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Unwise Beats Uninformed: The Rock, Paper, and Scissors of NEPA Challenges

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Unwise Beats Uninformed: The Rock, Paper, Scissors of NEPA Challenges

Webster v. United States Dep’t of Agric.1

I. INTRODUCTION

The National Environmental Policy Act2 ("NEPA") has been in place since 1970. Since 1983, there have been key Supreme Court decisions interpreting the act.3 The Supreme Court has routinely interpreted NEPA in such a way that the federal agencies and their actions that fall under NEPA’s regulation are given strong deference by the courts; meaning that these actions are generally allowed to proceed despite their adverse effects on the environment and those who are a part of it. NEPA exists to encourage agencies to make informed decisions about their actions effecting the environment; it is not in place to ensure that they make popular or wise decisions.4

It is this recognized standard that can lead to frustrating and ultimately unsuccessful litigation for plaintiffs, which was the case in Webster v. United States Dep’t of Agriculture. Agency actions can have devastating effects on those whose land is to be used to facilitate the actions; for example, those whose land is used for and/or destroyed in the process of building a dam. In Webster, seven plaintiff parties5 are faced with the loss of land and in some cases the loss of their homes. The defendant agency, the National Resource Conservation Service ("NRCS")6, however determined this cost does not outweigh the benefits to be gained from the construction of a new dam, and the courts have agreed.

1 685 F.3d 411 (4th Cir. 2012).
5 Webster, 685 F.3d at 411. Pat Webster; Joem Webster; Elizabeth Webster; Charles Foltz; Linda Foltz; Gloria Foltz Walker; Elizabeth Webster, as Executrix for the Estate of Allaina Garrett Whetzel.
6 See id. Natural Resources Conservation Service (NRCS) is an Agent of the United States Department of Agriculture; Hardy County Commission and West Virginia State Conservation Agency (WVSCA) also named as Appellees.
II. FACTS AND HOLDING

The Appellants in this case are seven parties seeking declaratory and injunctive relief against Appellees, the Natural Resources Conservation Service ("NRCS"). The Appellants complain that should the NRCS be allowed to proceed with its planned construction of a dam, as part of its ongoing project along the Lost River Subwatershed, their land will be adversely affected.⁷

The Lost River Subwatershed is part of the Potomac River Watershed in Hardy County, West Virginia.⁸ The dam at issue is one of five dams and impoundments the NRCS planned to construct along the Lost River Subwatershed in order to meet watershed protection, flood prevention, and water supply needs of the area.⁹

A. 1970's

The project began in 1974 as a collaborative effort between the NRCS and local sponsors.¹⁰ As required by the National Environmental Policy Act ("NEPA"), the NRCS issued an Environmental Impact Statement ("EIS").¹¹ The 1974 EIS considered six alternatives, including an alternative of no action, and the adopted plan involving a land treatment measure to 94,750 acres, construction of five dams, and impoundments on designated sites.¹² The EIS also discussed the anticipated environmental impacts of the project, including the need to

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⁷ Id.
⁸ Id. at 418.
⁹ Id.
¹⁰ Id. at 419. The original local sponsors are unknown, but the current sponsors include the named defendant agencies: the Potomac Valley Conservation District, Hardy County Commission, and West Virginia State Conservation Committee. Complaint for Declaratory and Injunctive Relief at ¶25, Webster v. United States Dep't of Agric. (N.D.W.Va. 2009) (No. 2:09cv138), 2009 WL 7060332.
¹² Webster, 685 F.3d at 419. The sites meant for dam construction originally included sites 4, 10, 23, 27, and 16.
relocate eleven residences.\textsuperscript{13} The site in controversy, Site 16, was originally intended to be a multi-purpose floodwater storage and recreation structure.\textsuperscript{14}

The NRCS and local sponsors released a work plan for implementing the project in October 1974, however, due to a lack of local support, the project was temporarily suspended.\textsuperscript{15}

\textbf{B. 1980's}

At the request of project sponsors, the project was reignited in 1985 following severe flood damage along the Lost River.\textsuperscript{16} In August 1989, the NRCS issued an Environmental Assessment ("EA")\textsuperscript{17} to determine whether a new EIS would be necessary.\textsuperscript{18} Later the following year, the NRCS issued a draft Supplemental Information Report, analyzing whether there had been any changes to the project as a whole or whether any significant environmental changes had occurred since the 1974 EIS had been issued.\textsuperscript{19} The NRCS ultimately determined that the 1974 EIS remained an adequate description of the project and its environmental impacts.\textsuperscript{20}

\begin{footnotes}
\item[13] Id. "The NRCS described the Project's anticipated environmental impacts and recognized that it would require relocating eleven residences."
\item[14] Id.
\item[15] Id.
\item[16] Id.
\item[17] See 40 C.F.R. § 1501.3 (2012) (detailing when an agency shall prepare an Environmental Assessment).
\item[18] Webster, 685 F.3d at 419.
\item[19] Id.
\item[20] Id.
\end{footnotes}
C. 1990's

The NRCS approved implementation of the project in a January 1991 Record of Decision (“ROD”) and began construction on Site 4, the first dam to be built, by May 1994. By 2001, dams at Sites 4 and 27 were complete and land-treatment measures had been applied to nearly 17,000 acres.

D. 2000's

Another EA was issued in 2001 when the planning for Site 10, the fourth dam, started. In the report, the NRCS discussed adding ‘water supply’ as a purpose for this site, following a request by local sponsors, prompted by a recent drought. While alternative water supply methods were considered, the NRCS decided that adding this as the purpose of Site 10 was the only practical alternative for providing both water supply and flood prevention, which was already a purpose of Site 10. There were also plans to build a water distribution system that would utilize the water supply from the dam at Site 10, however this plan was advocated by a non-sponsor organization, the Hardy County Public Service District, and construction of the system remained pending as of 2009. Throughout the project, the NRCS continued to evaluate the water resources situation in Hardy County, preparing, along with the West Virginia State Conservation Agency (“WVSCA”), the “Hardy County Water Resources Assessment” in April 2004, and assisted local sponsors with a “Projected Water Needs of Hardy County” report in March 2007.

21 See 40 C.F.R. § 1505.2.
22 Webster, 685 F.3d at 419-420.
23 Id. at 420.
24 Id.
25 Id.
26 Id.
27 Id.; See also id. at 426. (explaining the significance of the construction of the Water Distribution System being unconnected to the NRCS’s planned actions).
28 Id. at 420. This report evaluated the existing and projected water needs for Hardy
In 2005, the NRCS began to re-evaluate the remaining dam sites—Sites 16 and 23. Local sponsors had asked that water supply be added and that recreation be removed as a purpose for Site 16. The NRCS also issued a report that year proposing the elimination of Site 23 from the project. Because of these changes, the NRCS was required to issue a Supplementary Environmental Impact Statement ("SEIS"). The SEIS was released in 2007, reflecting the changes in purpose for Site 16, however, the NRCS withdrew the 2007 SEIS approximately two years later due to a federal lawsuit challenging it. The lawsuit was later dismissed.

A second, and final SEIS was issued in August 2009. The 2009 SEIS reflected the deletion of Site 23 from the project and the purpose changes for Site 16 that had been present in the 2007 SEIS—watershed protection, flood prevention, and water supply. The NRCS had considered 17 alternatives for achieving these purposes, but only two were considered "reasonable" and thus discussed in detail in the 2007 SEIS. Constructing the dam at Site 16 was deemed to be the best option and the 2009 SEIS described measures the NRCS could take for mitigating the adverse impacts of this portion of the project. The NRCS issued a record

29 *Id.* This report concluded that adding water supply storages to the dams at Sites 10 and 16 was necessary to meet the projected short term water demand.
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.; see also* 40 C.F.R. § 1502.9(c)(1) (2012).
34 *Webster,* 685 F.3d at 420.
35 *Id.*
36 *Id.*
37 *Id.* at 421.
39 *Webster,* 685 F.3d at 421. Discussion of mitigation measures required per 40 C.F.R. §
of decision in October 2009 agreeing to implement the Site 16 portion of the project.\textsuperscript{40}

In November 2009, Appellants filed their complaint in the Northern District of West Virginia, naming the USDA, NRCS, PVCD, HCC, and WVSCA as defendants (now, collectively, Appellees).\textsuperscript{41} At the trial level, Appellants asserted that construction of the dam at Site 16 would adversely affect their land and cause them to lose at least some, if not all, of the land.\textsuperscript{42} Appellants requested declaratory and injunctive relief, costs, expenses, and attorneys’ fees, based on allegations of several NEPA violations, most stemming from alleged deficiencies in the 2009 SEIS.\textsuperscript{43}

Parties filed cross-motions for summary judgment and on June 13, 2011, the district court issued an order granting summary judgment for Appellees and denying Appellants’ motion for summary judgment.\textsuperscript{44} The district court concluded that, after reviewing each alleged NEPA violation, Appellees had complied with NEPA by abiding by its procedural requirements, taking a hard look at environmental consequences that would result from the Site 16 dam construction, and allowing public participation in the decision-making process.\textsuperscript{45}

Appellants brought their timely appeal to the United States Court of Appeals for the Fourth Circuit.\textsuperscript{46} Appellants argued eight issues on appeal, each of which the Court of Appeals considered in detail.\textsuperscript{47} After

1502.14(f).

\textsuperscript{40}Webster, 685 F.3d at 421.

\textsuperscript{41}Id.

\textsuperscript{42}Id. See also Complaint for Declaratory and Injunctive Relief at ¶¶ 6-12, Webster v. United States Dep’t of Agric. (N.D.W.Va. 2009) (No. 2:09cv138), 2009 WL 7060332.

\textsuperscript{43}Webster, 685 F.3d at 421.

\textsuperscript{44}Id.

\textsuperscript{45}Id. The purpose and procedural requirements of NEPA will be discussed at depth in the COMMENT portion of this note.

\textsuperscript{46}Webster, 685 F.3d at 421.

\textsuperscript{47}Id. at 422.
considering the merits of each issue, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court.\textsuperscript{48}

III. LEGAL BACKGROUND

Before NEPA was signed into existence on January 1, 1970, its principles were the subject of congressional debate for at least ten years.\textsuperscript{49} There was a recognized need for such an act because of the lack of consistency between administrative agencies and court decisions, with courts reversing administrative agencies because of insufficient consideration to environmental factors.\textsuperscript{50} Guidance for these agencies was clearly lacking.\textsuperscript{51}

The resultant act consists of two key titles.\textsuperscript{52} Title I lays out a national environmental policy calling for cooperation of Federal, State, and local governments, as well as public and private organizations to "create and maintain conditions under which man and nature can exist in productive harmony."\textsuperscript{53} It provides broad national goals for achieving this policy and maps out the procedural requirements which were meant to ensure agency adherence to these goals.\textsuperscript{54} This section requires all federal agencies to take a "systematic, interdisciplinary approach" to planning and decision making which may impact the environment, including issuing a detailed statement of the environmental impact for all proposals for

\textsuperscript{48} See id. at 422-33.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 6.
\textsuperscript{53} Id. See also 42 U.S.C. §4331 (2012).
\textsuperscript{54} LUTHER, supra note 49, at 6-7. See also 42 U.S.C. § 4331(b).
legislation or other major Federal action significantly affecting the quality of the human environment.\textsuperscript{55}

Title II is the portion of NEPA establishing and framing the Council on Environmental Quality ("CEQ"),\textsuperscript{56} which is in charge of creating and implementing NEPA regulations, but has no authority to enforce them.\textsuperscript{57} The general oversight of NEPA is managed by the CEQ, which was created as part of NEPA.\textsuperscript{58} However, the enforcement of NEPA is done via the Administrative Procedure Act and federal question jurisdiction.\textsuperscript{59}

The introduction of NEPA was met with considerable resistance, some of which was fueled simply by confusion.\textsuperscript{60} Agencies simply were not sure if or when NEPA applied to them and if it did, how to use it.\textsuperscript{61} Because the CEQ lacks enforcement authority, the authority was left to the courts.\textsuperscript{62} Court decisions were significant because the CEQ was not authorized to produce legally binding regulations until 1978, eight years after NEPA was signed.\textsuperscript{63} The benefit was that those regulations could then reflect court interpretation of NEPA, which provided for more consistency.\textsuperscript{64}

\textsuperscript{55} LUTHER, supra note 49, at 7. This detailed statement is the Environmental Impact Statement, which will be considered at length in the COMMENT portion of this note.


\textsuperscript{57} LUTHER, supra note 49, at 10.


\textsuperscript{59} SALZMAN & THOMPSON JR., supra note 58, at 310.

\textsuperscript{60} \textit{Id.} ("NEPA cases generally raise one of two questions – should the agency have prepared an environmental impact statement and, if so, was the EIS adequate?") \textit{See also} LUTHER, supra note 49, at 8-9.

\textsuperscript{61} LUTHER, supra note 49, at 9.

\textsuperscript{62} \textit{Id.} at 10.

\textsuperscript{63} \textit{Id.} at 11-12.

\textsuperscript{64} \textit{Id.} at 12. ("...they reflect not only CEQ’s interpretation of NEPA, but also the initial interpretation of the courts and the administrative experiences of other agencies.") The CEQ has also sought to increase understanding of NEPA by issuing the Forty Most
Despite the CEQ’s attempts at clarity, more explanation was needed and came in 1983. The Supreme Court in *Baltimore Gas* was especially instructive, when it stated:

“NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Congress in enacting NEPA, however, did not require agencies to elevate concerns over other appropriate considerations. Rather, it required only that the agency take a “hard look” at the environmental consequences before taking a major action ... Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the “hard look” be incorporated as part of the agency’s process of deciding whether to pursue a particular federal action.”

Six years later, in *Robertson*, the Supreme Court sought to erase any lingering notion that NEPA prescribes results rather than merely prescribes process, stating that “other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed, rather than unwise agency action.” So long as NEPA protocol has been followed, courts will defer to an agency’s decision to act.

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*Asked Questions Concerning CEQ’s NEPA Regulations. See supra* note 38.


*66 Id. at 97. LUTHER, *supra* note 49, at 9.*


*68 Id. at 351.*
so long as that decision is not seen to have been made arbitrarily or capriciously. 69

Though there is an obvious emphasis on informed decision-making with NEPA, if is false to assume that this is the same thing as always reaching an "environmentally friendly" conclusion. National Audubon Society v. Department of the Navy 70 explains that the Act "does not force an agency to reach substantive, environment friendly outcomes." 71 This reinforces the Robertson explanation that NEPA "does not mandate particular results, but simply prescribes the necessary process[,]", 72 which is to say that it "merely prohibits uninformed - rather than unwise - agency action." 73

When reviewing the agencies decision, the court in National Audubon suggested that courts are to ensure that agencies take a "hard look" at the environmental consequences of their proposed actions. 74 This "hard look" involves, minimally, "a thorough investigation into the environmental impacts of [the] action and a candid acknowledgment of risks that those impacts entail." 75 National Audubon further instructs that a court is not to 'flyspeck' an agency’s analysis, looking at the most minor of deficiencies, 76 rather the court “must take a holistic view of what the agency has done to assess environmental impact” and “examine all of the various components of [the] agency’s environmental analysis ... to determine, on the whole, whether the agency has conducted the requisite ‘hard look.’” 77 Courts, often wary of appearing to engage in substantive

69Webster v. U.S. Dep’t of Agric., 685 F.3d 411, 422 (4th Cir. 2012).
71 Id. at 184.
72 Robertson, 490 U.S. at 350.
73 Id. at 351
74 Nat’l Audubon, 422 F.3d at 185.
75 Id. at 185-86.
76 Id. at 186.
77 Id.
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review, will often be disinclined to reverse agencies on grounds that their decision was not a ‘reasoned’ one.78

IV. INSTANT DECISION

The United States Court of Appeals for the Fourth Circuit affirmed the finding of the United States District Court for the Northern District of West Virginia and ruled in favor of the Appellees, finding specifically that the NRCS had complied with mandated NEPA procedures and that they had taken the requisite “hard look” at the project’s environmental effects,79 despite eight issues raised by Appellants.80

The Court of Appeals first determined that the NRCS did not abuse its discretion by accepting the purposes and needs proposed by project sponsors (watershed protection, flood prevention, and water supply) as the purposes and needs for building the Site 16 dam,81 based on the agency having wide discretion in defining the purposes and needs for their proposed actions, so long as those purposes and needs are reasonable,82 and also based on the appropriateness of an agency considering the applicant’s needs and goals for the project.83

The court next considered Appellant’s contention that the NRCS violated NEPA by failing to engage in a scoping process prior to issuing the 2009 SEIS.84 However, because there had been no significant changes in information or circumstances between the issuance of the 2007 SEIS and the 2009 SEIS85, the court disagreed and instead was of the opinion

78 SALZMAN & THOMPSON JR., supra note 58, at 330-31.
80 Id. at 422.
81 Id. at 424.
82 Id. at 422.
83 Id. at 423.
84 Id. at 424.
85 Id. Agencies would have to revise the determinations made in an initial scoping process if they subsequently made substantial changes to the proposed action or if
that the NRCS was not required to engage in another scoping process as part of the preparation of the 2009 SEIS.\textsuperscript{86}

Petitioners' third allegation against the NRCS was that the 2009 SEIS omitted information that was necessary for a complete analysis of the Site 16 dam's potential environmental impacts and stated benefits.\textsuperscript{87} The Court of Appeals rejected this argument by stating that some of the information deemed "missing" was, in fact, included in the 2009 SEIS and that other, non-included information merely amounted to "flyspecks" which did not defeat the NEPA's goals of informed decision-making and informed public comment.\textsuperscript{88} Appellants also contended, along this same point, that the NRCS violated the NEPA by failing to consider the construction and operation of a water treatment facility and water distribution system as "connected actions."\textsuperscript{89} The only such system would have been the Baker/Mathias Water Distribution System, and the Court of Appeals pointed out that this was an independent action and thus did not have to be discussed by the NRCS as a "connected action."\textsuperscript{90}

Fourth in the laundry list of Appellant contentions is that the NRCS failed to consider all reasonable alternatives in the 2009 SEIS, but the court states that they "are confident that the NRCS considered all reasonable alternatives."\textsuperscript{91} Appellants also state that the NRCS failed to consider alternative sites for the Site 16 Dam within the Lost River Watershed. However, Appellants themselves do not propose any specific alternative sites and thus the court defers to the findings of the NRCS.\textsuperscript{92}

significant new circumstances or information bearing on a proposed action or its impacts arise. 40 C.F.R. §1501.7(c).
\textsuperscript{86} Webster, 685 F.3d at 424.
\textsuperscript{87} Id. at 424-425.
\textsuperscript{88} Id. at 425.
\textsuperscript{89} Id. at 426 (discussing what is required to for an action to be considered "connected").
\textsuperscript{90} Id. at 426-427.
\textsuperscript{91} Id. at 427.
\textsuperscript{92} Id. at 428.
Appellants next assert that the 2009 SEIS was filed to address all of the environmental effects that would result from the construction of the Site 16 dam. The Court of Appeals found however that the NRCS did take a hard look at the environmental impact of the construction and that, again, information which Appellants claim was not but should have been considered, either actually was considered in the 2009 SEIS or amounted to nothing more than flyspecks.

The next contention by Appellants is that the NRCS included a misleading and inaccurate cost-benefit analysis. As with the other contentions, the court dismissed this, noting that the NRCS included an accurate comparison of the monetary and qualitative cost-benefit analysis of two alternatives and that an agency is not even required to include a cost-benefit analysis in an EIS when comparing different alternatives unless such an analysis is considered relevant to the choice among environmentally different alternatives.

The seventh assertion by Appellants is that the 2009 SEIS failed to provide sufficient detail about planned mitigation measures. However, the court points out that the 2009 SEIS included a “Mitigation Summary” section with identified environmental effects of the Site 16 dam construction and introduced specific proposals to alleviate these effects. In the court’s eyes, this was enough “for the purposes of NEPA, to

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93 Id.
94 Id. at 429.
95 Id. A specific example of this included information was the impact that the dam would have on downstream fisheries.
96 Id. Again Appellants try to connect the water distribution system, supra note 27.
97 Webster, 685 F.3d at 431.
98 Id. at 430 (noting that the analysis is not misleading and does not thwart the NEPA’s goals).
99 Id. The two alternatives considered were (1) building the Site 16 dam and (2) no action.
100 Id. See 40 C.F.R. § 1502.23 (2012).
101 Webster, 685 F.3d at 431.
102 Id. at 432.
demonstrate that the NRCS took a hard look at the effects its actions would have on wetlands and that it developed plans to mitigate those effects."

Finally, Appellants alleged the NRCS violated NEPA by failing to invite the Army Corps of Engineers to participate in preparing the 2009 SEIS. Based on the NRCS providing the Army Corps with opportunities to participate in the preparation of both the 2007 and 2009 SEIS’s and the Army Corps taking advantage of some of these opportunities, the court felt that this amounted to nothing more than harmless error.

Based on the Court of Appeals’ denial of all eight of Appellant’s contentions, the court affirmed the decision the District Court in favor of the NRCS.

V. COMMENT

The National Environmental Policy Act ("NEPA") is a unique creature, as far as environmental law statutes go, for several reasons including its background (as discussed above), its purpose, its procedures, and the seemingly harsh review process presented to anyone wishing to wield it as a challenging tool. It was this review process that ultimately defeated the plaintiffs in this case, both at the trial and appellate levels, resulting in what at first glance may seem like an unfair or even unreasonable result.

103 Id.
104 Id. See also 40 C.F.R. § 1501.6, 1508.15 (outlining who agencies must request to participate in the NEPA process as cooperating agencies).
105 Webster, 685 F.3d at 433.
106 Id.
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A. Purpose

The NEPA\textsuperscript{107} was enacted with the purpose of promoting general welfare; creating and maintaining conditions under which man and nature can exist in productive harmony; and fulfilling the social, economic, and other requirements of present and future generations of Americans.\textsuperscript{108} NEPA seeks to "educate decision makers, ideally by sensitizing them to environmental issues and helping the agencies find easy, inexpensive means of mitigating environmental impacts."\textsuperscript{109} Along these lines, there has more recently been emphasis placed on fostering cooperation and communication, as evidenced in a 2004 Executive Order, seeking to "ensure that [various federal departments and agencies] implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decision making, in accordance with their respective agency missions, policies, and regulations."\textsuperscript{110}

B. NEPA Procedural Requirements\textsuperscript{111} and NRCS Compliance

To facilitate its desired education component, NEPA requires agencies to create an Environmental Impact Statement ("EIS") whenever it is dealing with legislative recommendations or major federal actions that have significant environmental impacts.\textsuperscript{112} Before an agency even enters the EIS process, they will determine if this is a requirement for their proposed project. The EIS process is lengthy and can be expensive, so the pre-EIS process can potentially save agencies a large portion of time and money.

\begin{footnotes}
\item[108] 42 U.S.C. § 4331(a).
\item[109] SALZMAN & THOMPSON JR., supra note 58, at 322.
\item[111] For a graphical illustration of the process, see LUTHER, supra note 49, at 22.
\item[112] SALZMAN & THOMPSON JR., supra note 58, at 325.
\end{footnotes}
An EIS will be necessary if there is (1) a major federal action and (2) if the action has a significant impact on the environment. If the first requirement is established, the second will be established either through a Categorical Exclusion ("CE") or through an Environmental Assessment ("EA"), which will determine whether a CE or EIS is more appropriate.

In the event that the EA concludes that there is significant environmental impact, the agency will enter into the real meat of the NEPA process. This process begins with filing a Notice of Intent, which will essentially describe the proposed action, alternatives and scoping process; give details on whether, when, and where scoping meetings will be held; and provide the name(s) and address(es) of those within the agency who can answer questions about the proposed action and EIS. The NRCS issued an EA in 1989, “reevaluating potential environmental impacts relating to Site 4, the first dam scheduled for construction.” The agency issued another EA in 2001 related to dam

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113 See 40 C.F.R. § 1508.18 (2012) (Stating generally that major federal actions are those which “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.”).

114 See 40 C.F.R. § 1508.4 (Noting that those actions “which normally do not individually or cumulatively have a significant effect on the human environment” are classified as Categorically Excluded.”) These actions will not require an EIS, however the agency may be required to provide documentation proving that CE is an appropriate designation. LUTHER, supra note 49, at 21.

115 See 40 C.F.R. §1508.9. This document is to be used to determine whether an EIS or finding of no significant impact (“FONSI”) is appropriate; including “brief discussions of the need for the proposal, of alternatives as required . . . , of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” If it is determined that there is no significant impact, an Agency will simply prepare the FONSI and continue on with their planned action. LUTHER, supra note 49, at 21.

116 See 40 C.F.R. § 1508.22.

117 Id.

118 Webster v. U.S. Dep’t of Agric., 685 F.3d 411, 419 (4th Cir. 2012).
Site 10 because of the added purpose of "water supply" for this site. No EA's were issued in regards to the Site 16, the site in controversy.

The agency will then enter into the scoping process, which requires that the agency consider three types of actions (connected, cumulative, and similar actions), three types of alternatives (no action, other reasonable courses of action, and mitigation measures not already proposed), and three types of impacts (direct, indirect, and cumulative). This process determines "the scope of the issues to be addressed in the EIS and to identify significant issues related to the proposed action." During this process, the agency will invite participation by and input from federal, state, and local agencies, as well as the public. The information gathered in this process will be utilized in preparing the initial Draft EIS. The NRCS engaged in a scoping process in 2006, prior to issuing the 2007 SEIS, due to the changes in the Site 16 dam's purpose and the decision to eliminate the Site 23 dam. Petitioners in Webster complain that there should have been another scoping process prior to the release of the 2009 SEIS. The court, however, disagreed, noting that agencies are not required to engage in a scoping process when developing a SEIS; they must simply "revise determinations made in an initial scoping process if they subsequently make substantial changes to the proposed action or if significant new circumstances or information bearing on the proposed action or its impacts arise."

The next step in the NEPA process is the preparation of a Draft EIS. This draft will include all of the requisite EIS sections, including

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119 Id. at 420.
120 40 C.F.R. § 1508.25.
121 Webster, 685 F.3d at 418.
122 Id.
123 Id.
124 Id. at 420.
125 Id. at 424. See also 40 C.F.R. §§ 1501.7(c), 1502.9(c)(4).
126 LUTHER, supra note 49, at 22.
purpose and need statement, alternative, affected environment, environmental consequences, a list of preparers, and an appendix. Title 40, Section 1502, of the Code of Federal Regulations outlines EIS requirements and notes that an EIS should be “analytic rather than encyclopedic.” Once prepared, the draft EIS will be made available for comment. The comment portion of the process is vital because the aim of NEPA is to ensure the public is informed of those agency actions significantly affecting the environment. Draft EIS’s are distributed to all organizations, agencies, and members of the public which have an interest in the planned action, as well as made available to anyone who simply wants to see it; these entities are also all allowed to comment on the planned action and raise any concerns they feel necessary. To promote this public involvement, the agency is required, per Title 40 Section 1506.6 of C.F.R., to “provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform public stakeholders that may be interested in or affected by a proposed action.”

Once the lead agency receives comments from its cooperating agency and other interested organizations and/or individuals, they are required to respond to those comments. These responses, as outlined in

127 40 C.F.R. § 1502.
128 Id.
129 LUTHER, supra note 49, at 22.
130 Id. at 29.
131 Id.
132 Id. For the requirements of commenting, see 40 C.F.R. § 1503 (2012).
133 The lead agency, in this case the NRCS, is that agency which has the responsibility of preparing the NEPA documentation, making the case for proposed action. 40 C.F.R. § 1501.5. Cooperating agencies are those federal agencies that have jurisdiction, either by law or due to special expertise, regarding the environmental impact of the proposed action. 40 C.F.R. § 1501.6. Cooperating agencies have their own responsibilities in the NEPA process, see LUTHER, supra note 49, at 26.
135 Id. at 24.
Section 1503 of NEPA become part of the final EIS. The EIS will examine a wide scope of information including any adverse environmental effects of the proposed action and alternatives to the proposed action.

It is this final step in the EIS procedure that is the most common focus of NEPA litigation. Showing that an agency has not done its due diligence in preparing an adequate EIS presents a challenge for those agencies, organizations, and/or individuals who oppose the end decision reached as a result of the EIS. This end decision will be addressed in the lead agency’s Record of Decision, which will be published following the final EIS (or the final SEIS if necessary). The Record of Decision will state the agency’s course of action before the agency proceeds down that course. The overall formal decision making process under NEPA is relatively short, and “the CEQ has taken a pragmatic view of timing, acknowledging that, even without a formal report or recommendation, an agency proposal may exist in fact.”

In the present case, the original EIS was prepared in 1974, during the original project planning. Following the revamping of the project, a Record of Decision was issued in January, 1991, approving implementation of the Project. The NRCS issued another Record of Decision in October, 2009, specifically regarding their decision to implement the Site 16 dam.

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136 40 C.F.R. § 1503.4(b) (2012).
138 SALZMAN & THOMPSON JR., supra note 58, at 329.
139 40 C.F.R. § 1505.2.
140 Id.
141 40 C.F.R. § 1501.4. See also SALZMAN & THOMPSON JR., supra note 58, at 328.
142 SALZMAN & THOMPSON JR., supra note 58, at 328.
143 Webster v. U.S. Dep’t of Agric., 685 F.3d 411, 419 (4th Cir. 2012).
144 Id.
145 Id. at 420-21. In November, 2009, Appellants filed their complaint. Id. at 421.
Under certain circumstances, agencies will be required to prepare a supplemental EIS ("SEIS") prior to issuing a final rule of decision and proceeding on with their proposed action. As *Marsh*, a case which will be looked at further in the next section, points out:

"The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. PREPARATION OF SUCH statements, however, is at times necessary to satisfy the Act's "action-forcing purpose." .... "It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to completion of agency action simply because the relevant proposal has received initial approval."}

In other words, even in the event that a proposed action has been approved and a Rule of Decision issued, if new, material information comes available, it would be nonsensical to allow the agency to proceed without addressing this information with a SEIS. It is the same logic as that which requires agencies to incorporate their responses to the questions/concerned raised in the drafting process into the final EIS. To not require otherwise would be a failure to fulfill the public participation portion of NEPA's purpose.

The first NRCS decision to provide an SEIS came in 2007 due to significant changes made in the project, specifically the "changes in the purposes of the Site 16 dam to include flood control, water supply, and watershed protection" and the decision to remove recreation as a purpose for Site 16. The 2007 SEIS was challenged in a federal lawsuit, forcing

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147 *Id.* at 370-371 (emphasis in original).
148 *Webster*, 685 F.3d at 420.
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the NRCS to revise it and issue a second SEIS in 2009, which included the new decision to “eliminate Site 23 from the Project.” The 2009 SEIS was the focus of a majority of Petitioners’ complaints, and consequently, the focus of most of the Court of Appeals’ attention.

The complaints related to the 2009 SEIS focused on the breadth of information considered, including the alleged lack of information regarding a complete analysis of the Site 16 dam’s potential impacts and benefits, the failure to consider all reasonable alternatives and environmental impacts; and the failure to provide sufficient detail about planned mitigation measures. As was addressed supra in the Instant Decision, the court dismissed all of these complaints, finding that all of the “missing” or “insufficient” information was either actually included in the 2009 SEIS, or was sufficient to the extent that finding otherwise would be considered “flyspecking” and would be overstepping the court’s purpose in these decisions.

Finally, there was a complaint regarding the NRCS’s failure to invite the Army Corps of Engineers to participate in the preparation of the SEIS. Even this contention is not sufficient to win the court over, however, as it is deemed a “harmless error.” Specifically the court notes here:

“Despite bearing the burden to establish harm, Appellants fail to show, or even suggest, any harm that resulted from the failure to designate the Army Corps as a

149 Id. at 420, 421.
150 Id. at 424, 425.
151 Id. at 427.
152 Id. at 428
153 Id. at 431.
155 Webster, 685 F.3d at 432.
cooperating agency. Nor do we identify any harm resulting from this failure. In fact, the record reflects that the NRCS provided the Army Corps opportunities to participate in preparing both the 2007 SEIS and the 2009 SEIS, and that the Army Corp took advantage of at least some of these opportunities."

C. Standard of Review and Plaintiff’s Burden

*Robertson* established the burden to be met when seeking to successfully challenge NEPA, namely: “it requires all federal agencies to take a “hard look” at the potential environmental consequences of their decisions” and it “does not ... impose any substantive environmental obligations upon agencies;” it “merely prohibits uninformed – rather than unwise – agency action.” The trial court in *Webster* acknowledged this and further pointed out that this means that “an agency action with adverse environmental consequences can be compliant with NEPA so long as those consequences are adequately identified and evaluated.” It is up to the reviewing court to simply ensure that the agency took this requisite “hard look,” and beyond that the court is to give strong deference to the agency’s findings and final decision. It is not the job of the court to pick apart every small detail of the agencies NEPA compliance process,

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156 40 C.F.R. § 1501.6 (2012).
157 *Webster*, 685 F.3d at 433.
160 *Id. citing Robertson*, 490 U.S. at 350.
161 *Id.*
162 *Id.*
163 *Id. at *3.*
looking for "flyspecks" of inadequacy. An agency's action may only be set aside so long as it is wholly "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This "arbitrary and capricious" standard comes from the Administrative Procedure Act.

The primary adverse environmental consequences being challenged by the Plaintiffs in Webster was the loss of their land, a total of nearly 200 acres between all seven plaintiffs. The NRCS did acknowledge in the original EIS that the relocation of eleven residences would be required by the proposed action, but chose to proceed anyway, signaling that they must have felt that these costs did not outweigh the benefits of their actions. The court does not question this finding, giving very little acknowledgment at all to this particular cost.

The court ultimately considers the challenges raised by the plaintiffs to either not be credible or to be mere flyspecking and is unwilling to consider them enough to overturn the decision of the trial court, supporting the NRCS's actions.

Even in Marsh, the United States Supreme Court overturned the appellate court's decision that the Army Corp of Engineers acted in an.

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164 Webster v. U.S. Dep't of Agric., 685 F.3d 411, 421 (4th Cir. 2012).
165 Id. at 422.
166 Id.
168 The only attention given to the relocation of residences was the statement: "The NRCS described the Project's anticipated environmental impacts and recognized that it would require relocating eleven residences." Webster, 685 F.3d at 419.
169 Id. at 433.
arbitrary and capricious manner.\textsuperscript{171} The facts in that case also involved the construction of a dam with acknowledged adverse effects on the environment, namely effects on wildlife.\textsuperscript{172} While the Supreme Court acknowledged that the ACE’s final decision may have in fact been disputable, it was not arbitrary and capricious and should thus stand.\textsuperscript{173} The lesson learned from \textit{Marsh} and \textit{Robertson} is that an agency must only show that it took its requisite “hard look,” that it considered the benefits, costs of, and alternatives to its actions and, based on these findings, decided to proceed anyway. So long as this process can be shown, courts will not upset that decision and the agency shall be allowed to continue.

\textbf{D. Harsh, but Legally Just Result}

The seven plaintiffs in \textit{Webster} were obviously and reasonably concerned with the effect the NRCS’s actions would have on them. The Site 16 dam would effectively drive three of them from their homes and cost four of them a significant portion of their land.\textsuperscript{174} However, this was a cost which the NRCS considered in their decision making process, in fact it recognized that a total of eleven residences would be lost due to its actions, and it decided to proceed anyway.\textsuperscript{175} The NRCS did its due diligence, demonstrated compliance with the goals of NEPA, and thus met its “hard look” burden. From where the court sits, this is enough. The takeaway from the case for future plaintiffs wishing to challenge agency actions based on NEPA violations is that the standard is not only well established, but hard to beat, and plaintiffs will have a tall order to fill. Without being able to prove that the agency acted in an arbitrary and capricious manner, then the consequences of that agency’s actions, no matter how unpopular or “unwise,” will nevertheless be viewed as “informed” and allowed to proceed.

\textsuperscript{171} Id. at 385.
\textsuperscript{172} Id. at 363-366.
\textsuperscript{173} Id. at 385.
\textsuperscript{174} Webster, 685 F.3d at 421.
\textsuperscript{175} Id. at 419.
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At first glance, this result is harsh, almost to the point of unreasonable. The review of the past case history, however, brings it quickly into perspective and shifts the court from being perceived as a seemingly cold and heartless bench to one that legally had no other choice based on their standard of review. It could be argued that this “arbitrary and capricious” standard is too extreme in cases that could ultimately cost people their homes. On the other hand, it could also be, and probably more successfully, argued that there were other avenues of relief for the Petitioners in this case that would be more appropriate than changing the standard of review for an entire class of cases. The proposed action had been a possibility since 1974, when the original EIS\textsuperscript{176} was issued. It has been a nearly inevitable fact since 1991 Record of Decision\textsuperscript{177} was issued. There was no action to be filed by these particular parties until the 2009 SEIS and Record of Decision\textsuperscript{178} came out since they had not yet suffered a loss, but before this time, parties could have perhaps cut their losses and sold their arguably doomed (and certainly devalued) land.

VI. CONCLUSION

The National Environmental Policy Act is designed to encourage informed decision making by agencies whose proposed actions will have significant impact on the environment.\textsuperscript{179} Courts considering decisions made under NEPA’s oversight need only assure themselves that the agency did not come to their final conclusions in an “arbitrary or capricious”\textsuperscript{180} manner. These courts are not to consider whether or not these decisions will be viewed societally as “popular” or “wise.”\textsuperscript{181} The balancing of the costs and benefits of a project does not fall to the courts, for that is the job of the agency proposing the action. For plaintiffs like

\begin{enumerate}
\item\textsuperscript{176} Id.
\item\textsuperscript{177} Id.
\item\textsuperscript{178} Id. at 420-21.
\item\textsuperscript{179} SALZMAN & THOMPSON JR., supra note 58, at 322.
\item\textsuperscript{180} Webster, 685 F.3d at 422.
\item\textsuperscript{181} Robertson v. Methow Valley Citizens Council, 490 U.S. 322, 351 (1989).
\end{enumerate}
those in *Webster*, who will lose their land and their homes, some of which have been in their families for generations,\(^{182}\) this means that courts are unlikely to be sympathetic to their plight. These plaintiffs' only hope is to fulfill their burden of showing that the agency acted arbitrarily or capriciously, otherwise they are left to suffer their losses. While this seems to be a strong pill to swallow at first blush, the review of relevant case law reveals the reasonableness behind it. Agencies which have done their due diligence and met their own very costly burden, should not have their actions defeated by those whose losses the agency considered in the first place and ultimately deemed less than the benefits to reaped by their proposed actions. The Appellants in *Webster* will lose nearly 200 acres of land,\(^{183}\) but the NRCS has done their research, completed the NEPA process, and felt that these losses are not enough to cease and desist, which was enough to satisfy not only the trial court, but also the Fourth Circuit Court of Appeals.

AMIE COLEMAN

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\(^{183}\) *Id.*