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NEPA'S PROCEDURAL REQUIREMENTS: FACT OR FICTION?

Kuff v. United States Forest Service[1]

I. INTRODUCTION

The National Environmental Policy Act ("NEPA") was enacted in 1969 with high expectations. With the purpose of encouraging "[a] productive and enjoyable harmony between man and his environment," NEPA sets forth certain procedures federal agencies must follow to ensure full comprehension of the magnitude of their actions.[2] This is accomplished by two methods. First, NEPA requires that agencies consider every significant impact major federal actions will have on the environment,[3] and second, the act forces an agencies to inform the public that it accounted for the environmental impact of its actions.[4]

However, the full expectations of the drafters have not been met. The Supreme Court concluded that NEPA is merely a procedural tool and does not require specific, substantive results.[5] In addition, the standard of review for NEPA disputes is the highly deferential "arbitrary and capricious" standard elucidated in the Administrative Procedure Act ("APA").[6] These two interpretations alone are enough to limit the effectiveness of NEPA, yet the courts proceed one step further. State and federal courts commonly treat the agency's obligation to review reasonable alternatives to any given decision as highly dependent on the stated purpose of the agency's action. Although the considered alternatives must be within the scope of the proposed plan, the goals of NEPA fade away when an agency is allowed to manipulate its obligations by the language of the stated purpose.

In *Kuff v. United States Forest Service*,[7] the court was asked to review the Forest Services actions to ensure their compliance with NEPA. Unfortunately, the case illustrates the disintegration of NEPA as an effective regulatory device. The court placed great emphasis on the procedural nature of NEPA and its limited standard of review, practically deciding the case before it even analyzed the merits of the plaintiff's claim.[8] The *Kuff* court's analysis and the degree of deference given to the agency substantially limits the chances of bringing a victorious suit against an agency under NEPA. With little danger of judicial interference, one must question the remaining effectiveness NEPA has on an agency's procedures.

II. FACTS AND HOLDING

Plaintiff, Howard Kuff ("Kuff"), filed suit in the United States District Court for the Western District of Arkansas appealing the final decision of the United States Forest Service ("Forest Service") and seeking injunctive relief.[9] Kuff contends that the Forest Service violated the National Environmental Policy Act ("NEPA") when it approved the sale of timber from the Ozark-St. Francis National Forest.[10] Kuff's cause of action for the NEPA violation arose from the APA, which allows judicial review of final agency action.[11]

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[1] 22 F. Supp.2d 987 (W.D. Ark. 1998).
[2] 42 U.S.C. §§ 4321-4370 (1994).
[3] Baltimore Gas & Elec. Co. v. National Resources Defense Council, Inc, 462 U.S. 87, 87 (1983).
[4] *Id.* at 98.
[5] Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).
[6] *See* 5 U.S.C. § 702 (1998), which grants a right of review of final agency action, *and* 5 U.S.C. § 706(2)(A) (1998), which sets the arbitrary and capricious scope of review for agency actions.
[7] Kuff v. United States Forest Service, 22 F. Supp.2d 987 (W.D. Ark. 1998).
[8] *Id.* at 993-995.
[9] *Id.* at 992.
[10] *Id.* at 988. The timber sale was to occur under a project entitled "Headwaters Project." *Id.*
[11] *Id.* at 993.

The Forest Service is required to follow NEPA procedures when making forest management decisions.[12] NEPA's purpose is to ensure that when an agency's decision has an impact on the environment, the agency (1) evaluates the negative consequences of its decision upon the environment, and (2) distributes any relevant information to the public.[13] Thus, the Act mandates a process for the agency to implement but does not require a specific substantive result.[14]

NEPA requires all federal agencies acting under its authority to prepare an Environmental Impact Statement ("EIS") when the proposed project "significantly affect[s] the quality of the human environment."[15] When determining whether a proposed project will "significantly" affect the environment, an agency often prepares an Environmental Assessment ("EA").[16] The result of the EA will determine if an EIS is required, or will yield a finding of no significant impact ("FONSI") in which case an EIS is not required.[17]

In 1995, the Forest Service (through the District Ranger) provided notice of a proposed project entitled the Headwaters Project ("Project"). The Project's purpose was timber management and habitat improvement.[18] Because the Project would result in the harvesting of a number of acres within the National Forest, 550 interested persons signed and submitted a petition to the agency requesting termination of the project and to have the area "designated as a scenic area for dispersed recreational use."[19] The Forest Service assembled a team to review public comments and develop alternatives to the Project.[20] The review team prepared an EA and identified the objectives of the Project.[21]

The review team's EA listed five possible alternative actions and their effects on such things as the environment, health, and economics.[22] The District Ranger chose a variation of the original project, provided notice of the choice, and made the final decision to implement the chosen alternative. The chosen alternative was selected because it was the best combination of public concerns and the original objectives.[23] Further, the District Ranger concluded that the chosen course of action did not significantly affect the environment, so an EIS was not prepared.[24]

Kuff filed an appeal with the agency requesting a reversal of the final decision which was denied.[25] The case went to the district court after a magistrate judge issued a temporary injunction and restraining order against the Forest Service.[26] Kuff contends that the Forest Service acted arbitrarily and capriciously under the NEPA by not establishing or considering a "no action" and a "recreation only" alternative.[27] Kuff argued that the "no action" alternative considered by the Forest Service was actually

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[12] *Kuff*, 22 F. Supp. 2d at 989; 42 U.S.C. § 4321-70 (1994).

[13] *Kuff*, 22 F. Supp.2d at 989, *citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989): The public may play a role in the decision making through the notice and comment process required under NEPA and the APA.

[14] *Kuff*, 22 F. Supp.2d at 989.

[15] 42 U.S.C. § 4332(2)(C) (1994).

[16] Sierra Club v. Robertson, 784 F. Supp. 593, 602 (W.D. Ark. 1991), *aff'd.*, 28 F.3d 753 (8th Cir. 1994). An EA is a limited assessment of environmental impact. It "contains a brief discussion of the need for the proposed actions and alternatives that may be taken," and then the agency determines whether or not the impact on the environment is significant. *Kuff*, 22 F. Supp.2d at 989.

[17] *See* 40 C.F.R. § 1508.9 (1994) *and* 40 C.F.R. § 1508.13 (1994).

[18] *Kuff*, 22 F. Supp.2d at 990.

[19] *Id.* at 991. Dispersed recreation, as defined by the Forest Service, means "outdoor recreational use opportunities occurring outside developed sights over a wide area." *Id.*

[20] *Id.*

[21] *Id.* Specifically, the court identified the needs as: "The need to implement ecosystem sensitive, cost effective timber management practices to produce a supply of wood products now and a sustained yield of wood products for the future . . . maintaining ecosystems that contain a diversity of plant and animal species and ages which provide recreation and viewing opportunities for forest users." *Id.*

[22] *Id.* Alternative one was the no logging approach, alternative two was the original Headwaters Project approach, and alternatives three through five contained various degrees of logging intensities. *Id.*

[23] *Id.* at 992.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 992.

[27] *Id.* at 993-94.

an "action" alternative because the plan still required the removal of trees.[28] Kuff also claimed that the Forest Service ignored the petition signed by 550 individuals when considering the possible alternatives.[29]

The district court held the standard for arbitrary and capricious, as defined in the APA, is a narrow standard of review in which the court must determine if the agency's decision was based on "a consideration of relevant factors or was in clear error."[30] Agency decisions are given deference, assumed to be lawful, and are controlling if reasonable. Therefore, the plaintiff bears the burden of proof.[31] NEPA limits the court's inquiry to whether the procedural requirements were satisfied by the agency.[32]

The court denied injunctive relief and granted summary judgment to the Forest Service.[33] The court held that the petition's "recreational action" did not achieve the goals of the Project and was not required to be considered under NEPA.[34] In addition, the Forest Service's "no action" alternative only perpetuated old actions and was a true "no action" alternative.[35]

III. LEGAL BACKGROUND

A. Arbitrary and Capricious Standard for NEPA

1. In General

The court has the ability to set aside agency actions or conclusions that are found to be arbitrary, capricious, or an abuse of discretion.[36] The standard of review is narrow and reflects the deference given to agency expertise.[37] The standard set forth is not altered by the underlying substantive claim.[38] However, the standard has undergone considerable changes over the last sixty years.[39]

In 1935, the U.S. Supreme Court declared in *Pacific States Box & Basket v. White* that if reasonable facts to support the agency's action can be conceived, there becomes a presumption that the fact exists.[40] In order for a plaintiff to defeat the presumption of validity, the assailant must produce evidence that the action was arbitrary.[41] General conclusions of law or fact will not suffice to meet the burden imposed by the court; the assailant must set forth specific facts to rebut the presumption.[42]

Despite the extreme deference the Supreme Court gave to agency actions in *Pacific States* and its progeny, in 1943 the court began to shift its policy to a more stringent review.[43] It required the agencies to provide evidence that its actions were reasonable and within their delegated discretion.[44] Nonetheless, the court still recognized the high level of deference paid to agency judgments and limited the proof an

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[28] *Id.* at 994.
[29] *Id.* at 994-95.
[30] *Id., citing* Sierra Club v. Robinson, 784 F. Supp. 593, 604 (W.D. Ark. 1991). This consideration of relevant factors is often stated as the "hard look" doctrine, which requires the agency to thoroughly consider the issues in the record. *Id.*
[31] *Kuff*, 22 F. Supp.2d at 994-95, *citing Sierra*, 784 F. Supp. at 604. This consideration of relevant factors is often stated as the "hard look" doctrine, which requires the agency to thoroughly consider the issues in the record. *Id.*
[32] *Kuff*, 22 F. Supp.2d at 993.
[33] *Id.* at 995.
[34] *Id.*
[35] *Id.*
[36] Federal Administrative Procedure Act , 5 U.S.C. § 706 (2)(A) (1994).
[37] National Wildlife Fed'n v. Whistler, 27 F.3d 1341,1344 (8th Cir. 1994).
[38] Krichbaum v. Kelley, 844 F. Supp. 1107, 1110 (W.D. Va. 1994).
[39] *Compare* Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935), *with* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).
[40] *Pacific States*, 296 U.S. at 185.
[41] *Id.* at 185, *citing* Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194, 209 (1934).
[42] *Id.* at 185, *citing* Public Serv. Comm'n v. Great N. Utils. Co. 289 U.S. 130, 136-37 (1933) *and* Aetna Ins. Co. v. Hyde, 275 U.S. 440 (1928).
[43] *Compare Pacific States with* SEC v. Chenery Corp., 318 U.S. 80 (1943).
[44] *Chenery*, 318 U.S. at 94-95.

agency must give to meet their burden.[45] The Court also made clear the premise that a reviewing court cannot set aside an agency determination based on a permissible exercise of judgment, based solely on the fact that the court "might have made a different determination."[46]

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[47] the Supreme Court rejected the idea that scrutiny ends when it determines that the agency acted within the scope of its statutory authority. Moreover, the court stated that the inquiry must proceed beyond the scope of authority in general and look to the specific choice made by the agency and decide if it is arbitrary, capricious, or an abuse of discretion.[48] This determination is not based on the court's opinion, but on an actual consideration of factors relevant to the decision as well as considering whether the judgment was in clear error.[49] Though the court regards its inquiry as "searching and careful," the standard of review continues to be labeled as narrow.[50]

As a result of the deference given to agency decisions, the plaintiff bears the burden of proof and an insufficient showing will result in a judgment for the defendant agency.[51] The court's sole function is to determine whether the agency took a "hard look" at all relevant factors and made its decision accordingly.[52] The court's determination is further limited to the "administrative record already in existence" at the time the agency made the initial decision.[53] "Thus, to survive summary judgment, . . . the plaintiff must point to facts in the record . . . which support his claim."[54]

2. Consideration of Alternatives under NEPA

When determining the "sufficiency of an agency's consideration of environmental factors,"[55] the role of the reviewing court is limited by NEPA's procedural nature.[56] NEPA requires federal agencies to study and develop feasible alternatives to a proposed course of action.[57] The agency has substantial discretion in its choice and review of possible alternatives.[58]

Despite an agency's discretion in evaluating alternatives, there has been much litigation concerning which and how many alternatives an agency is required to review. Most courts have found that the agency need only provide a sufficient number of alternatives to "permit a reasoned choice."[59] In addition, NEPA does not require an agency to review an alternative that is outside the scope of the proposed action's purpose.[60] Furthermore, the range and scope of alternatives will vary depending on the magnitude of the proposal's impact upon the environment.[61] The Second Circuit explained that when no EIS has been filed "it is something of an anomaly" to require an agency to search for many alternatives

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[45] *Id.* at 95. The Court stated: "We merely hold that an administrative order can not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Id.*

[46] *Id.* at 94.

[47] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[48] *Id.* at 416.

[49] *Id.*

[50] *Id.*

[51] Sierra Club v. Robertson, 810 F. Supp. 1021, 1025 (W.D. Ark.1992), *aff'd*, 28 F.3d 753 (8th Cir. 1994).

[52] Sierra Club v. Robertson, 784 F. Supp. 593, 604 (W.D. Ark. 1991).

[53] Camp v. Pitts, 411 U.S. 138, 142 (1973).

[54] Krichbaum v. Kelley, 844 F. Supp. 1007, 1110 (W.D. Va. 1994).

[55] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554 (1978).

[56] Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996).

[57] 42 U.S.C. § 4332(2)(E) (1994). In addition to these alternatives, an agency is required to review a "no action alternative". 40 C.F.R. § 1502.14(d) (1994).

[58] State of North Carolina v. FAA, 957 F.2d 1125, 1134-35 (4th Cir. 1992).

[59] Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976).

[60] Olmsted Citizens for a Better Community v. United States, 793 F.2d 201, 208-09 (8th Cir. 1986).

[61] River Road Alliance, Inc. v. Corps of Eng'rs. of the United States Army, 764 F.2d 445, 452 (7th Cir. 1985). *See also* City of New York v. United States Dep't of Trans., 715 F.2d 732, 744 (2nd Cir. 1983).

that will not harm the environment.[62] In this situation, no alternative would be necessary because the agency already decided the proposal would have no significant affect on the environment.

Because of the NEPA note and comment procedure, citizens are permitted to respond to proposals that they find in error. In some situations, citizens will respond with alternatives of their own, which creates a controversy if the agency refuses to review the alternatives. As a response, courts have found that NEPA does not require an agency to analyze every available alternative that fits within the proposed action's purpose.[63] An agency need not make a separate analysis of an alternative that is sufficiently similar to an alternative already considered by the agency.[64]

B. Conclusion

In determining whether an agency's decision is arbitrary or capricious, the reviewing court must make a careful and searching inquiry.[65] The court must consider whether the agency's decision was based on relevant factors and whether there has been a clear error of judgment.[66] In addition, the agency must provide an adequate explanation for its action, including a rational connection between the relevant facts and the final agency action and purpose.[67] If the agency is unable to produce a reasonable basis on its own, the court cannot provide one.[68] The narrow standard of review afforded to agency actions reflects the particular expertise the agency possesses, due to its day to day administration.[69]

Furthermore, NEPA does not find that an agency acted arbitrarily or capriciously merely because it failed to review every possible alternative to a proposed action. The agency is only required to evaluate those alternatives that further the purpose of the proposed action. In addition, the agency need not consider alternatives that are sufficiently similar to those alternatives already analyzed. In other words, the agency is not required to consider "every conceivable alternative."[70]

IV. INSTANT DECISION

In the instant case, Kuff sought a preliminary injunction and a temporary restraining order to prohibit the Forest Service from proceeding with the Headwaters Project. Kuff charged that the agency's final decision was arbitrary and capricious for failure to consider a "no action" and "recreation only" alternative to the Headwaters Project.[71] The court refused to issue injunctive or declaratory relief to Kuff, granting instead summary judgment in favor of the Forest Service. The court held that Kuff's request for relief must fail because under the limited scope of review given to claims of arbitrary and capriciousness, the Forest Service's final decision met the procedural obligations imposed by NEPA.[72]

In refusing to grant relief to Kuff, the court first considered the scope of review that agency decisions are given under the arbitrary and capricious standard. Though Kuff claimed a violation of NEPA procedures, the cause of action arose out of the APA, which grants the right of judicial review for agency actions alleged to be arbitrary and capricious.[73]

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[62] Hanly v. Kleindienst, 471 F.2d 823, 836-37 (2nd Cir. 1972) (Friendly, J., dissenting). The conclusion of no significant environmental impact is shown through the agency's choice not to file an EIS. *Id.*

[63] Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1181 (9th Cir. 1990).

[64] *Id.* at 1181, *citing* Northern Plains Resource Council v. Lujan, 874 F.2d 661, 666 (9th Cir. 1989).

[65] Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 416 (1971).

[66] *Id.*; Motor Vehicle Mfrs. Assn. v. State Farm Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

[67] *Motor Vehicle*, 463 U.S. at 43.

[68] *Id.*

[69] *Id.*

[70] Kentucky *ex rel.* Beshear v. Alexander, 655 F.2d 714, 718 (6th Cir. 1981).

[71] Kuff v. United States Forest Serv., 22 F. Supp.2d 987, 992-93 (W.D. Ark. 1998).

[72] *Id.* at 995.

[73] *Id.* at 993. *See also* Administrative Procedure Act, 5 U.S.C. § 702 (1994), which states the right of review *and* 5 U.S.C. § 706(2)(A) (1994), which sets the standard of review as arbitrary and capricious.

The court notes three "well-established limitations" to the scope of its review: 1) the presumption of lawfulness of agency decisions, 2) deference to agency expertise, and 3) legal interpretations made by the agency are controlling if reasonable.[74] With the above limitations in mind, the court concluded that its role was to "determine whether the Forest Service took a 'hard look' at the relevant factors" and if the agency's final decision was based on the relevant factors.[75] This determination is based on the record in existence at the time of the Forest Service's decision.[76] As applied to NEPA inquiries, the arbitrary and capricious standard "is limited to whether NEPA's procedural obligations were met by the Forest Service."[77]

The court next examined the substance of Kuff's claims. Kuff first contended that the Forest Service did not consider his "no action" alternative when deciding on how to proceed with the Headwaters Project.[78] When an agency conducts an analysis of the affects a proposed project will have on the environment, a "no action" alternative must be considered.[79] The prior magistrate judge and the current court agreed that the Forest Service's Alternative One, considered and rejected by the agency, was a "no action" alternative.[80]

Kuff argued that the Forest Service's "no action" plan was not truly a "no action" alternative because under Alternative One a designated number of acres are still subject to "growth management," which constitutes action.[81] Conceding that Kuff's argument did make sense to a degree, the court stated that the "management" occurring under the Forest Service's "no action" alternative was simply an extension of the actions already performed by the Forest Service.[82] Because the action in the "no action" alternative was neither new or in addition to prior activity, the court concluded that Alternative One qualified as a "no action" alternative.[83]

From the record, the court concluded that there was no basic difference between Kuff's "no action" alternative and Alternative One, which was reviewed by the Forest Service.[84] Therefore, the Forest Service had no obligation to separately consider Kuff's plan because NEPA did not require an "analysis of alternatives that are not significantly distinguishable from alternatives actually considered."[85] Because the Forest Service's consideration of the "no action" alternative was sufficient, Kuff failed to show that the agency acted in an arbitrary or capricious fashion as to his first allegation.

Second, Kuff accused the Forest Service of failing to consider the "recreation only" alternative suggested by the signed petition.[86] While Kuff acknowledged that the "recreation only" alternative was "outside the scope" of the purpose of the Headwaters Project, he contended that the Forest Service should have changed its forest management plan and designated the area according to the guidelines set forth in the petition.[87] The court conceded that NEPA required an agency to study and develop alternatives to a

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[74] *Kuff*, 22 F. Supp.2d at 993. The court went on to state that the burden of proof on all issues is on the plaintiff. *Id.*

[75] *Id.* at 993.

[76] *Id. citing* Camp v. Pitts, 411 U.S. 138, 142 (1973) *and* Krichbaum v. Kelley, 844 F. Supp. 1107, 1110 (W.D. Va. 1994). "[T]o survive summary judgment, plaintiff must point to facts in the record . . . which support his claims . . ." *Kuff*, 22 F. Supp.2d at 993.

[77] *Kuff*, 22 F. Supp.2d at 993. The court added "it is well settled that NEPA itself does not mandate particular results but simply proscribes the necessary process" *Id.* (citations omitted).

[78] *Id.* at 993-94.

[79] 40 C.F.R. § 1508.9(b) (1994); 40 C.F.R. § 1502.14(d) (1994).

[80] *Kuff*, 22 F. Supp.2d at 994. Alternative One, titled "No Timber of Wildlife Habitat Improvement Alternative," was included in the EA. *Id.*

[81] *Id.*

[82] *Id.* Under the National Forest Management Act, 16 U.S.C. § 1600 (1994), the Forest Service must create Land and Resource Management Plans ("LRMPs"). LRMPs establish the overall management direction for the forest. *Id.* The "action" in question is required by the Forest Service's LRMPs. *Id.*

[83] *Kuff*, 22 F. Supp.2d at 994-95.

[84] *Id.*

[85] *Id., citing* Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1181 (9th Cir. 1990).

[86] *Kuff*, 22 F. Supp.2d at 994. The petition was signed by more than 550 people and requested that the land be set aside as a "scenic area for dispersed recreational use." *Id.*

[87] *Id.* at 994.

proposal, but the Forest Service was not obliged to consider "every conceivable alternative."[88] The Forest Service was not required to consider an alternative that does not aid in the achievement of the proposed project's purpose.[89]

The court found that the Forest Service considered multiple alternatives that did accomplish the purpose of the project, and the chosen alternative was the "best mix" of the purpose and public concern.[90] In addition, the court found that the "recreation only" and Kuff's "no action" alternatives were significantly similar in their purpose, and the Forest Service's consideration of Alternative One "sufficiently addressed" the recreational use proposed in the petition.[91] Since the Forest Service had no obligation to consider the "recreation only" alternative, its lack of consideration was not arbitrary and capricious.

Because NEPA's procedural obligations were satisfied, the court denied injunctive and declaratory relief to Kuff and granted summary judgment in favor of the Forest Service. The Forest Service's decisions were not arbitrary and capricious, because the agency considered a "no action" alternative in the EA. Furthermore, it was not required to review the "recreation only" alternative since it was outside of the project's purpose and sufficiently addressed in other alternatives.

V. COMMENT

A. In General

The court in *Kuff* considered whether the Forest Service acted arbitrarily and capriciously in violation of NEPA, when it failed to consider two proposed alternatives supported by the plaintiff. The court supported its decision with volumes of case law, and granted summary judgment in favor of the Forest Service.[92]

Whether decided correctly or not, the outcome in *Kuff* is not an isolated incident. The majority of courts, when faced with the question of whether an agency under the NEPA should consider an alternative proposed by an individual or public organization, have found that the agency acted properly. As a result, a legitimate question exists as to whether NEPA remains a valid means of achieving its stated purpose or has become nothing more than a superficial limitation of agency actions.

Agencies are formed and Congress grants their power. However, it is the "citizen suit" that ensures an agency is following Congress' mandate. A lawsuit brought by a member of the public or organization ensures an agency does not act improperly, by forcing a court to measure an agency's actions against regulations enacted by Congress. The effectiveness of this "checking mechanism" is directly tied to the chance of success a plaintiff will have in court. If the agency is the constant recipient of judicial rubber-stamped victories, the effectiveness of the limiting statutes or regulations are negated.

NEPA's present and future usefulness is lessened by two factors: (1) the court's standard of review and (2) the court's interpretation of NEPA's impact on federal agencies. The validity or reasonableness of preparing an EIS or EA will not directly be disputed. The focus of this note is an agency's obligation to consider various alternatives to a proposed action and the role of the court in this process. The arguments will then be illustrated by *Kuff's* facts and decision.

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[88] *Id.* at 995, *citing* Kentucky *ex rel.* Beshear v. Alexander, 665 F.2d 714, 718 (6th Cir. 1981).

[89] *Kuff*, 22 F. Supp.2d at 995. *See also* Sierra Club v. Robertson, 810 F. Supp. 1021, 1029 (W.D. Ark. 1992), *aff'd*, 28 F.3d 753 (8th Cir. 1994).

[90] *Kuff*, 22 F. Supp.2d at 995.

[91] *Id.* Recall that the court concluded earlier that the plaintiff's "no action" and the Forest Service's "no action" alternatives were similar enough that consideration of the agency's plan foreclosed the need to separately analyze Kuff's alternative. *Id.* Now the court concluded that the petition's "recreation only" alternative and Kuff's "no action" alternative are identical, therefore consideration of Alternative 1 again foreclosed a separate analysis. *Id.*

[92] *Id.* at 993-95.

B. NEPA's Procedural Requirements and the Courts' Standard of Review

1. Standard of Review

a. Arbitrary and Capricious

In *Kuff*, the court declared the applicable standard of review as the arbitrary and capricious standard elucidated in the APA.[93] The APA requires a court to overturn an agency's decision if it is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[94] The modern interpretation of the arbitrary and capricious standard comes from *Citizen to Protect Overton Park v. Volpe*.[95] In *Overton Park*, the Court set forth what became known as the "hard look" doctrine. Though *Overton Park* was not a NEPA case, the doctrine applies to NEPA decisions invoking the arbitrary and capricious standard.[96]

The problems caused by this standard become more clear when combined with the courts' interpretation of NEPA. However, disregarding the courts' interpretation, one can understand a plaintiff's difficulty when challenging an agency's decision. The standard of review is narrow and reflects the great amount of deference given by the court to an agency's expertise.[97] An agency's decision can be found arbitrary and capricious for only four reasons: (1) the decision ignores material factors, (2) the decision places great weight on irrelevant factors, (3) the decision is contrary to the agency's explanation for the choice, and (4) the decision is so outrageous that it was a "product of agency expertise."[98]

The Supreme Court determined that when an agency makes a decisions pursuant to the requirement imposed by NEPA, the court's only role is to insure that the agency considered the environmental consequences of it actions.[99] In accordance with the APA, when deciding if an agency has violated NEPA, the reviewing court must determine whether the agency took a hard look at the environmental effects of its actions.[100]

The standard of review a court gives to an action is often critical to the success of the dispute. It is apparent that the arbitrary and capricious standard of review accords the agency a great amount of deference. Without considering the requirements imposed on an agency by NEPA, a plaintiff faces an extreme burden when seeking to enjoin agency actions. NEPA requirements do not aid plaintiffs in their battle, instead the requirements further hinder the "checking mechanism" mentioned above.

b. NEPA Procedural Requirements

When Congress passed NEPA, it was probably viewed as a great environmental protection tool. NEPA required all agencies to consider the environmental impact of their actions and promoted a policy of "encouraging productive and enjoyable harmony between man and his environment."[101] NEPA has two general goals. First, it "places upon the agency the obligation to consider every significant aspect of

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[93] *Id.* at 993. *See also* APA, 5 U.S.C. § 702 (1994), which grants a right of review of final agency action, *and* 5 U.S.C. § 706(2)(A) (1994), which sets the arbitrary and capricious scope of review for agency actions.

[94] 5 U.S.C. § 706(2)(A) (1994).

[95] 410 U.S. §§ 402, 406 (1971). Specifically, the court must consider whether the agency's decision was based on a consideration of relevant facts or is a clear error of judgment. *Id.* The inquiry should be searching and careful ("hard look"), but it should also be limited. *Id.*

[96] *Overton Park*'s "hard look" doctrine controls the APA standard in section 706(2)(A). The Supreme Court, in Vermont Yankee Nuclear Power v. National Resources Defense Council, 435 U.S. 519, 548 (1978), stated that NEPA controversies are to be governed in accordance with APA requirements. *Id.*

[97] National Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1344 (8th Cir. 1994).

[98] Motor Vehicle Mfrs. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[99] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980).

[100] Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989).

[101] 42 U.S.C. § 4321 (1994).

the environmental impact of the proposed action."[102] Second, NEPA forces an agency to inform the public that it has taken into account the environmental impact of its actions during the decision making process.[103]

Despite the high expectations illustrated in the goals of NEPA, the U.S. Supreme Court concluded that NEPA "does not set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."[104] NEPA requires an EIS be completed for certain federal actions.[105] At the heart of the EIS is the consideration of alternatives by the agency to the proposed action.[106] The regulation sets forth a detailed list of which alternatives an agency must consider as well as other requirement an agency must follow.[107]

The purpose of the focus on alternatives is to "ensure that each agency decision maker . . . takes into proper account all possible approaches to a particular project."[108] Yet, despite the seemingly broad scope, NEPA's only concern is to guard against uninformed agency action, not unwise action.[109]

The two requirements from the regulations that plaintiffs attempt to utilize most often are the consideration of the "no action" alternative and consideration of reasonable alternatives. The term reasonable alternative is interpreted to include "those [alternatives] that are practical or feasible . . . , rather than simply desirable . . . [by] the proponent.[110] Of these reasonable alternatives that must be considered, the agency actually need only consider those that are within the scope of the proposed plan's purpose.[111] Therefore, the agency's articulated purpose for its proposed action is almost determinative of whether an alternative needs to be considered.[112] In addition, a separate analysis of alternatives that are substantially similar to those already considered is not required.[113]

Like the consideration of reasonable alternatives, the "no action" alternative does not necessarily aid the plaintiff either. A "no action" alternative is not a true "no action" alternative, but rather a *no new action* alternative. The "no action" alternative varies depending on the federal action proposed and can include a change in action to a limited degree.[114] Its basic purpose appears only to be a ruler by which to measure the proposed action and its impact, rather than a viable alternative of no action.

NEPA's requirements currently have few "teeth" left. The classification as procedural limits the impact the requirements will have on an agency, because it acts more as guideline than a restriction. It would seem that the regulations requiring the consideration of certain alternatives would have some affect, but ultimately the affect is itself limited. The reasonable alternative is highly dependent on the agency action taken and the stated purpose for the action. Furthermore, the court, as seen in *Kuff* can use the "substantially similar" limitation as an escape mechanism. The addition of the arbitrary and capricious scope of review to the analysis prohibits a plaintiff from enjoining an agency action under NEPA. Obviously this is not always the case, for agencies do lose, however, the difficulty for the plaintiff in achieving victory seems to answer the above asked question. The affect of NEPA's procedural requirements is very limited and in many instances is no more than a procedural hoop for agencies to jump through.

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[102] Baltimore Gas and Elect. Co. v. Natural Resources Defense Council, 462 U.S. 87, 107 (1983) (citations omitted).
[103] *Id.*
[104] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978).
[105] *See supra* note 15 and accompanying text.
[106] 40 C.F.R. § 1502.14 (1994).
[107] *Id.* An agency must (a) rigorously explore and objectively evaluate all reasonable alternatives and discuss the reasons [why other alternatives were excluded]; (b) devote substantial treatment to each alternative considered in detail; (c) include reasonable alternatives not within the jurisdiction of the lead agency; (d) include the alternative of no action; (e) identify the agency's preferred alternative...; (f) include appropriate mitigation measures. *Id.*
[108] Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
[109] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).
[110] Dinah Bear, *Alternatives and the Scope of Analysis*, C981 ALI-ABA 353, 358 (1995).
[111] *See supra* note 70 and accompanying text.
[112] National Resources Defense Council v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972).
[113] Northern Plains Resource Council v. Lujan, 874 F.2d 661, 666 (9th Cir. 1989).
[114] Bear, *supra* note 110, at 359.

2. NEPA's Procedural Requirements and Kuff

a. Superficial Limitation

Kuff offers a perfect example of how a court's interpretation of an agency's obligations makes the NEPA nothing more than a superficial limitation on agency actions. Mirroring the discussion above, the court in *Kuff*, dodged its responsibility of enforcing NEPA by hiding behind the limited arbitrary and capricious standard of review and granting the agency more deference than is justifiable.

The court began the analysis by reiterating the limited standard of review forced upon the courts by prior case law.[115] The court states what standard of review it must use and gives the generally accepted definition and applicability of the standard.[116] However, instead of proceeding to the merits of the case, the court further explains how the standard is applied. The court's discussion of the standard of review gives the impression that Kuff lost his case from the outset. After all, the standard of review is so narrow and the discretion given to the agency so great how, can the plaintiff prevail?

The court spends as much time discussing the standard of review, as it does determining the case on its merits.[117] The actual time spent on a topic is not necessarily determinative, but the depth of the discussion is important and is damning. Often repeating itself over and over again, the court cites a series of cases all stating the same facts in different words.[118] The court makes certain that the limited nature of the standard is fully understood, but then in one sentence explains that it is also the duty of the court to take a "hard look" at the agency's actions.[119]

b. No Action Alternative

Eventually the court reached a discussion of the merits of Kuff's claim, and in this discussion the usefulness of NEPA can truly be questioned. The conclusion the court reaches is based on three questionable bases: (1) the agency's Alternative One was supposed to be a "no action" alternative, (2) the agency considered a valid "no action" alternative and (3) this alternative was sufficiently similar to Kuff's "no action" alternative so no further consideration was required by the agency.

The first questionable basis concerns the courts assumption that the agency's Alternative One was supposed to be a "no action" alternative. The court is not allowed to provide a justification for the agency if the agency itself has not provided one.[120] The agency never identified Alternative One as a "no action" alternative, yet the magistrate judge and the district court judge both concluded that Alternative One was a "no action" alternative with a different name.[121] The question remains: what justifies this conclusion?

Second, the court states that a "no action" alternative is defined as *no new action*.[122] The court, however, cites no cases or regulations to justify this conclusion.[123] Even if taken at face value, the definition of a "no action" alternative given by the court does not support its final conclusion. The court's finding that the agency's "no action" alternative did not institute new action is questionable.

The court states that the action occurring under the agency's "no action" alternative is simply an extension of old action.[124] However, as the court itself points out the "no action" alternative "provides for

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[115] Kuff v. United States Forest Serv., 22 F. Supp.2d 987, 993 (W.D. Ark. 1998).

[116] *Id.*

[117] *Id.* at 993-95. At least in terms of pages of the opinion devoted to each, the court seems more interested in stating its standard of review than it is in discussing the merits of the plaintiff's case. *Id.* The standard of review discussion takes up one full page, whereas the claims raised by the plaintiff are explained in less than a page each. *Id.*

[118] *Id.* at 993-94.

[119] *Id.* at 993.

[120] *See supra* notes 36-70, 80 and accompanying text.

[121] *Kuff*, 22 F. Supp.2d at 994.

[122] *Id.*

[123] *Id.* It seems strange that a court that went out of its way to cite a multitude of cases when considering the standard of review now fails to justify its conclusion with one case.

[124] *Id.*

a longer than normal rotation . . ."[125] An extension beyond the norm does constitute new action. The court, without any explanation, concludes that the longer period is merely an "extension of the old" action.[126]

Third, the court concludes that the agency's and Kuff's "no action" alternatives are "not significantly distinguishable," so the agency was not required to consider Kuff's alternative.[127] Disregarding the argument immediately above, there is a significant difference between the two "no action" alternatives. Kuff's alternative calls for a ceasing of all activity in the area and the establishment of a special interest area,[128] whereas the agency's alternative extends the current practices.[129] Nonetheless, the court concludes that the consideration of the agency's Alternative One, precludes consideration of Kuff's alternative.

c. Recreation Use Alternative

The plaintiff's second claim suffers from the same problems that arose in the "no action" discussion. In this instance, the court's conclusion rests on two questionable bases: (1) the recreational use alternative was outside the scope of the plan's purpose and (2) the recreational use alternative was sufficiently similar to the agency's no action alternative so no further consideration was required.

First, the court finds that the recreational use alternative contained in the petition did not require consideration by the agency because it was outside of the proposed plan's purpose.[130] This statement of the law is absolutely correct, but what the court chose to ignore was that the plaintiff was not claiming it was within the scope. The plaintiff conceded that the alternative was outside the scope of the purpose but claimed that the agency (due to the number of people who signed the petition) should have amended the proposed plan and purpose.[131]

However, the court does not bother to discuss the validity of such an argument. Instead, the court attempts to validate its conclusion by citing a long list of authority supporting that an agency need not consider an alternative outside the scope of the purpose of its original proposal.[132] The court found that the agency considered enough alternatives to accomplish the goal of the proposed plan.[133] Regardless of the correctness of the court's assertion, the plaintiff is arguing the goals should have been changed. The court answers a question that was not raised by the plaintiff.

Second, after stating that the recreational use alternative need not be considered by the agency because it was outside the scope of the plan's stated purpose, the court then states that the plaintiff's "no action" alternative and the petition's recreational use alternative "are virtually identical in purpose."[134] Through a chain of reasoning the court concludes that the agency's "no action" alternative took into consideration the concerns of the petition's alternative.[135]

The assumptions behind this "chain of reasoning" are problematic. As previously noted, it is questionable whether Kuff's alternative and the agency's Alternative One are actually similar enough to warrant exclusion from consideration. Further, the court never claimed that Kuff's alternative was outside the scope of the plan, nor did it conclude that the agency's Alternative One was outside the scope

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 995.
[131] *Id.* at 994.
[132] *Id.* at 995.
[133] *Id.*
[134] *Id.*
[135] *Id.* The reasoning is that because the recreational use alternative is the same as Kuff's "no action" alternative, and Kuff's "no action" alternative is the same as the agency's "no action" alternative, the petitioner's alternative is the same as the agency's Alternative One. *Id.*

of the plan. Despite this, the court concluded that an alternative it considered outside of the plan's scope is identical to alternatives inside the scope (or at least not expressly outside of the scope).

In the instances stated above, the court finds the facts justify a conclusion that the plaintiff's claim is without merit.[136] However, in all instances the facts do not support the court's conclusion, but instead lead the reader to believe that NEPA essentially has no teeth. An agency need not take a *hard look* because the court will not require the agency to do so. From the court's analysis, the only reasonable conclusion is that the deference given to the agency overrides the procedural requirements imposed by NEPA, and that today the statute is nothing more than a fictitious monitoring device.

VI. CONCLUSION

The *Kuff* decision provides a perfect example of the trend in modern NEPA jurisprudence. The court's analysis placed a great amount of emphasis on NEPA's lack of substantive effect and focused a disproportionate amount of time and energy on explaining its limited scope of review. When the court finally discussed the merits, it was obvious that the restraints placed on the Forest Service were minimal. The alternatives an agency is obligated to consider are no longer limited by reasonableness, but are dependent on the agency's stated purpose of the proposed plan.

As *Kuff* illustrates, although NEPA was at one time considered to be an effective regulatory device, its role in forcing agencies to make informed decisions has greatly diminished. Instead of ensuring consideration of possible environmental impacts, the NEPA has been reduced to a mere facade. Its effectiveness seems to lie in legitimizing agency action and not in regulating it.

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[136] *Id.* at 994.