulation 40 CFR § 1502.16(b) (1987).

15. "The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from both the language of the Act [NEPA] and, more expressly, from CEQ's implementing regulations." *Robertson*, 109 S.Ct. at 1846. "CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c)." *Id.* at 1847.

16. 40 CFR §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b) (1987).

17. *Robertson*, 109 S.Ct. at 1837.

a pair of spotted owls.¹⁸ The EIS predicted that within ten years, 31 species would decrease and 24 would increase in numbers. The pine marten and nesting goshawk would be eliminated altogether. The EIS estimated only a 15 percent reduction in mule deer, depending on off-site development which reportedly could not be predicted.¹⁹ The Washington Department of Game challenged the accuracy of conclusions on wildlife effects. Challengers²⁰ asserted that a migratory herd of mule deer of over 30,000, of significant value to the hunting industry, might be reduced by more than half because of loss of their critical winter range and migrating routes.

Regarding air quality, the wilderness at issue was a "Class I" pristine area, to which the strictest Clean Air Act standards applied.²¹ Off-site development was again the source of uncertainty in projecting degradation. According to the EIS, the most significant effect would result during severe weather inversion periods from automobile and wood burning sources, reducing air quality such that in time the air would become more polluted than state Total Suspended Solids standards allow.²² Some listed mitigation measures were suggestions directed to the county government, not to MRI.²³ Project opponents questioned the adequacy of impact assessments based on mitigation measures which were undeveloped, and further, which depended on third party cooperation that was unenforceable.

The Regional Forester decided to issue the permit,²⁴ but only on the condition that the Forest Supervisor²⁵ identify and implement mitigating measures to reduce adverse effects sure to result otherwise.²⁶ Citizens

18. Since late 1989, a pair of spotted owls has created a legitimate challenge to any development project potentially threatening their habitat, as the spotted owl is becoming more and more rare.

The old-growth forest is home for the "bark-colored spotted owl, who mates for life, lives in the craggy cavities of 200 year-old trees, hunts on two-foot-wide wings a 2,500 acre territory to daily eat its weight in quarry. 1,500 pairs remain: they vanish in proportion to their forest.

60,000 acres of old-growth are logged each year. 90% of Washington and Oregon old-growth is gone, with 1 square mile more cut each week. Only 4% of California cathedral forest remains. We have destroyed 96% of eons of evolutionary achievement in a mere 90 years. The forest disappears long before its last tree." Chez Liley, Compact Disc, Notes from Paul Winter Consort: Voices of a Planet: Earth. Earth Music Productions, 1990.

19. *Robertson*, 109 S.Ct. at 1842.

20. The Washington Department of Game. *Robertson*, 109 S.Ct. at 1841.

21. The Clean Air Act, § 1, 42 U.S.C. § 7473(b) (1982).

22. *Robertson*, 109 S.Ct. at 1840.

23. *Id.* at 1841. The study suggested that the county develop an air quality management plan including monitoring and enforcement. Regarding wildlife, it suggested the county design roads away from wildlife, restrict access during migrating season, impose zoning and taxing incentives to reduce damage, etc. *Id.* at 1842.

24. The permit allowed development at the second highest level considered: a 16-lift ski area able to accommodate 8,200 skiers at one time, as the EIS had recommended. *Robertson, Id.* at 1843.

25. Both independently and in cooperation with local government. *Id.*

26. *Id.*

groups²⁷ appealed to the Chief of the Forest Service, Dale Robertson, who affirmed the Regional Forester's decision. The citizens then brought suit²⁸ to review the Service's decision, alleging that the EIS did not satisfy NEPA requirements.²⁹ The District Court affirmed, concluding that the EIS was sufficient.³⁰ The Ninth Circuit Court of Appeals reversed.³¹

The appellate court declared the EIS inadequate, reasoning that: 1) NEPA imposes a substantive duty on agencies to take action to mitigate the adverse effects of major federal actions;³² 2) every EIS must include a detailed explanation of specific actions that will be taken to mitigate adverse impacts;³³ 3) if the Forest Service had difficulty obtaining information adequate to make a reasoned assessment of the project's environmental impact, it had an obligation to make a "worst case analysis" on the basis of available information, using reasonable projections of the worst possible consequences.³⁴

The Supreme Court reversed the Ninth Circuit Court of Appeals, concluding that it misapplied NEPA and gave insufficient deference to the Forest Service's interpretation of its own regulations.³⁵ The Supreme Court unanimously³⁶ declared: 1) NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan; and 2) NEPA does not impose a duty on an agency to make a "worst case analysis" in its EIS if it cannot make a reasoned assessment of a proposed project's environmental impact.³⁷ Under conditions of scientific uncertainty, an agency must comply with the CEQ's new regulation to project "reasonably foreseeable significant adverse impacts."³⁸

27. Methow Valley Citizens Council, Washington State Sportsmen Council (although not a party in the Supreme Court appeal), Washington Environmental Council, and the Cascade Chapter of the Sierra Club. *Robertson*, 109 S.Ct. at 1843, n.11.

28. The suit was brought pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1988).

29. "Respondents also alleged violations of the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 and the Clean Air Act, 42 U.S.C. §§ 7401-7626." 109 S.Ct. at 1843, n.12. "These claims were dismissed on petitioner's motion for summary judgment and [were] not in issue [on the appeal]. App. to Pet. for Cert. 22a." *Id.*

30. *Robertson*, 109 S.Ct. at 1843.

31. *Methow*, 833 F.2d. 810 (9th Cir.1987).

32. *Id.* at 819.

33. *Id.*

34. It also held that the Forest Service's failure to develop a complete mitigation plan violated the agency's own regulations. *Id.* at 811-12.

35. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104 L.Ed.2d 351, 109 S.Ct. 1835, 1838 (1989).

36. Justice Brennan concurred in the opinion, but wrote separately to emphasize that an important ingredient of an EIS is the discussion of steps to mitigate adverse environmental impact. *Robertson*, 109 S.Ct. at 1851.

37. *Supra* note 4.

38. 40 C.F.R. § 1502.22 (1987).

**THE NATIONAL ENVIRONMENTAL POLICY ACT
(NEPA) OF 1969, 42 U.S.C. § 4321, *et seq.***

Congress enacted NEPA in response to a widely perceived need to integrate environmental considerations into decisions of the federal government. NEPA declares that federal policy is "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony" and preserve the environment for the future.³⁹ Although NEPA encompasses a broad policy with significant substantive goals,⁴⁰ *Robertson* reaffirms that NEPA merely mandates a process with which agencies must comply. Still, NEPA's broad language invites controversy about the requirements of that process.

NEPA requires completion of an EIS, a detailed statement analyzing the environmental impacts of proposed "major governmental actions."⁴¹ It "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action."⁴² Its first aim "is to inject environmental considerations into the federal agency's decisionmaking process. The second aim is to inform the public, through the disclosure of an EIS, that the agency has considered environmental concerns in its decisionmaking process."⁴³ Thus, the EIS forces action in two important respects: it forces agencies to consider the (previously ignored) environmental consequences of their decisions, and it informs

39. 42 U.S.C. § 4331 (1988).

Congressional declaration of national environmental policy.

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony.

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 recognizes 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.

42 U.S.C. § 4331(a) (1988).

40. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (The court held the agency EIS adequate under NEPA because it insured a fully informed and well-considered decision, procedural requirements had been met, and deference to substantive agency decision was owed).

41. 42 U.S.C. § 4332(C)(i-v).

42. *Vermont Yankee*, 435 U.S. at 553.

43. *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143, (1981), (quoting 42 U.S.C. § 4332(2)(C)), (Section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C) held not to require Navy to prepare and release "Hypothetical EIS" regarding possible nuclear weapons storage when proposing constructing nuclear storage facility).

the public that it is doing so with opportunity to comment. In this way, the EIS is intended to provide a decisionmaking tool that helps agencies to achieve the sweeping goals of NEPA.⁴⁴ The *Robertson* holding does not aid this purpose.

NEPA also provides for a Council on Environmental Quality (CEQ), a three-member, appointed body of highly qualified experts. The CEQ's functions include appraising activities in light of NEPA and formulating and recommending policies to "promote and improve the quality of the environment."⁴⁵ Part of the interpretive controversy surrounding NEPA has concerned what weight agencies must give to CEQ recommendations and directives. Initially, the CEQ issued guidelines which were not considered binding on agencies.⁴⁶ This changed when, in 1977, President Carter ordered the CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions" of NEPA.⁴⁷ In *Andrus v. Sierra Club*,⁴⁸ the Supreme Court took note of this Order in determining that "CEQ's interpretation of NEPA is entitled to substantial deference."⁴⁹

44. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104, L.Ed.2d 351, 109 S.Ct. 1835, 1845. See generally § 1075, 91st Cong. 1st Sess., 115 Cong. Rec. 40415 (1969) (Conference Report on NEPA). For elaboration on the value and significance of these informing purposes of an EIS, see Weiss, Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?*, 86 Mich. L. Rev. 777, 785-87 (1988).

45. 42 U.S.C. § 4342 (1988).

46. Consequently, courts differed on what exactly an EIS must contain. See generally, Note, *supra* note 44, at 777.

47. Exec. Order No. 11991, 3 C.F.R. § 123 (1978). The CEQ regulations addressed the question of how to handle uncertainty in an EIS by requiring a "worst case analysis." The pertinent regulation follows:

Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (for example, the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, *it shall include a worst case analysis* and an indication of the probability or improbability of its occurrence.

43 Fed.Reg. 55,997 (1978) (codified at 40 CFR § 1502.22 (1985)), (emphasis added).

48. *Andrus v. Sierra Club*, 442 U.S. 347 (1979). *Andrus* held that federal agencies' preparation of EIS to accompany appropriation requests were not required under NEPA. Thus, the Court upheld CEQ regulations. This case marked the beginning of giving CEQ regulations substantial deference, as other agencies enjoy.

49. *Id.* at 358.

Until *Robertson*, it was unclear whether the CEQ regulatory authority would supersede conflicting judicial interpretation of NEPA. *Robertson* further increases judicial deference to an agency, such that the CEQ has the final word in interpreting the statute.

ANALYSIS

I. THE WORST CASE ANALYSIS REQUIREMENT

A. The Ninth Circuit's Analysis

Ninth Circuit decisions have consistently given precedential value to the case law interpreting NEPA. In *Methow Valley Citizens Council v. Regional Forester*,⁵⁰ the Ninth Circuit Court of Appeals held that if the government agency has difficulty obtaining adequate information upon which to make a reasoned assessment of environmental impacts of proposed actions, it must engage in a "worst case analysis."⁵¹ The *Methow Valley* court drew from reasoning in its own prior decisions to conclude that this particular analysis is required in order to fulfill the purposes of NEPA.⁵²

Ninth Circuit precedent followed the Fifth Circuit decision in *Sierra Club v. Sigler*.⁵³ In *Sigler*, the Sierra Club and others challenged construction permits for a deepwater port and crude oil distribution system in Galveston Bay.⁵⁴ Specifically, Sierra Club contended that in order to fulfill NEPA requirements,⁵⁵ the EIS must consider the worst case possibility of a massive oil spill in the ecologically sensitive bay. The *Sigler* court looked at the purpose implied in NEPA language,⁵⁶ its legislative history,⁵⁷ prior case law, the CEQ's interpretation and its binding au-

50. 833 F.2d 810 (9th Cir. 1987).

51. *Methow*, 833 F.2d at 817. An amendment to the applicable CEQ regulation had removed the worst case analysis requirement, however. Amendment discussed below.

52. "The purpose of the analysis is to carry out NEPA's mandate for *full disclosure to the public* of the potential consequences of agency decisions, and to *cause agencies to consider* those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action."

Id. at 817, (quoting *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244-45 (9th Cir. 1984)) (emphasis added).

53. *Sigler*, 695 F.2d 957 (5th Cir. 1983).

54. Galveston Bay is 1) a much traveled commercial waterway; 2) "Texas' largest estuary" and "a nursery and habitat for vast numbers of wildlife, including fish and migratory birds"; and 3) central to the Texas commercial fishing industry, since the Bay is the habitat for these fish. *Sigler*, 695 F.2d at 961.

55. *Id.* at 964.

56. That language includes: "[R]esponsibility of federal government to avoid 'unintended' consequences of environmental use," 42 U.S.C. § 4331(b)(3), (EIS to disclose all environmental impacts) § 4332(C).

57. *Sigler*, 695 F.2d at 970, n.9.

thority,⁵⁸ all in addition to the regulation itself,⁵⁹ to conclude that the EIS must include a worst case analysis. In *Methow Valley* then, the court had a precedential basis, in addition to the CEQ regulation, for requiring a worst case analysis.⁶⁰

Notably, after the *Sigler* decision and prior to the *Methow Valley* holding, the applicable CEQ regulation was amended.⁶¹ The CEQ regulations of 1978 had required a "worst case analysis" when an agency was faced with inadequate or unverifiable information about environmental impacts.⁶² The CEQ amendment dropped the worst case requirement, after dissatisfaction with judicial interpretation and agency response to EIS challenges. The CEQ believed that courts were requiring agencies to go beyond the "rule of reason."⁶³ The new regulation replaces the "worst case analysis" requirement with one merely requiring the agency to "evaluate" "reasonably foreseeable significant adverse impacts" for which information is unavailable or incomplete. By amending the regulation to

58. *Id.* at 973.

59. 40 C.F.R. § 1502.22. (Note that the old CEQ regulation was in effect.)

60. See discussion in text, *supra*, of this regulation.

61. The amended regulation follows:

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

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

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) a statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating *reasonably foreseeable* significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 C.F.R. § 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

51 Fed.Reg. 15625-26 (codified as 40 C.F.R. § 1502.22 (1986)(emphasis added). For reasons supporting proposed amendments and comments, see *generally* 51 Fed.Reg. 15618-26 (Apr. 25, 1986).

62. 40 C.F.R. § 1502.22 (1985).

63. See 50 Fed Reg. 32234-38 (Aug. 9, 1985).

apply only to "reasonably foreseeable" impacts, the CEQ aimed to remove the unintended focus on incidents of remote possibility, so as to encourage the preferred study of a wide range of possible consequences.⁶⁴ Under the new regulation, any significant impacts which are "reasonably foreseeable" must be discussed in the EIS in all instances when obtaining complete information is prohibited by either exorbitant costs or limited technology.⁶⁵

The new regulation ostensibly relieves the agency of the obligation to speculate on a worst case scenario, which can be both highly difficult and unscientific. As a formal kind of risk analysis, the worst case analysis required models and evaluative methods difficult to apply because of the high degree of speculation, the possibility for omission of factors, and the inclusion of incidents of very low probability.

The "reasonably foreseeable impacts" standard makes agency analysis much simpler to justify and calculate. However, the less demanding standard can also result in an EIS with less alarming, and perhaps less complete conclusions on adverse impacts. By deciding insufficient foreseeability or significance exists, an agency could omit to evaluate those impacts of extremely low probability which nevertheless result in the most severe and irreparable damage as well as the most public outrage and resistance to a project (for example, the Exxon-Valdez or Three Mile Island accidents). Consequently, the new regulation reduces the public disclosure value of an EIS and public resistance to projects.⁶⁶

Even after the CEQ eliminated the worst case requirement from its NEPA regulations, the *Methow Valley* court required a worst case analysis, relying upon part of the *Sigler* rationale. The Fifth Circuit had reasoned that case law developed prior to the "worst case" regulation had interpreted NEPA to require agencies to weigh "costs of proceeding without more and better information."⁶⁷ The Fifth Circuit also determined that scientific uncertainty did not obliterate agencies' obligation to examine impacts. This preregulation case law had developed a "rule of reason" approach to uncertainty, which included "reasonable forecasting and speculation."⁶⁸ A probability threshold developed: when the probability of a significant effect was sufficiently high, even though scientific uncertainty existed, the EIS must include acknowledgment of uncertainty with regard

64. *Supra* note 61.

65. 40 C.F.R. § 1502.22 (1987). Commentators on the proposed amendment were divided on their opinion of the change. See generally, 51 Fed.Reg. 15618-26 (Apr. 25, 1986). (For example, compare Yost, *Don't Gut The Worst Case Analysis*, 13 *Env't.L.Rep.* 10,394 (Dec. 1983) with Brock, *Abolishing The Worst Case Analysis*, 2 *Nat. Resources & Env't.* 22 (Spring 1986)).

66. For more on worst case analysis difficulties, see Note, *supra* note 44.

67. *Sigler*, 695 F.2d at 970 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976)).

68. *Sigler*, 695 F.2d at 970 (quoting *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092, (D.C. Cir. 1973)).

to those effects. The agency was directed to balance the probability of harm against magnitude of harm later, when deciding how to proceed, rather than within the EIS.⁶⁹ The Fifth Circuit translated these principles into the CEQ's worst case analysis requirement; it found that the CEQ's regulation had merely codified judicially created principles.⁷⁰ Similarly, the *Methow Valley* court determined that the adequacy of an EIS should be judged by the progeny of judicially created principles that preexisted the regulation, as well as by the CEQ regulation.

B. The Supreme Court's Analysis

The Supreme Court rejected Ninth Circuit reasoning, in effect holding agency (CEQ) interpretation above conflicting judicial principles. The Supreme Court held that the new CEQ regulation applied in *Robertson*,⁷¹ finding that since the amended regulation had abandoned the "worst case" language, so must the Ninth Circuit, despite conflicting case law. The appellate court had exercised its judicial power—guided by statutory purpose, by legislative history, by case law, as well as by CEQ regulations—to review the agency's handling of uncertainty. Nonetheless, the Supreme Court found that such an exercise of power was improper.⁷² The Supreme Court based this decision primarily on a line of cases, including *Andrus v. Sierra Club*,⁷³ that accorded substantial deference to agency interpretations.⁷⁴ Hence, the adequacy of this EIS was fundamentally entangled with the issue of the scope of judicial power to review agency activity.

The Court acknowledged that less judicial deference may be appropriate when administrative guidelines conflict with an earlier, more demanding agency regulation.⁷⁵ However, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change."⁷⁶

69. 695 F.2d at 974.

70. *Id.* at 971.

71. The grandfather clause of the new regulation, 40 C.F.R. § 1502.22(c) (1987): specifies that agencies have the option of applying the old or the new regulation to EISs commenced prior to May 27, 1986, that are still "in progress" after that date. Because the Court of Appeals ordered that the Forest Service revise the Early Winters Study, and because such a revision is necessary even though we hold today that the Court of Appeals erred in part, the Study remains 'in progress' and thus the Forest Service is entitled to rely on the new regulation.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 104, L.Ed.2d 351, 109 S.Ct. 1835, 1849, n.18.

72. *Robertson*, 109 S.Ct. at 1848.

73. *Supra* note 48.

74. *Robertson*, 109 S.Ct. at 1848. The Court did not make reference to its prior decision which limited that deference. The Supreme Court held in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1983), that courts should defer to agency interpretations when congressional intent is unclear and the agency interpretation is a reasonable one.

75. *Robertson*, 109 S.Ct. at 1848.

76. *Id.* (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)), 442 U.S. at 358).

As the Court found good reason for the CEQ amendment, the new regulation was entitled to substantial deference.⁷⁷

To buttress its position, the Court asserted that CEQ's abandonment of the worst case requirement is not inconsistent with any previous judicial interpretation of NEPA.⁷⁸ The Court appeared unwilling to rely solely on the deference principle, when doing so would also nullify the precedential value of preexisting judicial principles interpreting NEPA.⁷⁹ Consequently, it carefully construed judicial principles to be consistent with the new regulation. The Supreme Court distinguished these principles from the worst case requirement, criticizing the Ninth Circuit's reliance on *Sigler*:⁸⁰

[T]he regulation, in fact, was not a codification of prior judicial decisions. . . . *Sigler*, however, simply recognized that the "worst case analysis" regulation codified the "judicially created principl[e]" that an EIS must "consider the probabilities of the occurrence of any environmental effects it discusses."⁸¹

The Supreme Court found that an agency's consideration of probabilities of impacts occurring need not be in the form of a worst case analysis.⁸² This *Robertson* holding is logically based upon the principle of *Andrus v. Sierra Club*:⁸³ the regulations of the CEQ are controlling regardless of conflicting precedent.

C. Commentary on "Worst Case Analysis" Decision

The consequence of rejecting Ninth Circuit jurisprudence is to give the CEQ full authority over interpretation of NEPA. The new regulation incorporates a probability threshold derived from early NEPA case law such that agencies are only required to analyze an adverse impact when credible scientific evidence demonstrates reasonable foreseeability.⁸⁴ Thus, the CEQ moves an adequate EIS on the spectrum from environmentally conscious goals to environmentally neutral goals in accordance with Reagan Administration policies.

77. The Court mentioned in *dicta* that the CEQ intended the new regulation to better serve EIS purposes by focusing on impacts of greatest concern to those involved, rather than on improbable, highly speculative impacts. *Id.*

78. *Id.*

79. Interestingly, the significance of NEPA case law development has been recognized by a member of the Supreme Court. Justice Marshall, concurring in part in *Kleppe v. Sierra Club*: "[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law.' . . . Indeed, that development is the source of NEPA's success." 427 U.S. 390, 421 (1975).

80. *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983).

81. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104, L.Ed.2d 351, 109 S.Ct. 1835, 1848 (quoting *Sigler*, 695 F.2d at 970-71) (1989).

82. *Id.*

83. *Supra* note 48.

84. Note, *supra* note 44.

The Court also narrowed the scope of judicial review by giving the CEQ the last word in interpreting its regulations, an interpretation which will now be difficult to successfully challenge. Ironically, after *Robertson*, President Carter's efforts to promulgate binding CEQ regulations for the protection of the environment may inadequately safeguard NEPA policy. Unfortunately, the effectiveness of NEPA in achieving its sweeping policy goals will now be heavily dependent upon the executive powers that be, and will swing with the political pendulum. Judicial deference goes too far when legislation intending to secure environmental considerations in federal actions is dependent upon the whims of the executive branch.

Robertson settles a longstanding judicial controversy on the worst case analysis and CEQ regulatory authority. With the abandonment of the worst case analysis, it is unclear whether the new CEQ regulation will improve EIS analysis of potential impacts when scientific certainty is lacking in an agency. Perhaps it was wise to abandon the worst case analysis—a technically difficult analysis. But the danger in this decision lies in the overstressed deference to an agency that amounts to a rubberstamping.

In practice, the *Robertson* decision might encourage deception in an EIS. Under the new regulation, EIS preparation will be easier for agencies, as unfavorable environmental impacts might be ignored by simply labeling them too improbable (not reasonably foreseeable) for mandatory analysis under the new regulation. Public or political opposition to a proposed project (arguably an environmentally protective mechanism Congress intended an EIS to provide)⁸⁵ that would otherwise ensue when an EIS described a worst case scenario can now be more easily evaded by project proponents. A regulation true to NEPA would fall somewhere in between the two.

II. THE MITIGATION ISSUE

A. The Ninth Circuit's Analysis

Regarding the mitigation issue,⁸⁶ the Ninth Circuit held that the district court erred in holding that the EIS adequately discussed adverse envi-

85. See generally, 2.1075, 91st Cong., 1st Sess., 115 Cong. Rec. 40415, 40416 (1969) (Conference Report on NEPA).

86. CEQ regulations define "mitigation" to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments. 40 C.F.R. § 1508.20 (1987).

ronmental impacts and mitigation measures.⁸⁷ The Ninth Circuit found the EIS inadequate. In its analysis, the Ninth Circuit linked impacts and mitigation measures together, as the CEQ does in its regulations.⁸⁸ The Ninth Circuit criticized as illogical the Forest Service's assessment of only those impacts that would flow from a project that included mitigation measures, when those mitigation measures were not even yet specified.⁸⁹

Also, the Ninth Circuit construed CEQ regulations and NEPA to require that the air quality management plan ordered by the Regional Forester be developed before issuing a permit, not after.⁹⁰ Thus, the Ninth Circuit held that the EIS' discussion of mitigation steps, absent the air quality management plan, was inadequate. The Ninth Circuit believed that the EIS should be judged on its own merit; subsequent development of an elaborate mitigation plan would not absolve this EIS of its failures under NEPA.⁹¹

Moreover, the appellate court held that NEPA requires that mitigation steps be developed in detail, measured for effectiveness, and adopted.⁹² Accordingly, the Ninth Circuit deemed the EIS additionally inadequate because the agreement between the developer and local governments⁹³ "offers no assurance whatsoever that the vague mitigation objectives . . .

87. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816 (9th Cir. 1987).

88. *Supra* note 15. For example, 40 C.F.R. § 1502.16, requires including mitigation in the discussion of environmental consequences:

The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. . . . It shall include discussions of:

. . . (e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

43 Fed.Reg. 55994 (1978) (codified at 44 Fed.Reg. 873 (1979)). 40 C.F.R. § 1502.16 (1979).

89. In response to citizens' argument that the mule deer herd's survival may be threatened by development, the court noted:

In contrast, the Forest Service believes that "with the implementation of mitigation measures," the impacts to the mule deer will be minor. This court fails to see the logic with which the Forest Service reaches this conclusion, since not only has the effectiveness of these mitigation measures not yet been assessed, but the mitigation measures themselves have yet to be developed.

Methow, 833 F.2d at 817. Thus there was the additional lack of a guarantee that any steps would in fact be taken.

90. *Id.* at 818.

91. *Id.* at 819.

92. *Id.* (quoting, *inter alia*, CEQ regulations 40 C.F.R. §§ 1502.14(f), 1502.16(h) (1988)).

93. Memorandum of Understanding, required by the Regional Forester upon issuance of the permit. *Id.*

would ever in fact be achieved or even that effective measures would ever be designed (let alone implemented)" if development occurs.⁹⁴ The court reasoned that since most of the mitigation discussion in the EIS merely suggested possible measures that third parties might but were not obligated to implement, the EIS was inadequate and improper.

The Ninth Circuit judged the EIS against informing purposes of an EIS. It interpreted discussion of mitigation to be adequate if it enabled the agency to make a fully informed assessment of environmental impacts. Here, "merely conceptual" mitigation measures were inadequate because they did not enable that fully informed decisionmaking process.⁹⁵

B. The Supreme Court's Analysis

The Supreme Court discerned the issue differently than did the Ninth Circuit: the Court did not address the Ninth Circuit's charge that conclusions based on inadequately discussed mitigation were illogical. Instead, the Supreme Court focused its attention on rejecting the idea that NEPA imposes a substantive duty to mitigate, drawing from a line of cases that adamantly reiterate that NEPA imposes procedural rather than substantive duties.⁹⁶ That same line of cases limited judicial review to agency decisionmaking procedures, excluding substantive decisions. Because the Court viewed the Ninth Circuit decision as an improper review of an agency's substantive conclusion, it reversed the Ninth Circuit and held the mitigation discussion to be adequate.

1. Background

Relying primarily on three cases, the Court based its analysis on the scope of judicial power to review agency activity, as well as on interpretation of NEPA. At issue in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*⁹⁷ was the proper scope of judicial review of the Atomic Energy Commission's procedures for licensing nuclear power plants. The CEQ had issued guidelines recommending energy conservation as an alternative. The Supreme Court required deference to the agency's decision, holding that the appellate court had exceeded its proper scope when it remanded the permit. The Court further noted that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. See 42 U.S.C. § 4332. . . . It is to insure a fully informed and well-considered decision, not necessarily" one the courts would have reached.⁹⁸

94. *Id.* at 819-20.

95. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104 L.Ed.2d 351, 109 S.Ct. 1835, 1839 (1989).

96. See discussion of these cases *infra* "Background."

97. 433 U.S. 519 (1978).

98. *Vermont Yankee*, 435 U.S. at 558.

A second case, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,⁹⁹ relied heavily on *Vermont Yankee* in upholding an EIS under NEPA. The Housing and Urban Development Department (HUD) had ignored environmental impacts, finding the factor of project delay dispositive to the decision to proceed with redevelopment. After suit, the Second Circuit held that HUD's consideration of environmental impacts of redesignation of a site for low-income housing in its EIS was inadequate. The Court of Appeals said that the agency must give "determinative weight" to environmental considerations in reaching its decision.¹⁰⁰ The Supreme Court reversed, asserting that the agency need only *consider* environmental factors. *Strycker's Bay* significantly described the judicial role under NEPA as a duty to review process, not substance. Citing *Yankee* as support, the Supreme Court held that the Court is not authorized to review the merits of an agency decision under NEPA, but rather only to ensure that the agency considered environmental consequences.¹⁰¹

The *Robertson* Court heavily relied on *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*¹⁰² to conclude that no mitigation plan is necessary, since NEPA is a procedural, rather than substantive mandate.¹⁰³ In *Baltimore*, the Court reiterated that "NEPA does not require agencies to adopt any particular internal decisionmaking structure."¹⁰⁴ The issue in *Baltimore* was the validity of a Nuclear Regulatory Commission rule that permanent storage of nuclear wastes should be assumed to have no environmental impact and should not affect licensing decisions. The Court upheld the rule because it deemed this assumption to be a decisionmaking device, not a conclusion.¹⁰⁵

Congress in enacting NEPA, . . . did not require agencies to elevate environmental concerns over other appropriate considerations. . . . Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action. . . . The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.¹⁰⁶

C. Commentary on Mitigation Decision

Baltimore supports the *Robertson* holding that NEPA demands no substantive duty to actually mitigate. Indeed, *Baltimore* could be viewed to

99. 444 U.S. 223 (1980).

100. *Strycker's Bay*, 444 U.S. at 227.

101. *Id.*

102. 462 U.S. 87 (1983).

103. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104, L.Ed.2d 351, 109 S.Ct. 1835, 1847 (1989).

104. *Baltimore Gas and Electric*, 462 U.S. at 100.

105. *Id.* at 97.

106. *Id.*

address whether NEPA requires an agency to choose one mitigation plan over another. However, *Baltimore* does not address the extent to which an EIS must discuss any mitigation plan. Moreover, *Baltimore* supports the Ninth Circuit's position that the courts' role is to ensure adequate consideration and disclosure of impacts.¹⁰⁷ The Supreme Court used *Baltimore*, however, to ignore the real issue in *Methow Valley*, which was the extent of the duty to analyze impacts, not mitigation of them.

The Supreme Court's assessment thus reverses the most sensible conclusion of the Ninth Circuit. The Supreme Court stated that as long as impacts are adequately identified and evaluated, NEPA does not require valuing environmental interests foremost.¹⁰⁸ Therefore, the Court reasoned, an agency need not develop a mitigation plan and implement it. The Court concluded that impacts are adequately identified and evaluated. But the Court effectively ignored the fact that adequacy of identification of impacts in the EIS is suspect because of reliance on the implementation of unspecified and optional mitigation steps.

The Court applied the deference principle in interpreting CEQ regulations on mitigation¹⁰⁹ as requiring only a hard look at environmental consequences, but not necessarily a look toward environmental preservation.¹¹⁰ The Court also stated that since mitigation of offsite impacts depends upon cooperation of third parties, mitigation cannot be required before the permit issues—another reversal of the lower court.¹¹¹

The Court reiterated general principles broadly where a holding more specifically articulated was called for. In its fervor to keep NEPA procedural, the Court may have read more into the Ninth Circuit's opinion than was there. The Ninth Circuit interpreted a duty to adequately develop mitigation steps, in keeping with the purposes of an EIS. But Supreme Court jurisprudence lends itself to an emphasis on clarifying general principles; subtle distinctions sometimes suffer. Justice Marshall alluded to this foreseen imprecision in his dissent in *Strycker's Bay*.

In *Strycker's Bay*, Justice Marshall dissented to the Court's broad application of *Vermont Yankee* to reach a simplistic conclusion.¹¹² According to Marshall, *Vermont Yankee* discusses NEPA with regard to judicial review, and its holding (that administrative decisions should be

107. The Ninth Circuit logically found such consideration inadequate because the EIS's assessment of impacts depended upon an inadequate mitigation plan. *Methow Valley Citizens Council v. Regional Forrester*, 833 F.2d 810, 817 (9th Cir. 1987).

108. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 104, L.Ed.2d 351, 109 S.Ct. 1835, 1846 (1989) (citing *Strycker's Bay*, 444 U.S. at 227-228).

109. "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Robertson*, 109 S.Ct. at 1847 (Brennan, J., concurring).

110. *Id.* at 1847.

111. *Id.* at 1847, n.16.

112. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 229 (Marshall, J. dissenting).

set aside only for substantial procedural or substantive reasons as mandated by statute) applies to all administrative decisions, not only to NEPA cases.¹¹³ Although NEPA demands of agencies' actions are essentially procedural in nature, Marshall explained, NEPA does not necessarily preclude *any* substantive requirement toward pursuing its substantive goals.¹¹⁴ By not recognizing this, *Vermont Yankee's* holding was overbroad.

Similarly, the *Robertson* Court imprecisely articulated the holding. The Court decided that the EIS adequately discussed mitigation for the purposes of the Forest Service's first-stage analysis in a three-stage review process, when indirect (offsite) impacts are uncertain and depend upon third parties. But it did not call attention to these important details, and they could be easily overlooked. The initial EIS was merely intended to examine the possibilities for providing a "winter sports opportunity" on Forest Land.¹¹⁵ It did not, supposedly, purport to examine the effects of construction and operation of MRI's project in particular, although it was looking to the MRI proposal. It must be remembered that in this case lower courts relied on a master plan and a further environmental assessment at a later stage.¹¹⁶

The fact that the Supreme Court did not explicitly tailor its holding to these unique facts cautions strict scrutiny of future uses of this case. In one subsequent case, *Robertson* was cited inaccurately for the extreme proposition that it is not "necessary for the FEIS to describe mitigation measures."¹¹⁷ Further distressing implications for NEPA would be appropriately tempered by a careful, narrow reading of the holding: this case does not reach the question of mitigation adequacy for anything but an initial EIS in a multi-tiered Forest Service review process, which also relies on third party, offsite cooperation.

The imprecision in this opinion betrays the inherently confusing nature of the mitigation aspect of an EIS. The interested public surely finds it confusing that mitigation steps are written in an "adequate" EIS so as to imply that they will be carried out,¹¹⁸ and that therefore the project's

113. *Id.*

114. *Id.*

115. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987).

116. The Magistrate found that "in this EIS there is more—not much more—but more than a mere listing of mitigation measures." *Robertson*, 109 S.Ct. at 1844 (quoting App. to Pet. for Cert. at 41a).

117. *Collin County, Texas v. Homeowners Association for Values Essential to Neighborhoods (HAVEN)*, 716 F. Supp. 953, 970 (N.D. Tex. 1989) (citing, but not quoting, *Robertson*, 109 S.Ct. at 1847). In *Collin County*, the court held there existed no material issue of fact. *Id.* at 974. A Declaratory Judgment was granted that an FEIS, although it did not discuss mitigation, was sufficient under NEPA.

118. For example, note the implied guarantee in the language recommending certain mitigation steps:

1. The County will initiate the formation of an Air Quality Control Authority. . . .
2. The County will develop an airshed management plan. . . . [T]he following mitigation measures will be considered:

negative impacts will be minimized, when this is not, in fact, the case. In this way, public concern, and perhaps opposition also, are unfortunately minimized.

The Court's treatment of the *Robertson* EIS does little to alleviate this problem, and may exacerbate it. For example, one specific effect of *Robertson* is to change the conditions under which the permit was initially issued. The Regional Forester had required that an air quality management plan be developed at the time he issued the permit so as to avoid degradation from the very start.¹¹⁹ The Supreme Court removed this requirement, undermining the value of the EIS.

But even more disastrous, mitigation measures now need only be perfunctorily listed to satisfy the requirement of "discussion" in an EIS. Thus, the misleading nature of an EIS will not be discouraged: conceptual mitigation steps (and impacts assessed dependent upon them) will be adequate, without any guarantee that they will be developed or implemented.

This cursory treatment of mitigation, that the Supreme Court upholds, frustrates even the informational purposes of an EIS. Courts have limited the purposes of an EIS to two procedural ones: providing an informational guide for agencies on the environmental aspects of projects, and disclosing this information to the public for comment. *Robertson* verifies that the EIS is a mandate of pure process; the Supreme Court unanimously rejected the long line of circuit decisions that gave some small measure of substantive quality to the purposes of NEPA. Yet even the process is impeded by the *Robertson* holding. A merely conceptual listing of mitigation does not fully inform the public, nor the agency, in its decisionmaking process. An adequate discussion of mitigation in an EIS must do that, even if it need not necessarily choose environmental values over others under NEPA.

CONCLUSION

The *Robertson* decision is fraught with inconsistencies. Substantial judicial deference to agency decisionmaking tells the public to trust that

-
- Development of land use codes . . .
 - Requiring all new construction to be fully weatherized . . .
 - Restricting the number of fireplaces and wood stoves. At a minimum, few fireplaces should be allowed in accommodations constructed for tourist use.
 - Encouraging the use of alternative, non-polluting energy sources.
 - Establishing a certification mechanism for wood stoves and fireplace inserts.
 - Establishing an air pollution monitoring system specifically designed to alert local residents to impending pollution episodes and to record long term changes in air quality levels. Such long term data will be used to evaluate the success or failure of the mitigation and impose more stringent measures if standards are violated.
 - Development of enforcement measures to assure that standards will be met."

Robertson, 109 S.Ct. at 1841, n.5, (quoting Early Winters Study 68-69).

119. *Id.* at 1843-44. The trial court had upheld the adequacy of the EIS because the Regional Forester relied on an agreement by permittees to devise mitigation arrangements with local governments.

the agency will be conscientious, whether it be the Forest Service in fulfilling NEPA or the CEQ interpreting NEPA. But at the same time, the decision sends a message to agencies that in preparing an EIS, they can be a little more lax with regard to mitigation and uncertain impacts. The resulting reduced informational value of an EIS, both to the public and to the agency, will also reduce public trust in the agency.

Finally, an EIS that does not serve the procedural goal of fully informed decisions also does not further substantive policy goals of NEPA. Can it really be true, as the Supreme Court says, that "NEPA merely prohibits uninformed—rather than unwise—agency action?"¹²⁰ How, then, to ever achieve "NEPA's significant substantive goals for the Nation," acknowledged even in *Vermont Yankee*?¹²¹ The purpose and policy of NEPA—"to promote efforts which will prevent or eliminate damage to the environment and biosphere . . ." ¹²² and to "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony"¹²³ have been shortchanged.

JENNIFER R. BARTLIT

120. *Id.* at 1846.

121. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

122. 42 U.S.C. § 4321 (1988).

123. 42 U.S.C. § 4331(a) (1988).