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Defying the Law: Northern Plains Resource Council, Inc. v. Surface Transportation Board and the State of NEPA Jurisprudence

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DEFYING THE LAW: NORTHERN PLAINS RESOURCE COUNCIL, INC. V. SURFACE TRANSPORTATION BOARD AND THE STATE OF NEPA JURISPRUDENCE

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I. INTRODUCTION

As concern mounts over how to address the world's increasingly severe environmental issues, it is important to examine the United States' current policies. For over forty years, the touchstone of American environmental policy has been the National Environmental Policy Act of 1969 ("NEPA"). The language of the Act is sweeping and employs a tone suggesting that the federal government will carefully consider the environmental impacts of its actions.

Whatever the aims of NEPA may have been, interpretation of the Act in the court system has endowed it with little substantive purpose. Specifically, the Supreme Court has construed NEPA narrowly, as a procedural law with little ability to have a substantive effect on environmental policy. Department of Transportation v. Public Citizen, a 2004 Supreme Court decision, reflects this statutory interpretation and stands as the current state of the law.

This Note will examine the Ninth Circuit's 2011 decision in Northern Plains Resource Council, Inc. v. Surface Transportation Board, which exceeds the narrow boundaries of the Supreme Court's NEPA jurisprudence, yet honors the substantive values advanced by the text of the Act. Part I introduces the structure of the National Environmental Policy Act of 1969. Part II then considers the various ways in which courts have interpreted the Act, focusing on the trigger for action under NEPA, the relevance of various environmental effects, and the "rule of reason" analysis. Part III provides an in-depth examination of the Ninth Circuit's decision in Northern Plains. Finally, Part IV concludes by proposing that, regardless of whether the decision comports with Supreme Court jurisprudence, the Ninth Circuit's all-encompassing decision is faithful to NEPA's purpose and should be adopted by the courts.

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Northern Plains construes NEPA broadly, with procedural requirements that mandate consideration of a wide range of potential environmental effects before the implementation of federal action. Under the Ninth Circuit's formulation, NEPA compliance is not limited to situations in which the agency can directly control the environmental effects. A comparison between the Ninth Circuit's decision in Northern Plains and the Supreme Court's decision in Public Citizen reveals several conflicts. Given the current state of the law, the Ninth Circuit likely misinterpreted NEPA's requirements which the Supreme Court established in Public Citizen. However, a close reading of NEPA provisions indicates that the Ninth Circuit's interpretation of what NEPA compliance entails is true to the spirit of the Act and advances a culture of self-awareness and sustainability into federal government.

II. STRUCTURE OF THE NATIONAL ENVIRONMENTAL POLICY ACT

Criticism of the various interpretations of NEPA requires a foundational understanding of the law itself. NEPA is codified in several sections, beginning at 42 U.S.C. § 4321. The first section sets forth the substantive goals of NEPA. The following sections set forth particular procedures that the government must follow to comply with NEPA. The Act establishes the Council on Environmental Quality ("CEQ"), which guides government entities on proper compliance with NEPA procedures. The CEQ regulations are listed in Title 40 of the Code of Federal Regulations, beginning with § 1500.1. The major sections of this Act will be discussed in detail below.

The first section of the Act states the purpose of NEPA in broad language, which appears to lend the statute substantive weight:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

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The following section, states NEPA’s policy, recognizing the “profound impact of man’s activity on the interrelations of all components of the natural environment,” as well as the “critical importance of restoring and maintaining environmental quality.” The federal government declares that it will “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.”

Though the language is vague, NEPA’s declared purpose suggests that the focus of the federal government’s environmental policy is to implement procedures that protect and conserve the environment rather than serve as mere administrative formalities. The Act not only cites the crucial role of environmental quality to the general welfare, but also states that the government will lead the nation in serving as a “trustee” of the environment. As such, it will seek to achieve a balance between use and degradation of the environment.

Given such lofty language, it seems reasonable to expect strong procedural provisions to support NEPA’s substantive weight. To comply with the Act, all federal agencies must consider the environmental impacts of their decisions to ensure that environmental values are given “appropriate consideration” in the planning process. This is the first of the two primary purposes of NEPA. If the government’s initial assessment of the potential environmental impact shows that there are no significant risks, NEPA requires no further action. However, if the initial assessment determines that the proposed agency action may “significantly affect” the quality of the environment, the responsible official must prepare a “detailed statement.” This “detailed statement,” known as the Environmental Impact Statement (“EIS”), describes the environmental impact of the proposal, inevitable adverse environmental effects inherent to the action, alternatives to the proposal, the relationship between short-term and long-term usage of the environment, and any “irreversible commitments of resources” which would result from the proposal. The Act also contemplates cooperation with foreign nations to develop solutions to worldwide environmental problems.

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10 Id. at (a).
13 Id. at (b)(5).
15 40 C.F.R. § 1508.9 (2013).
17 Id. at (C)(5).
18 Id. at (2)(F).
In addition, NEPA encourages the dissemination of information on the environmental impacts of government proposals to the public. Specifically, the Act requires the federal government to “make available to States, counties, municipalities, institutions, and individuals” information pertaining to restoration and maintenance of the environment. The Council on Environmental Quality’s regulations reiterates the requirement of releasing environmental impact information to the public before the federal government takes action. Agencies are asked to make “diligent efforts” to include the public in NEPA procedures and provide public notice of NEPA-related hearings and meetings. Inviting public scrutiny comports with the spirit of the law, which addresses the “profound impact” of humans on their environment.

The entire federal government is responsible for carrying out NEPA’s policies and procedures. 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” in order to carry out the policy goals which NEPA envisions. The CEQ regulations explicitly charge the President, federal agencies, and the courts with achieving NEPA’s substantive requirements through enforcement.

III. JUDICIAL INTERPRETATION

NEPA requires the courts to share responsibility of enforcement of the Act to achieve the substantive goals set forth in § 4331. Whether federal courts have been faithful to the Act’s language is open to debate. Since the passage of NEPA in 1969, courts have construed the Act to demand full procedural compliance, but have been relatively flexible in requiring substantive compliance. Consequently, the dominant interpretation of the Act has focused on the Environmental Impact Statement rather than long-term policy goals.

Supreme Court decisions interpreting NEPA requirements have narrowly construed the Act, largely deferring to agency decision-making. In 1976, shortly after Congress passed the Act, the Supreme Court decided

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19 Id. at (2)(G); see also 40 C.F.R. § 1506.6 (2013).
21 See 40 C.F.R. § 1500.1(b) (2013).
22 40 C.F.R. § 1506.6 (2013).
26 Id.
28 Id. at 10.
In *Kleppe*, the Sierra Club challenged the Department of the Interior’s failure to prepare a comprehensive EIS on the possible effects of coal mining in the Northern Great Plains region. Though there was no formal proposal for a project affecting that entire region, the Court of Appeals for the District of Columbia found that the Department of the Interior’s various local and national undertakings “contemplated” a regional plan that could require an impact statement. In *Kleppe*, the D.C. Circuit devised a four-factor balancing test for determining when contemplated action requires a statement under NEPA, which considered: “the likelihood and imminence of the program’s coming to fruition the extent to which information is available on the effects of implementing the expected program and on alternatives thereto the extent to which irretrievable commitments are being made and options precluded ‘as refinement of the proposed progresses,’ and the severity of the environmental effects should the action be implemented.”

The Supreme Court’s response to the D.C. Circuit’s four-factor test established a limited role for the judiciary under NEPA. The Court rejected the test, reasoning that such judicial intervention would encourage litigation and leave agencies uncertain of their procedural obligations. Even when several actions are pending simultaneously, the decision to prepare a cumulative impact statement belongs solely to the agency, subject only to judicial review for arbitrariness. The Court’s deference to agency discretion is in accord with an earlier D.C. Circuit case, *Natural Resources Defense Council v. Morton*, which held that courts may not impose unreasonable burdens under NEPA, so long as there is evidence that the agency took a “hard look” at environmental consequences.

In *Kleppe*, the D.C. Circuit set the tone for NEPA jurisprudence, hindering the Act’s ability to advance the substantive environmental policy that it contemplates. The court’s rejection of a balancing test for imposing further environmental studies limits the court’s ability to enforce NEPA. Furthermore, such deference to agency discretion conflicts with CEQ regulations, which require the President, agencies, and the courts to share responsibility for enforcement in order to achieve NEPA’s substantive goals. However, the court seems to have bowed out. Thus, an agency’s ability to comply minimally, in order to further its own agenda, remains unchecked.

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30 Id. at 395.
31 Id. at 403.
32 Id. at 404-05.
33 Id. at 418-19.
34 Id. at 406.
35 Id. at 412.
This concern relates to the fulfillment of one of NEPA’s two primary purposes: the availability of environmental information to public officials before decisions are made. As Justice Marshall noted in his Kleppe dissent, a balancing test that allows for judicial intervention may provide an adequate means to prevent environmental damage when an agency fails to act. Marshall argued for judicial enforcement of NEPA during the planning phase of an agency’s proposal, rather than in the form of a challenge after planning is complete. The purpose of the Act, after all, is not simply to produce a statement, but to consider environmental consequences throughout the planning process. The statement itself is the evidence of the underlying decision-making process.

In Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., the Supreme Court explicitly stated that while NEPA does set forth substantive goals, it is essentially a procedural statute. Specifically, the Court held that the fact that the Atomic Energy Commission acted in the context of NEPA did not allow the court to mandate further procedures beyond those employed by the agency pursuant to the Administrative Procedure Act. The Administrative Procedure Act allows a court to set aside only agency actions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The CEQ regulations, which state that the President, federal agencies, and the courts share responsibility for enforcing NEPA so as to achieve its substantive requirements, directly conflict with the Court’s interpretation. Instead, Vermont Yankee casts NEPA as a typical administrative statute, which requires the courts to do nothing more than review for abuse of discretion and glaring error on the part of federal agencies.

In 2004, the Supreme Court handed down another restrictive reading of NEPA in the Public Citizen case. As in Kleppe, the Supreme Court in Public Citizen interpreted NEPA as a limited procedural provision rather than a substantive provision requiring responsible environmental stewardship on the part of the federal government. In 1982, Congress

38 Id. at (b).
39 Kleppe v. Sierra Club, 427 U.S. 390, 418 (1976) (Marshall, J., dissenting) ("Because an early start in preparing an impact statement is necessary if an agency is to comply with NEPA, there comes a time when an agency that fails to begin preparation of a statement on a contemplated project is violating the law.").
40 Id. at 416.
41 Id. at 417.
42 Id. at 418.
44 Id. at 548; see 5 U.S.C. § 553 (2013) (explaining rulemaking procedures which bind the Atomic Energy Commission and other federal agencies).
46 40 C.F.R. § 1500.1(a) (2012).
enacted a moratorium on grants of operating authority in the United States to motor carriers from Canada and Mexico, authorizing the President to lift the moratorium in the public interest. The United States later agreed to lift the moratorium as a condition of the North American Free Trade Agreement. The President agreed, with consent contingent upon the promulgation of new regulations governing Mexican carriers. The Federal Motor Carrier Safety Administration ("FMCSA") proposed the new rules, and, pursuant to NEPA, prepared an environmental assessment to determine the effect of the regulations. The agency did not go on to prepare a full EIS because it found that its regulations would not have a significant impact on the environment.

The Ninth Circuit upheld Public Citizen's challenge to FMCSA's failure to prepare an EIS, holding that the agency did not consider adequately the "overall environmental impact of lifting the moratorium" despite the fact that the rescission was "reasonably foreseeable" at the time that the FMCSA prepared its environmental assessment. The Supreme Court reversed, holding that an agency is not required to prepare an EIS if the agency itself does not "cause" the relevant environmental effects. Because the FMCSA did not have control over whether the moratorium was lifted, the court declined to consider that it was the cause of any incidental environmental effects resulting from the increased presence of Mexican trucks in the United States. However, several aspects of the Supreme Court's opinion conflict with the substantive goals of NEPA and the accompanying CEQ regulations.

A. The Trigger for Action Under NEPA is Whether the Agency Has the Discretion to Prevent the Action that Causes the Environmental Impact

Public Citizen holds that no agency is responsible for assessing environmental impacts that it does not cause directly. In Public Citizen, the Court required more than a "but for" causal relationship to implicate NEPA requirements. Furthermore, it rejected the attempt to link FMCSA

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49 Id. at 759.
50 Id.
51 Id. at 760.
52 Id. at 761.
53 Id. at 762; see 42 U.S.C. § 4332(2)(C) (2013) (requiring a detailed statement only where "major Federal actions" significantly affect the environment).
54 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 762-63 (quoting 40 C.F.R. § 1508.8(b) (2013)).
56 Id. at 772.
57 Id. at 770.
58 Id. at 767.
to the effects of an action it had no authority to prevent. NEPA itself contemplates a much broader scope for compliance. Nowhere does NEPA explicitly mention proximate cause as a limit for the preparation of an EIS. The language of the Act, while recognizing as a practical matter that different branches of government will confront NEPA separately, suggests that the federal government should comply with NEPA whenever any of its actions may be the cause of environmental impacts. The Act prefaces the requirement for an EIS with a broad declaration of purpose:

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.

Nowhere does the statute evidence a need for an agency's assessment to concern only those actions which it has set in motion and may withdraw. The language of NEPA is broad and inclusive and requires a statement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

A finding that there is no "but for" causation relieves the government of responsibility for examining environmental impacts, as long as the implementing agency has no discretion to stop the action causing the effects. Without a strong enforcement mechanism to bind the federal government as a whole, particular departments or agencies may be able to avoid responsibility for environmental assessment by simply shifting the authority to implement the action to another agency.

In Public Citizen, the President lifted the moratorium, which had the potential to cause environmental impacts. The FMCSA's role in the process was to promulgate new regulations for the influx of Mexican carriers resulting from the moratorium's removal. The Court's finding that there is no "but for" causation, relieved the government of responsibility for

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59 Id. at 767; see also Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983).
61 Id. at (2)(C).
examining environmental impacts, as long as the implementing agency has no discretion to stop the action causing the effects. Accordingly, the FMCSA prepared the initial environmental assessment and issued a finding that there would be no significant environmental impact resulting from the implementation of its regulations. However, there is no evidence that the executive branch issued an assessment of the effects of the President’s lifting of the moratorium. Without a strong enforcement mechanism to bind the federal government as a whole, particular departments or agencies may be able to avoid responsibility for environmental assessment by shifting the authority to implement the action to someone else. With the FMCSA excused from the burden of assessing any actions that it does not control, who holds responsibility for assessing the actions of the President or the Executive branch as a whole?

The CEQ’s interpretation of NEPA claims to hold the President jointly responsible for enforcement of its provisions. There is no explanation as to why the President’s actions are exempt from an environmental assessment or why the President is not required to enforce a law designed to shape the environmental policy decisions of every branch of the federal government. Perhaps to accomplish this purpose, the Act should have used more consistent language. Despite requiring joint enforcement in its initial section, the CEQ regulations quickly switch to listing duties required of “federal agencies.” The first procedural section of NEPA requires “all agencies of the Federal government” to prepare an EIS in response to federal actions affecting the environment. All further mention of the President and the courts entails standard language concerning review of an agency’s efforts, rather than strong enforcement. Even assuming that agencies are the primary actors under NEPA, the Supreme Court has not set parameters for the evaluation of the President’s actions.

B. Are Indirect Effects of a Federal Action Irrelevant?

The use of “but for” causation in establishing the relevance of environmental effects for NEPA analysis does more than limit the impacts which may be considered; it also ignores indirect environmental effects that may result from federal action. The CEQ regulations define “effects” for

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63 Id. at 752.
64 40 C.F.R. § 1500.1(a) (2013).
67 See e.g. 42 U.S.C. §4333 (2013) (requiring agencies to present policies and procedures to the President to ensure compliance with NEPA); see also 40 C.F.R. § 1500.3 (2013) (noting the point at which judicial review of agency action under NEPA is appropriate).
purposes of the preparation of the EIS. The definition includes both "direct" effects, those caused by an action and occurring at the same place and time, and "indirect" effects. "Indirect" effects are the result of federal action but occur remotely, either in a different place or after the initial action, and include changes in land use and effects on natural ecosystems, water, and air. The Supreme Court restricts NEPA compliance based on responsibility for the federal action, rather than whether the effects are direct or indirect. This strict reliance on "but for" causation, however, casts doubt on whether indirect effects will be considered relevant in the future. NEPA takes a holistic approach in addressing any effects which result from government action, including "any adverse effects which cannot be avoided should the proposal be implemented." On the other hand, the Court limits relevancy only to effects that are within the preparing agency's control; the consideration of other effects may be eliminated from the planning process. Due to this uncertainty, it is unknown whether indirect or long-term effects will be weighed appropriately in the consideration of future federal actions.

C. The "Rule of Reason" – Environmental Impact Statement Must Contribute to the Decision-Making Process in Order to Be Necessary

In Public Citizen, the Court regarded the failure to prepare an EIS as appropriate because the statement would not serve a purpose. According to the Court, the "rule of reason," which is inherent in NEPA and the CEQ regulations, "ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." While NEPA unquestionably intends to influence public officials during the planning process of a federal action, the Act also intends ordinary citizens to have access to information concerning the environmental impact of government projects. The CEQ regulations state that NEPA must make information available to public officials and citizens alike.

In holding that an EIS is useless if it cannot assist public officials during the planning process, the Supreme Court dismissed the importance

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68 40 C.F.R. § 1508.8 (2013).
69 Id.
70 Id. at (b).
71 Id.
74 Dep't of Transp. v. Pub. Citizen, 541 U.S. at 767-68.
75 Id. at 767.
76 40 C.F.R. § 1500.1(b) (2013).
of one of the two main purposes of NEPA. The Court determined that the benefits of providing EIS information to the public are outweighed by the lengthy preparation process, when it does not provide information to officials when they are able to incorporate it into the planning process. Although this interpretation may be reasonable at first glance, it is not in accord with the spirit of NEPA or with the Act’s language concerning public access to information.

IV. NORTHERN PLAINS RESOURCE COUNCIL v. SURFACE TRANSPORTATION BOARD

Despite the restrictive line of NEPA precedent that the Supreme Court has developed, a few courts continue to interpret NEPA broadly, requiring proactive enforcement. Northern Plains Resource Council v. Surface Transportation Board, a recent Ninth Circuit decision, serves as an example of exceeding the restrictive requirements set for courts in Public Citizen. The Ninth Circuit interpreted NEPA in accordance with the spirit of the Act, declining to adopt the restrictive scope endorsed by the Supreme Court. The Ninth Circuit’s decision in Northern Plains oversteps Public Citizen by requiring that the Surface Transportation Board take a “hard look” at the cumulative environmental impacts inherent in its railroad project, as well as the coal bed methane (“CBM”) development in the region. The court also rejected the Board’s attempt to use outdated data in preparing the EIS. Northern Plains suggests that the trigger for action under NEPA is whether or not a federal action causes environmental impact, not whether a particular agency has the power to regulate or prevent the effects. Although the court’s findings of deficiency present an interpretation of NEPA compliance which contrasts sharply with that in Public Citizen, the decision is faithful to the two primary purposes of NEPA: to provide information to agencies during the decision-making process and to inform the public about the environmental impact of a federal action.

Under the Public Citizen interpretation of NEPA, Northern Plains is too broad and goes beyond what the Supreme Court requires of any federal agency. Northern Plains, while arguably too broad, is true to the language and spirit of NEPA and illustrates a few of the difficulties of developing sound environmental policy going forward.

80 Id. at 1076-77.
81 Id. at 1086-87.
A. Case Summary

Northern Plains arose out of a complicated challenge to the Tongue River Railroad Company’s (“TRRC”) plan to build a railroad to haul coal through Southeastern Montana. The Surface Transportation Board approved three separate applications. The second proposal concerns a portion of the planned railway, which was modified after legal challenges prevented the plan from going forward. The EIS prepared in response to the new application, referred to as TRRC III, combined parts of the first two reviews and is the EIS at issue in the case.

As the D.C. Circuit established in Morton early on, NEPA compliance is satisfactory if the court finds that an agency took a “hard look” at the proposed action in accordance with NEPA’s procedural requirements. The Court found three deficiencies with the EIS at issue. First, the Surface Transportation Board failed to analyze the “cumulative impacts” of the railroad project. Specifically, the Board neglected its duty to analyze the coal bed methane development used to mine the coal that the railroad was intended to transport. The Surface Transportation Board’s EIS also lacked adequate baseline data on the affected wildlife species. The final deficiency in the Surface Transportation Board’s EIS involves their reliance on “stale data,” that is, outdated aerial surveys, for its impact analysis.

B. The Northern Plains Decision Exceeds Supreme Court Precedent Regarding the Scope of NEPA

The Ninth Circuit and the Supreme Court frequently conflict with respect to environmental jurisprudence; in Public Citizen, the Supreme Court reversed the Ninth Circuit’s conclusion that more was required of FMCSA under NEPA. The Ninth Circuit’s imposition of additional requirements to ensure the Board’s compliance with NEPA asks for a complete picture of the environmental impact of the railroad project. It contrasts with the Supreme Court’s willingness to ignore the less imminent or obvious effects of an action in favor of narrow procedural requirements and lighter burdens on federal agencies. Had the Northern Plains decision

84 Id.
85 Id. at 1073-74.
86 Id. at 1074.
87 Id. at 1075; see Natural Res. Def. Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).
89 Id.
90 Id. at 1083.
91 Id. at 1085-86.
been reviewed by the Supreme Court, it is unlikely that the Surface Transportation Board would have been subject to such extensive EIS requirements.93

The first finding of deficiency highlights the conflict between Public Citizen and Northern Plains. While Public Citizen established "but for" causation as the trigger for agency compliance with NEPA procedures,94 Northern Plains requires the railroad EIS to include effects of related coal mining projects which are not part of the railroad proposal.95 The court views the inclusion of the effects of future coal bed methane development as a necessary component of a "cumulative impact" analysis.96 The CEQ regulations define "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions."97 The effects of past actions are exempt from consideration unless they are necessary to analyze the effects of all past actions combined.98 The cumulative impacts of pending and future actions qualify as effects which agencies must consider in their Environmental Impact Statements.99

The Surface Transportation Board limited the scope of its analysis to a five-year period. This limit disregarded the impact of proposed CBM wells, as they were planned but had not been constructed.100 The court rejected this reasoning, finding that NEPA requires reasonable speculation about future effects and requires that agencies recognize projects that are not yet finalized.101 The fact that the Bureau of Land Management and the state of Montana had completed impact studies on the projected development of CBM wells over the next twenty years further convinced the court that the Board could have incorporated cumulative effects data.102

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93 The Surface Transportation Board released a statement on June 18, 2012 stating that it would require Tongue River Railroad Company to submit a revised application and that subsequently it would conduct environmental review in accord with the Ninth Circuit's decision. SURFACE TRANSPORTATION BOARD, No. 12-10, SURFACE TRANSPORTATION BOARD PROCEEDS ON TONGUE RIVER RAILROAD'S REVISED CONSTRUCTION PROPOSAL (2012), available at http://stb.dot.gov/newsrels/nsfl/0/7c7159a5e6e2a41385257a21005ca571.
94 Dep't of Transp. v. Pub. Citizen, 541 U.S. at 767.
96 Id.
97 40 C.F.R. § 1508.7 (2013).
100 N. Plains Res. Def. Council v. Surface Transp. Bd., 668 F.3d at 1077, 1079. (The Board also omitted an analysis of the cumulative effects of the railroad project and the existing Otter Creek coal mines in the EIS.)
101 Id. at 1078-79 (quoting Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 962 (9th Cir. 2003)).
102 Id. at 1077, 1079.
In *Northern Plains*, the Ninth Circuit determined the proper trigger for action is the possibility of environmental impacts as a result of federal action. NEPA compliance is not dependent on whether a particular agency, in this case the Surface Transportation Board, can regulate reasonably foreseeable environmental effects; instead, the question is whether those effects exist. Like the FMCSA in *Public Citizen*, the Surface Transportation Board has no control over whether or not the mining projects come to fruition. Its only concern is the approval of transportation projects, in this case, the construction of a railroad. Under the Supreme Court’s narrower “but for” formulation, the effects of other projects which the Board does not directly control would be beyond the scope of the Board’s EIS. Under *Public Citizen*, the Ninth Circuit’s reading is too broad.

The second deficiency in *Northern Plains*, the inadequacy of baseline data about affected wildlife, may be precluded under the Supreme Court’s formulation of NEPA if the Board’s treatment of the issue is reasonable. The Ninth Circuit viewed the Board’s plan to conduct post-approval studies on the effects of the railroad project on several species of plants and animals as an insufficient mitigation measure. According to the Ninth Circuit, the use of mitigation measures presupposes approval and does not fulfill either of the two primary purposes of NEPA, which contemplate that information on environmental impacts will be available to aid public officials during the decision-making process and to inform the public about proposed federal action. Nothing in the *Public Citizen* directly conflicts with the Ninth Circuit’s finding of a deficiency in this respect. However, given the Supreme Court’s narrow construction of NEPA, it is more likely that a court giving proper precedence to the Supreme Court’s decisions would defer to the Board’s judgment.

The final deficiency discussed by the Ninth Circuit was the Surface Transportation Board’s reliance on “stale data,” that is, outdated aerial surveys. The Ninth Circuit found this reliance to be “arbitrary and capricious” because the Board failed to explain how it used the photographs to identify the habitats and populations of the region’s wildlife. Determining whether an agency’s action is “arbitrary and capricious” is itself a policy judgment. Applying its broad construction of NEPA, the Ninth Circuit decided that the Surface Transportation Board’s reliance on the stale data was misplaced. However, a narrower construction of NEPA would likely prompt a different result. The importance of the characterization of NEPA in *Northern Plains* is that it more closely embodies the spirit of the law than current Supreme Court jurisprudence.

\[103\] *Id.* at 1072.
\[104\] *Id.* at 1083.
\[105\] *Id.* at 1084-85.
\[106\] *Id.* at 1086.
C. The Ninth Circuit’s Analysis in Northern Plains Accords with the Spirit of the National Environmental Policy Act

There are two primary differences between the constructions of NEPA in *Northern Plains* and *Public Citizen*: the trigger for action and the types of environmental effects considered for purposes of the EIS. The Supreme Court would likely reverse the Ninth Circuit’s broad interpretation of NEPA requirements, which requires a great deal more in terms of agency compliance. The language of NEPA, however, is broad and substantive in spirit. The Supreme Court has curtailed the broad sweep of the Act and rendered it a purely procedural provision, subject to requirements that are narrower than its language suggests. *Northern Plains* honors the legislative intent by amplifying judicial enforcement of NEPA and carefully scrutinizing federal actions for environmental impacts.

1. The Language of NEPA Supports the Ninth Circuit Interpretation that Any Significant Environmental Effect Resulting from Federal Action Is a Trigger for an Impact Statement

From a textual perspective, there is no indication that NEPA was intended to adopt the causation principles of tort law, as *Public Citizen* and *Metropolitan Edison Co.* suggest.\(^{107}\) NEPA does not set forth a strict causation requirement restricting an agency’s environmental studies to consider only those effects that the agency controls or regulates. The trigger for NEPA compliance in *Northern Plains* is any finding that federal action may cause significant environmental impacts. The *Northern Plains* approach finds textual support in the Act. NEPA intended each Environmental Impact Statement to include direct, indirect, and cumulative effects resulting from federal action.\(^{108}\) While *Public Citizen* restricted relevant effects to those that an agency may regulate directly, *Northern Plains* required a detailed statement which examined the effects of the project at issue, as well as related projects in the region.

The proper scope for NEPA under the Ninth Circuit’s interpretation is broad enough to account for the reasonably foreseeable future effects of a project and the combined effects of other developments.\(^{109}\) In *Northern Plains*, the court noted that NEPA analysis is more than a formality—it must be “useful,” rather than “perfunctory.”\(^{110}\) The decision’s holistic approach accords with the Act’s emphasis on discerning the impact of


\(^{108}\) 40 C.F.R. § 1508.8 (2013); see 40 C.F.R. § 1508.7 (2013) (explaining the term “cumulative impact”).


\(^{110}\) Id. at 1076.
man’s activity on the “interrelations of all components of the natural environment.” The Public Citizen mandate, which limits environmental assessments to effects resulting directly from the actions of a particular agency, is essentially willful blindness to the possibility of cumulative harm.

2. The Northern Plains Approach Fulfills the Two Primary Purposes of NEPA

Public Citizen failed to confer significance to NEPA’s mandate that agencies provide information to the public, despite the clear language of the Act. The Supreme Court stopped short of requiring further compliance with NEPA. This was due in part to its conclusion that the main purpose of providing information to public officials was to inform their decision-making process. In the Court’s view, whether information concerning the emissions of Mexican motor carriers was valuable to the interested members of the public was not important, because the public could not participate in the decision-making process.

In some respects, the Supreme Court’s analysis adheres to the text of the Act. NEPA envisions the release of information as a mechanism to “encourage and facilitate public involvement” in agency decisions. However, the Court’s commitment to allowing public access to information is contingent on whether the public has an effect on the government’s decision. Arguably, the public deserves to know of the effects of government action, whether that action is pending or has already been instated.

NEPA considers the importance of general public awareness of potential environmental impacts. In addition to providing information to involve the public in the decision-making process, NEPA states that information “useful in restoring, maintaining, and enhancing the quality of the environment” should be made available to individuals, States, and local governments. This is a broader mandate than the provision requiring agencies to share information to foster public participation in the decision-making process and suggests the importance of the availability of information even after a decision is made. In Northern Plains, the Ninth Circuit demonstrated its commitment to upholding the public information purpose of NEPA. The second deficiency the court identified with respect to the Surface Transportation Board’s EIS concerned the planned use of mitigation measures, rather than solid baseline data to study potential

114 Id. at 768.
115 40 C.F.R. § 1500.2(d) (2013).
effects on plant and animal species. According to the court, the use of mitigation measures fails to serve either of the two primary purposes of NEPA. Like the Supreme Court, the Ninth Circuit stated that this failure deprives the public of the opportunity to participate in the agency’s decision-making process. More importantly, the court also noted that the failure to provide adequate baseline data about the impact on wildlife prevents the EIS from serving its “larger informational role.”

The Ninth Circuit’s nuanced reasoning clearly reflects NEPA’s goal of providing the public with information. An agency may present information pertinent to “restoring, maintaining, and enhancing the quality of the environment” at any time to foster public awareness of the environmental impacts inherent in government projects. Even if a particular proposal has already been approved, information concerning its effects may shape public opinion about future proposals. The Supreme Court’s characterization of NEPA’s public information requirements oversimplifies its purpose by focusing solely on whether access to information would enable the public to intervene during the planning process.

V. CONCLUSION

Northern Plains is an example of jurisprudence which, contrary to the Supreme Court’s restrictive interpretive guidelines, complies with the spirit of the National Environmental Policy Act. Whether NEPA itself embodies sound environmental policy is a separate issue. Read as a procedural provision, the Supreme Court’s interpretation of the Act seems to be little more than an exercise in futility. Under the Ninth Circuit’s more substantive interpretation, the Act creates a longer delay of federal action. Certainly, the Northern Plains decision has presented a bureaucratic headache for both the Tongue River Railroad, whose project has been significantly delayed while awaiting federal approval, and the Surface Transportation Board, which must now reassess the railroad’s application. Compliance with NEPA does not encourage efficient action. Perhaps Congress intended NEPA to put a stop to projects after environmental impact assessments result in negative reports. It is unclear whether the greater scrutiny of Northern Plains stops harmful projects in their tracks, pushes agencies to make decisions more considerate of potential environmental impacts, or simply requires extensive and expensive paperwork for projects that will eventually be approved.

118 Id. at 1085.
119 Id.
120 Id.
Do we need a new environmental policy for the 21st century? Arguably, current implementation of NEPA provisions does not provide the government or the public with the tools to positively influence our government's impact on the environment. Interpretation of NEPA appears to give less than serious consideration to the Act's purpose, perhaps creating the situation that the CEQ regulations warned against — the generation of paperwork, rather than the promotion of action.\textsuperscript{122} Given the current political and economic climate, any substantive alternative to NEPA is unlikely to develop in the near future. Greater substantive requirements—or interpretation of NEPA as a largely substantive Act—would delay government decision-making and decrease efficiency, a reality that is unlikely to win over an American public preoccupied with economic, rather than environmental, woes.

As resources dwindle and debates over climate change intensify, environmental issues will become increasingly difficult to ignore. How the federal government will respond to global environmental problems remains an open question. A positive step would be to adopt the attitude espoused in NEPA's declaration of policy; the federal government should focus its resources on ensuring that man and nature can exist in harmony.\textsuperscript{123} The courts must provide an all-encompassing, rather than restrictive and incomplete review of actions, which negatively affect the natural world, as the Ninth Circuit attempted to do in \textit{Northern Plains}. Whatever its flaws or inefficiencies, this is likely what NEPA was intended to accomplish.
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