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Allowing for Greater Admission of Evidence in NEPA Predetermination Suits

W. Riley Lochridge†

INTRODUCTION

Congress passed the National Environmental Policy Act (NEPA)1 to ensure that federal, state, and local governments and their associated organizations coexist in harmony with the environment.2 It is "our basic national charter for protection of the environment."3 It is distinct from other areas of environmental law, which focus on specific activities (such as strip mining or introducing new chemicals); specific places, flora, or fauna (such as wilderness areas or endangered species); or the land, water, or air.4 By contrast, NEPA broadly aims to "establish[ ] [environmental] policy, set[ ] [environmental] goals, and provide[ ] means for carrying out [said] policy."5 It aims to structure the governance process in support of environmental values and forces the government and its agents to adhere to those values when it regulates.6

To achieve the goal of coexisting with the environment, Congress "requires agencies to consider the environmental consequences of major federal actions that significantly affect the quality of the human environment."7 Before committing resources to such a project, the agency must perform an environ-

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2 42 USC § 4331(a).
3 40 CFR § 1500.1(a).
4 See Nicholas C. Yost, NEPA Deskbook 5 (Environmental Law Institute 3d ed 2003).
5 40 CFR § 1500.1(a) (citations omitted).
6 Yost, NEPA Deskbook at 5 (cited in note 4).
mental analysis of the effects of their proposed action. Most conspicuously, this requires completion of an environmental impact statement (EIS). To comply with NEPA, the agency must produce an objective EIS, although it may identify a preferred course of action while conducting the EIS. The agency must also assess the results by closely examining the EIS “objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” Courts have thus held that agencies violate NEPA if they predetermine their analysis by committing themselves to an outcome before the process is completed rather than conducting an EIS prior to making a final decision. If a court finds that an agency has violated NEPA, it may issue a remedy that “fulfill[s] the objectives of the statute as closely as possible”—a standard that most frequently results in an injunction.

Judicial review of NEPA is governed by the Administrative Procedure Act (APA), which establishes that a court should overturn an agency decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” A court requires an agency to take a “hard look” at environmental consequences in order to demonstrate that its process was not arbitrary or capricious under the APA. This “hard look” doctrine establishes a level of judicial review requiring “agencies to offer a clear explanation of the weight they give to various factors in the decision-making process.” This standard gives deference to the agency but requires the court to “insure [sic] that the agency has taken a ‘hard look’ at environmental consequences [while assuring that the reviewing court] cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”

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8 Forest Guardians v United States Fish & Wildlife Service, 611 F3d 692, 711 (10th Cir 2010). See also 42 USC § 4332(2)(C).
9 42 USC § 4332(2)(C). See also Yost, NEPA Deskbook at 9 (cited in note 4).
10 See Forest Guardians, 611 F3d at 713.
11 Metcalf v Daley, 214 F3d 1135, 1142 (9th Cir 2000).
12 See, for example, id at 1143–45.
13 Environmental Defense Fund v Marsh, 651 F2d 983, 1005 (5th Cir 1981) (noting further that injunctions are subject to equity principles).
15 5 USC § 706(2)(a).
16 See Kleppe v Sierra Club, 427 US 390, 410 n 21 (1976).
17 Czarnezki, 25 Stan Envir L.J at 14 (cited in note 7).
A circuit split has recently emerged on the question of what evidence courts may consider when assessing whether an agency has predetermined its environmental assessment and thus violated its obligations under NEPA. This split implicates not only NEPA’s power to shape agency behavior, but also the general relationship between courts and federal agencies under the APA. Specifically, in *Forest Guardians v United States Fish & Wildlife Service*, the Tenth Circuit held that courts should “not ignore relevant evidence that suggests that the agency may have violated the procedures established by NEPA.” This requires courts to look at the administrative record in its entirety, rather than focusing solely on the environmental analysis itself, as the Fourth Circuit did in *National Audubon Society v Department of the Navy*.

This Comment seeks to establish a framework for deciding what evidence courts may consider while determining whether a NEPA environmental assessment has been inappropriately predetermined. Part I provides background on NEPA, its enactment, and its dual purpose of providing both substantive goals and “action forcing” procedures to realize them. Part II outlines the judicial review of NEPA under the APA’s “hard look” doctrine. Part III discusses the circuit split that has emerged between the approaches of the Fourth and Tenth Circuits regarding evidence used to decide whether an environmental assessment was predetermined. Part IV advocates adopting the Tenth Circuit’s position, which allows for greater admission of evidence by the courts. Finally, Part V offers a brief conclusion.

I. NEPA’S DUAL OBJECTIVES

Congress enacted NEPA to ensure that federal, state, and local governments, as well as public and private organizations, “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony.” In this way, NEPA was meant to serve as the “basic national charter for protection of the environment.”

NEPA seeks to balance a broad range of environmental considerations as well as “other essential considerations of national

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19 611 F3d 692 (10th Cir 2010).
20 Id at 717.
21 422 F3d 174, 198 (4th Cir 2005).
22 42 USC § 4331(a).
23 40 CFR § 1500.1(a).
The Act requires agencies to integrate environmental considerations throughout the planning process. To accomplish this integration, NEPA sets out two related objectives: "[p]reventing environmental damage and ensuring that agency decisionmakers take environmental factors into account." In crafting NEPA, the factor of ultimate importance was the "link between procedure and substance." In contrast to the previous patterns of narrow, incremental regulation focused on specific aspects of our environment, NEPA establishes a new, comprehensive framework that reorganizes the government's relationship with environmental considerations. The Act's stated objectives and its congressional record make clear that "Congress intended to make NEPA more than a procedural paper trail." Rather, NEPA seeks to provide improved and harmonious interactions with the environment, while recognizing that "if goals and principles are to be effective, they must be capable of being applied in action."

Substantively, NEPA's framers intended to "redirect the goals and policy decisions generated within federal agencies" to elevate the importance of environmental assets and concerns. Through NEPA, Congress declared a "national policy to guide federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment." Specifically, NEPA declares a purpose of promoting efforts that "will prevent or eliminate damage to the environment." The Act requires that agencies use "all practicable means" to achieve these goals.

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24 42 USC § 4331(b).
26 Yost, NEPA Deskbook at 5 (cited in note 4).
28 See Yost, NEPA Deskbook at 5 (cited in note 4).
30 Lindstrom, 20 J Land Res & Envir L at 247 (cited in note 27). See also Calvert Cliffs' Coordinating Committee, Inc v United States Atomic Energy Commission, 449 F2d 1109, 1114 (DC Cir 1971) ("Congress did not intend [NEPA] to be such a paper tiger.").
32 Lindstrom, 20 J Land Res & Envir L at 249 (cited in note 27).
34 42 USC § 4321. See also Yost, NEPA Deskbook at 5–6 n 12 (cited in note 4), citing 115 Cong Rec 40416 (1969) (noting that NEPA's Senate author, the late Senator Henry Jackson (D-Wash), explained to the Senate before NEPA's final passage that "[t]he basic
In terms of procedural changes, the drafters sought to provide policymakers with the ability to overcome the prior gridlock and fragmentation that consumed many previous attempts at environmental legislation. NEPA required federal agencies to consider the environmental consequences of major federal actions before it commits resources to a project. To ensure that the environmental factors remain a part of the agency’s process, the Act established “action-forcing” requirements that generate information for agency and public benefit and guarantee that decision-makers give the environmental factors appropriate consideration. Most important among these is the EIS, which obligates an agency to thoroughly consider all potential environmental consequences.

The Council on Environmental Quality (CEQ), an organization created under NEPA to report on the quality of the environment in 42 USC §§ 4341–4347, has emphasized the connection between the procedural and substantive goals of the act. Its binding regulations state that the primary purpose of the EIS “is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” The procedural requirements, including the EIS, of “NEPA ha[ve] twin aims. First, [agencies are obligated] to consider every significant aspect of the environmental impact of a proposed action. Second, [NEPA] ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” In the end, the procedure established by NEPA seeks to operationalize the Act’s underlying goal of realizing harmony between government activities and the environment “to the fullest extent possible.”

principle of th[is] policy is that we must strive in all that we do, to achieve a standard of excellence in man’s relationships to his physical surroundings”.

36 42 USC § 4331(b).
37 See Lindstrom, 20 J Land Res & Envir L at 249 (cited in note 27).
38 See Yost, NEPA Deskbook at 6 (cited in note 4).
39 See 42 USC § 4332(2)(C).
40 See Yost, NEPA Deskbook at 7 (cited in note 4) (discussing Executive Order of President Carter in which CEQ’s guidelines became mandatory regulations).
41 40 CFR § 1502.1.
43 42 USC § 4332.
Ultimately, the substantive and procedural goals of NEPA aim "not to generate paperwork—even excellent paperwork—but to foster excellent action." The process established by NEPA requires public officials and decisionmakers to make informed decisions based upon an understanding of relevant environmental concerns in order to take actions consistent with the Act's goals of protecting and even restoring the environment.

II. JUDICIAL REVIEW OF NEPA ASSESSMENTS UNDER THE "HARD LOOK" DOCTRINE

Part II provides background on the judicial review governing NEPA, which is essential given that the Act places regulatory obligations on agencies "without apparent means of oversight." The Council on Environmental Quality's (CEQ) regulations state that "[t]he President, the federal agencies, and the courts share responsibility for enforcing the Act." Despite this mandate, the absence of enforcement provisions invites institutional inattention, and "NEPA's enforcement ultimately depends on the courts." Part II.A looks at the way courts have grappled with the procedural and substantive requirements of the Act while ultimately focusing on the former. Part II.B discusses the APA's requirement that courts take a "hard look" at an agency's decision-making processes. Part II.C discusses the exacting requirements a plaintiff must meet to successfully litigate a charge of predetermination.

A. NEPA Litigation in the Courts Has Emphasized Procedural Requirements

NEPA requires federal agencies planning major federal actions that will significantly affect the environment to create an EIS detailing "the environmental impact of the proposed action . . .[,] any adverse environmental effects which cannot be avoided . . .[,] [and] alternatives to the proposed action." NEPA thus establishes specific procedures that agencies must follow before taking any action and requires the agencies to publicly distribute their findings regarding the environmental implications of any

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44 40 CFR § 1500.1(c).
45 See id.
46 Yost, NEPA Deskbook at 19 (cited in note 4).
47 40 CFR § 1500.1(a).
48 Id.
49 42 USC § 4332.
proposed actions. Furthermore, NEPA created the CEQ to oversee the implementation of the Act and report on the quality of the environment. CEQ regulations require that decision-makers "emphasize real environmental issues and alternatives." 

The first significant decision interpreting NEPA demonstrated that the courts would require agencies to take environmental considerations seriously. In *Calvert Cliffs’ Coordinating Commission v United States Atomic Energy Commission* the DC Circuit found that an EIS that merely "accompan[ied]" an application through the review process without actually being considered made a "mockery of the Act." Thus, the Court held that an agency must engage in an individualized balancing of the environmental issues raised by weighing them against economic and technical benefits and taking all alternatives into account. This balancing makes certain that "each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." 

Subsequent cases—in particular those cases that have reached the Supreme Court—have emphasized the procedural nature of NEPA. The Supreme Court has recognized that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." The focus on procedure has led to claims that the Supreme Court and "disinterested" leadership from the Executive Branch have rendered "NEPA's substantive objectives and declarations for environmental quality legally impotent." This overwhelming emphasis on procedure led a former chair of CEQ to describe court and agency implementation of NEPA as a "near obliteration of substantive review."

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50 *Audubon Society*, 422 F3d at 184.
51 42 USC § 4341-47.
52 40 CFR § 1500.2(b).
53 449 F2d 1109 (DC Cir 1971).
54 Id at 1117.
55 Id at 1114.
57 Lindstrom, 20 J Land Res & Envir L at 246 (cited in note 27).
Strycker's Bay Neighborhood Council, Inc v Karlen\textsuperscript{59} is often cited to support the notion that NEPA is strictly procedural in nature.\textsuperscript{60} In Strycker's Bay, the Court overturned the Second Circuit's finding that adverse environmental effects outweighed the US Department of Housing and Urban Development's selection of a site for a housing facility.\textsuperscript{61} In reaching its decision, the Court rejected the view that "environmental factors . . . should be given determinative weight."\textsuperscript{62} Rather, the Court found that once an agency has complied with NEPA's procedural requirements and arrived at a decision, a court may only ensure that the agency has considered the environmental consequences, and it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."\textsuperscript{63} The Court stated that an agency was not required to elevate environmental concerns over other considerations and provided no guidance regarding how the relevant environmental factors should be addressed.\textsuperscript{64}

Nine years after Strycker's Bay, the Court clarified its view that NEPA is procedural in Robertson v Methow Valley Citizens Council.\textsuperscript{65} It distinguished "[o]ther statutes" that "may impose substantive environmental obligations on federal agencies" in finding that "NEPA merely prohibits uninformed—rather than unwise—agency action."\textsuperscript{66} Focusing on procedure, the Court found that the "sweeping policy goals announced in § 101 of NEPA" are realized in the "action-forcing" procedures the Act lays out, namely an EIS.\textsuperscript{67} By requiring the preparation of detailed impact statements, the Court found that NEPA will "inevitably bring pressure to bear on agencies 'to respond to the needs of environmental quality.'"\textsuperscript{68} Furthermore, it found that the substantive policy goals were only precatory to NEPA.\textsuperscript{69} Thus, Robertson further entrenched the procedural focus of NEPA.

\textsuperscript{59} 444 US 223 (1980).
\textsuperscript{60} See id at 227. See also Robertson v Methow Valley Citizens Council, 490 US 332, 350 (1989).
\textsuperscript{61} Strycker's Bay, 444 US at 227–28.
\textsuperscript{62} Id at 227 (quotations and citations omitted).
\textsuperscript{63} Id at 227–28 (quotations and citations omitted).
\textsuperscript{64} Czarnezki, 25 Stan Envir L J at 11 (cited in note 7), citing Strycker's Bay, 444 US at 227.
\textsuperscript{65} 490 US 332 (1989).
\textsuperscript{66} Id at 351.
\textsuperscript{67} Id at 350.
\textsuperscript{68} Id at 349, citing 115 Cong Rec 40425 (1969) (remarks of Senator Muskie).
\textsuperscript{69} Robertson, 490 US at 349.
B. The "Hard Look" Doctrine Provides for a Review of the Substantive Grounds of NEPA Determinations

NEPA litigation takes place under the framework of the APA. APA § 701(a) states that agency decisions are subject to judicial review except when a statute forbids judicial review or where "agency action is committed to agency discretion by law." NEPA does not explicitly prohibit judicial review and thus is subject only to the second exemption, although the Supreme Court has consistently stated that the "committed to discretion" exception is a narrow one. Thus, judicial review of NEPA occurs under the APA's requirement that a federal agency's final decision may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard provides general deference to the agency decision but also requires careful examination of the environmental consequences.

In describing this position, the Court in *Citizens to Preserve Overton Park, Inc v Volpe* declared that courts are required to consider the relevant factors in such a way that its "inquiry into the facts is to be searching and careful." Courts must assure that the agencies have "engage[d] in careful consideration of relevant factors in the decision-making process," but the *Overton Park* Court emphasized that "the ultimate standard of review is a narrow one. . . . The court is not empowered to substitute its judgment for that of the agency." It is by applying this searching, albeit limited, standard of review that courts comply with the APA-mandated arbitrary and capricious standard.

The Supreme Court clarified its *Overton Park* decision in *Kleppe v Sierra Club* by explaining that the role of the courts in NEPA litigation "is to ensure that the agency has taken a 'hard

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70 See 5 USC § 701(a)(1).
71 5 USC § 701(a)(2).
72 See *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 410 (1971) (quoting the APA's framers statement that discretion is appropriate only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'"). See also Lindstrom, 20 J Land Resources & Envir L at 255 (cited in note 27).
73 5 USC § 706(2)(A).
74 See *Kleppe*, 427 US at 410 n 21.
76 Id at 416.
77 Czarnezki, 25 Stan Envir L J at 13 (cited in note 7).
78 *Overton Park*, 401 US at 416.
79 See 5 USC § 706(2)(A).
look' at environmental consequences." The "hard look" review of the agency's NEPA compliance occurs "within the framework of normal arbitrary and capricious review" and does not allow for the court to substitute its judgment for that of the agency.

While maintaining deference to the agency, the "hard look" doctrine requires that a court carefully review an agency decision. The doctrine emerged from a judicial skepticism of administrative agencies and requires the agency to justify its conclusion in light of the legal challenge being made. The "hard-look" doctrine contains four principal features: "[a]gencies must give detailed explanations for their decisions; justify departures from past practices; allow participation in the regulatory process by a wide range of affected groups; and consider reasonable alternatives, explaining why they were rejected." Thus, "hard look" demands in-depth judicial review and requires the agency to "accompany its decision with a clear explanation of the factors considered, the weights assigned to them, and the reasons [it] dictated the decision ultimately adopted." This necessitates that courts closely examine an agency's decision-making process. The court's scrutiny of the relevant record ensures that the agency's decision has complied with NEPA's requirement that the environmental consequences be given a "hard look."

Post-Overton Park the Court continued to refine and emphasize the contours of "hard look" review in the context of NEPA challenges. Notably, in Marsh v Oregon Natural Resources Council, the Court again emphasized the requirement that the judiciary must generally defer to the informed discretion of the agency on issues requiring technical expertise but also needed to carefully assess the record to guarantee that the agency has made a reasoned evaluation of the relevant factors by "hard look" review. The Court thus affirmed the importance of a thorough

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81 Id at 410 n 21.
88 See id at 376–77.
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analysis of the agency's decisionmaking process while respecting its holding in *Strycker's Bay* which cautioned that a court may not "interject itself within the area of discretion of the executive as to the choice of the action to be taken."^{89}

C. Predetermination Claims Must Meet a High Bar In Order to Succeed

An agency violates NEPA when it makes a decision before analyzing the environmental effects of that action.\(^{90}\) The Supreme Court has stated that the required environmental assessments "shall be prepared at the feasibility analysis (go-no go) stage."\(^{91}\) This timing allows the "assessment [to] 'be prepared early enough so that it can serve practically as an important contribution to the decision-making process [rather than being] used to rationalize or justify decisions already made.'"\(^{92}\) While an agency may have a preferred alternative in mind when it conducts a NEPA analysis, the analysis still "must be timely, and it must be taken objectively and in good faith."\(^{93}\) A general summary of the doctrine underlying judicial review of NEPA predetermination claims was given by the Tenth Circuit, which stated that when "an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously."\(^{94}\)

A petitioner must meet a high standard for allegations that an agency has predetermined the outcome of its NEPA analysis to prevail.\(^{95}\) Predetermination does not exist "simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the possibility that a particular environmental outcome would be the result of its NEPA re-

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\(^{89}\) *Strycker's Bay*, 444 US at 227–28 (quotations and citations omitted).

\(^{90}\) See, for example, *Native Ecosystems Council v Dombeck*, 304 F3d 886, 892 (9th Cir 2002).

\(^{91}\) *Andrus v Sierra Club*, 442 US 347, 351 n 3 (1979).

\(^{92}\) *Dombeck*, 304 F3d at 892, citing *Metcalf v Daley*, 214 F3d 1135, 1142 (9th Cir 2000). See also 40 CFR § 1502.2(g) (stating that the EIS ought to be "the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); 40 CFR § 1502.5.

\(^{93}\) *Forest Guardians*, 611 F3d at 712, citing *Metcalf*, 214 F3d at 1142.

\(^{94}\) *Forest Guardians*, 611 F3d at 713.

\(^{95}\) Id at 714.
view of environmental effects."96 Predetermination requires not simply the contemplation of a preferred outcome, but rather occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis—which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.97

Thus, agencies are not required to be completely impartial; rather they must analyze and prepare the EIS in good faith.98 However, this is done with the understanding that "NEPA [ ] prohibits agencies from preparing an EIS simply to 'justify [ ] decisions already made.'"99 The circuits agree on these standards regarding what constitutes wrongful predeterminations by an agency under NEPA.100

## III. CIRCUIT SPLIT

Part III describes the circuit split regarding what evidence a court may consider when deciding whether an agency has inappropriately predetermined an environmental assessment under NEPA. Part III.A outlines the Fourth Circuit's position. Part III.B discusses the Tenth Circuit's position. Part III.C describes approaches taken by other circuits in prior cases.

### A. The Fourth Circuit's Position

The Fourth Circuit has held that, when assessing a NEPA predetermination claim, "court[s] should generally restrict [their] inquiry to the objective adequacy of the EIS, namely, thorough investigation of environmental effects and candid acknowledgement of potential environmental harms."101 The test's focus on

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96 Id at 715. See also Dombeck, 304 F3d at 892–93 (finding that "contemplation does not amount to a NEPA violation unless [it] . . . committed the [agency] to the amendments proposed").

97 Forest Guardians, 611 F3d at 714. See also Metcalf, 214 F3d at 1143.

98 See Environmental Defense Fund, Inc v Corps of Engineers of the United States Army, 470 F2d 289, 296 (8th Cir 1972).

99 Audubon Society, 422 F3d at 198, citing 40 CFR § 1502.2(g).

100 This agreement derives from the text of 40 CFR § 1502.2(g) and can be seen throughout the cases mentioned here and in Part III.

objective adequacy allows the court to avoid probing into the subjective predispositions of decisionmakers within an agency. Furthermore, it establishes that the test for NEPA compliance is procedurally focused and "one of good faith objectivity rather than subjective impartiality."\textsuperscript{102}

The Fourth Circuit held that confining the evidence considered to the EIS itself was sufficient to determine whether the agency was simply justifying previously made decisions.\textsuperscript{103} It found that if "an agency has merely engaged in post hoc rationalization, there will be evidence of this in its failure to comprehensively investigate the environmental impact of its actions and acknowledge their consequences" as required by NEPA.\textsuperscript{104} Furthermore, this objective test also enables the court to avoid inquiring into the subjective intent of the agency, which is "a Pandora's box that courts should in most cases attempt to avoid."\textsuperscript{105} By limiting the scope of the court's evaluation, the Fourth Circuit hoped to avoid "restrict[ing] the open exchange of information within an agency" or "frustrat[ing] an agency's ability to change its mind or refocus its actions."\textsuperscript{106} The court found the latter consideration to be particularly important given that one of NEPA's goals is to force information into the decisionmaking process that could alter the final determination.\textsuperscript{107} Finally, the court found that discerning subjective intent was at best a speculative enterprise given that "most federal agencies consist of numerous actors with varying levels of responsibility and different objectives."\textsuperscript{108} Given these challenges, the court felt the objectives of NEPA were best met by limiting the evidence considered in predetermination claims to the EIS itself. The weakness of this approach is that it fails to prevent strategic behavior by an agency that decides its course of action prior to creating the EIS; the agency can survive judicial scrutiny by carefully drafting the EIS to appear neutral and avoid discussion of incriminating actions and decisions.

\textsuperscript{102} Fayetteville Area Chamber of Commerce v Volpe, 515 F2d 1021, 1026 (4th Cir 1975) (quotations omitted).
\textsuperscript{103} Audubon Society, 422 F3d at 199.
\textsuperscript{104} Id.
\textsuperscript{105} Id at 198.
\textsuperscript{106} Id.
\textsuperscript{107} Audubon Society, 422 F3d at 198–99, citing 40 CFR § 1502.1 (stating that the primary purpose of an EIS "is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government").
\textsuperscript{108} Audubon Society, 422 F3d at 199.
B. The Tenth Circuit’s Position

In *Forest Guardians* the Tenth Circuit explicitly denied the Fourth Circuit’s evidentiary limitation requiring the court to rely solely on the environmental analysis itself. The court found that the holding was contrary to its own circuit precedent, which “looked to evidence outside of the environmental analysis itself.” The court also noted that its willingness to look beyond the EIS was supported by precedent in other circuits, in which courts “ha[d] examined similar evidence, including e-mails, letters, memoranda, meeting minutes, and statements made at a press conference—as well as the agency’s issuance of permits and entrance into binding contracts—to determine if an agency predetermined the outcome or otherwise acted in bad faith in conducting the NEPA analysis.” For example, despite the lack of an express statement by the Ninth Circuit as to whether it allows the consideration of internal agency communications when evaluating predetermination claims, in *Native Ecosystems Council v Dombeck* it considered a memorandum outside of an EIS to find that an agency violated the NEPA requirements.

The Tenth Circuit also provided several policy arguments in support of its position. Specifically, it expressed a lack of confidence in the belief “that, in every instance, the bias will be evident from the NEPA analysis [itself].” The court expressed concern that “the Fourth Circuit’s restrictive approach does not permit the predetermination inquiry to be conducted with sufficient analytic rigor.” First the court found that “[t]he purpose behind NEPA is to ensure that the agency will only reach a deci-
sion on a proposed action after carefully considering the environmental impacts of several alternative courses of action."116 Thus, to uphold the statute's overarching purpose the court held that "irrespective of the facial regularity of the agency's NEPA analysis, we should not ignore relevant evidence that suggests that the agency may have violated the procedures established by NEPA."117

Additionally, the Tenth Circuit found that extending review to evidence beyond the environmental analysis would not have the detrimental effects on agency decisionmaking raised by the Fourth Circuit.118 The court reasoned that both the chilling effect on the free exchange of ideas within an agency would not occur and the objective adjudication of predetermination claims would be protected "because the evidence must meet the rigorous standard of establishing that the agency has made 'an irreversible and irretrievable commitment.'"119 Given the high bar needing to be met for the standard, the court found that employees would not be discouraged from debating an environmental analysis because an issue would arise only when "those communications fairly could be said to have the effect of binding the agency (as a whole) to an irreversible and irretrievable commitment to a course of conduct based upon a particular environmental outcome."120 Thus, the court concluded "that the Fourth Circuit's concerns about the detrimental effects on agency deliberations and the principled adjudication of predetermination claims are not well-founded."121

Furthermore, Tenth Circuit precedent supported the consideration of evidence beyond the EIS. In *Davis v Mineta*122 the court looked at a memorandum and meeting minutes to find that predetermination occurred when the private party hired to prepare the environmental assessment was contractually obligated to issue a finding of no significant impact (FONSI).123 The court used the materials to find that the public opportunity to comment on an environmental assessment (a precursor to an EIS)

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116 Id.
117 Id.
118 Forest Guardians, 611 F3d at 717.
119 Id, quoting Metcalf, 214 F3d at 1143.
120 Forest Guardians, 611 F3d at 717.
121 Id at 718.
122 302 F3d 1104 (10th Cir 2002).
123 Id at 1112–13.
was merely pro forma. In *Lee v United States Air Force* the court analyzed multiple agreements between the US Air Force and the German Defense Ministry to ascertain whether the NEPA process was inappropriately predetermined.

The Tenth Circuit's approach meaningfully upholds the purpose of NEPA. It requires examination of the complete record of agency action, thus limiting the ability of an agency to strategically avoid the Act's requirements. In so doing, it effectively applies the APA-mandated rigorous examination of NEPA compliance within the agency's decision-making process.

C. Other Circuits' Approaches

Other courts have consistently considered evidence outside the EIS in predetermination cases prior to the explicit statements of the Tenth Circuit in *Forest Guardians*. The fact that prior trial records have contained information that is beyond the text of the EIS demonstrates that the approach of the Tenth Circuit in *Forest Guardians*—despite explicitly creating a circuit split—is within the accepted bounds of NEPA litigation. It also demonstrates that consideration of such evidence may occur without adversely affecting agency functionality, further undermining the Fourth Circuit's concerns.

Other circuits have examined extra-record evidence to determine whether an agency predetermined its NEPA analysis. While noting that a court's review of agency action is generally limited to examining certain portions of the administrative record, courts have found that in NEPA cases a court may extend beyond this "and permit the introduction of new evidence where the plaintiff alleges that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug." Various circuits have considered a multitude of other resources. For example, the Ninth Circuit has considered evidence of lobbying efforts of the federal government on behalf of the parties or internal memoranda between agency staff. The Elev-
enth Circuit has considered letters, meeting minutes, and various memoranda in NEPA cases. The Fifth Circuit allowed consideration of "two excerpts from letters of the Mobile District Engineer for the [Army] Corps [of Engineers]" as "[t]he most cogent proof . . . offered in support of their thesis of mere [procedural] formalism." Additionally, district courts have often been willing to examine evidence such as e-mails, meeting minutes, statements at press conferences, letters, and memoranda to ascertain whether an agency predetermined a NEPA analysis. These decisions lend support to the Tenth Circuit's approach, demonstrating the ability of courts to use extra-EIS evidence and the effectiveness of doing so.

IV. CONSIDERING EVIDENCE BEYOND THE ENVIRONMENTAL ANALYSIS ALLOWS FOR EFFECTIVE AGENCY DEBATE WHILE ADVANCING THE UNDERLYING PURPOSES OF BOTH NEPA AND THE APA

Predetermination claims under NEPA must be considered in light of the Act's goals, as well as the judicial record that has emerged. The general stance of courts, and in particular the Supreme Court, was expressed in Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc\textsuperscript{33} where the Court held that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."\textsuperscript{134} Despite this procedural focus,\textsuperscript{135} there exist judicial, CEQ, and scholarly interpretations of NEPA that emphasize the centrality of vital substantive goals by Congress that were to be paired with the Act's procedural mandates.\textsuperscript{136} There-
fore, any proposed solution should seek to emphasize both the procedural and substantive aims of NEPA. This Comment suggests that courts should follow the Tenth Circuit’s holding that evidence beyond the environmental analysis can be considered in cases that advance predetermination claims because this approach would be most consistent with upholding the dual aims of the Act.

Part IV.A outlines the Fourth Circuit’s rationale for limiting the evidence considered in predetermination claims. Part IV.B explains that the Tenth Circuit’s position is consistent with both the Supreme Court’s procedural emphasis towards NEPA and addresses the Fourth Circuit’s concerns given the rigor of its predetermination standards.

A. The Fourth Circuit’s “Common Sense” Rationale for Restriction of Evidence in Predetermination Claims

The Fourth Circuit in National Audubon137 premised its holding on the fact that a “court should generally restrict its inquiry to the objective adequacy of the EIS.”138 The court found that an agency takes an appropriate “hard look” when it “obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.”139 To carry out this review, the Fourth Circuit found that “[c]ourts should not conduct far-flung investigations into the subjective intent of an agency.”140 Instead, courts must continue to guarantee that the test for NEPA compliance remains “one of good faith objectivity rather than subjective impartiality.”141

Furthermore, the court found that this rule was supported by common sense.142 Determining “subjective intent in the NEPA context” represented a Pandora’s box that should be avoided by courts.143 The Fourth Circuit feared that carrying on such an ex-

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137 422 F3d 174 (4th Cir 2005).
138 Id at 198.
139 Hughes River Watershed Conservancy v Johnson, 165 F3d 283, 288 (4th Cir 1999), citing Marsh v Oregon Natural Resources Council, 490 US 360, 378–385 (1989). See also Audubon Society, 422 F3d at 198 (finding that the objectivity of the EIS should occur namely via “thorough investigation of environmental effects and candid acknowledgment of potential environmental harms”).
140 Audubon Society, 422 F3d at 198.
141 Id (quotations omitted).
142 Id.
143 Id.
amination "could restrict the open exchange of information within an agency, inhibit frank deliberations, and reduce the incentive to memorialize ideas in written form."\textsuperscript{144} Beyond these concerns, a subjective intent inquiry could "frustrate an agency's ability to change its mind or refocus its actions."\textsuperscript{145} Overall, given that an agency is comprised of many individuals, the court found that discerning a single subjective intent for the entire organization was "a speculative exercise at best."\textsuperscript{146} Given the challenges of making such an assessment, the Fourth Circuit concluded that it was best to constrain the inquiry to only the EIS itself.

B. The Tenth Circuit's Approach Ensures that NEPA's Procedural Requirements are Met by an Agency and Does Not Overly Burden Agency Decision-Making

The Tenth Circuit's willingness in \textit{Forest Guardians} to look beyond the EIS to decide whether an agency's decision has been inappropriately predetermined is consistent with the Supreme Court's procedural focus in regards to NEPA and the "common sense" concerns of the Fourth Circuit. Considering evidence beyond the EIS allows a court to remain sensitive to the procedural focus of NEPA but also provides for a more searching inquiry into an agency's decisionmaking process as required under the "hard look" doctrine.

NEPA's procedural provisions require that an agency produce an EIS for any major federal action.\textsuperscript{147} According to the CEQ, whose "interpretation of NEPA is entitled to substantial deference,"\textsuperscript{148} the primary purpose of the EIS "is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government."\textsuperscript{149} While not requiring an agency to have no preferred alternative, an agency goes too far if it has "[l]imit[ed] the choice of reasonable alternatives."\textsuperscript{150} Thus, as described more fully in Part II.C, an agency that uses the EIS pro-

\textsuperscript{144} \textit{Audubon Society}, 422 F3d at 198.

\textsuperscript{145} Id, citing 40 CFR § 1502.1 (stating that the "primary purpose" of an EIS "is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government").

\textsuperscript{146} \textit{Audubon Society}, 422 F3d at 199.

\textsuperscript{147} 42 USC § 4332(2)(C).


\textsuperscript{149} 40 CFR § 1502.1.

\textsuperscript{150} 40 CFR § 1506.1(a)(2). See also \textit{Audubon Society}, 422 F3d at 206.
cess “to rationalize or justify decisions already made” does not comply with the requisite demands of NEPA when conducting such a (biased) review. The examination of other materials does not expand the duties of an agency or place greater limitations upon them; rather, examination of other materials assures that the agency complies with NEPA’s predetermination requirements by providing a court with a more complete view of an agency’s actions and its decisionmaking process. Furthermore, applying the Fourth Circuit’s “common sense” approach would suggest that evidence beyond the EIS is needed to assure that an agency cannot avoid compliance by acting strategically and creating an EIS that appears objective, but which only justifies previously made decisions.

Additionally, the Fourth Circuit’s concern that examining materials beyond the EIS will hinder internal dialogue is mitigated by the fact that “the evidence must meet the rigorous standard of establishing that the agency has made an irreversible and irretrievable commitment.” Thus, any recorded debate between employees would be considered relevant only if “those communications fairly could be said to have the effect of binding the agency (as a whole) to an irreversible and irretrievable commitment to a course of conduct based upon a particular environmental outcome, thereby rendering any subsequent environmental analysis biased and flawed.” In this way, the rigorous predetermination standard protects both individual and agency concerns that could lead to a reduction in debate by excluding the vast majority of communication and dialogue from potential scrutiny. This protection is particularly strong for the lower-level employees, experts, or scientists whose effectiveness depends on an ability to freely converse and discuss their findings. Their opinions, regardless of how vigorously expressed, would not be able to “effectuate an irreversible and irretrievable commitment of the agency” given their relatively modest position in the agency.

The Tenth Circuit explicitly recognized this protection of lower-level employee dialogue, finding such comments, even if expressed with great force, were not likely to make an otherwise unbiased environmental review invalid. In this way, review of extra-EIS materials enables a court to conduct the rigorous re-

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152 *Forest Guardians*, 611 F3d at 717 (citations omitted).
153 Id.
154 Id at 718.
155 See id.
view demanded by NEPA and the APA while still enabling the agency to function and communicate effectively.

Beyond providing for more effective agency review, the Tenth Circuit’s approach is not contrary to accepted practice or precedent in NEPA litigation at all levels of the judiciary. Part III.C described situations in which courts have considered evidence outside the EIS in predetermination cases prior to the explicit statements in *Forest Guardians*. With such evidence having previously been admitted to public trial records, it shows that agencies continue to function effectively even after extra-EIS evidence is considered and made public. Additionally, the high bar set for plaintiffs to succeed with predetermination claims helps to insulate the vast majority of agency employees from any possible chilling effect. The Tenth Circuit’s approach is thus strengthened by its consistency with the precedent and practices of other circuits.

Ultimately, the Tenth Circuit’s approach to considering sources outside the EIS most effectively maintains both the procedural and substantive aims of NEPA. By considering a greater breadth of evidence, a court is able to more effectively conduct a searching review of the evidence to assure that the agency complies with its NEPA obligations. Even recognizing the potential harms identified by the Fourth Circuit, precedent and the practice of other circuits demonstrates that utilizing outside sources would not undercut agency deliberations. Thus, the dual aims of NEPA are best realized when courts follow the Tenth Circuit’s approach and consider evidence beyond only the environmental analysis in predetermination cases.

V. CONCLUSION

Through its recent ruling in *Forest Guardians* the Tenth Circuit has explicitly created a split regarding what evidence a court may consider when deciding if a NEPA-required environmental analysis has been predetermined. While other circuits have considered evidence outside of the environmental analysis, they have never explicitly stated which evidence will be considered, as have the Fourth and Tenth Circuits. Adopting the Tenth Circuit’s position and allowing for evidence outside of the EIS enables courts to conduct a thorough, searching analysis, as required under the APA’s “hard look” doctrine. That approach is consistent with the Supreme Court’s procedural focus for NEPA while allowing courts to ensure that agency procedures are consistent with the underlying substantive goals of the Act. Ulti
mately, this approach allows the courts to enforce the dual goals of NEPA: preventing environmental damage as well as assuring that agency decisionmakers take environmental factors into account and are well informed. By allowing for more rigorous oversight by courts the Tenth Circuit approach more effectively monitors each agency, while still protecting the agency's executive power and independence.