Ripeness Doctrine in NEPA[1] Cases: A Rotten Jurisdictional Barrier

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"Well," said Owl, "the customary procedure in such cases is as follows."

"What does Crustimoney Proseedcake mean?" said Pooh.[2]

Before a court will review a dispute, the issues must be "ripe,"[3] i.e., the controversy must be "reduced to . . . manageable proportions, and its factual components fleshed out, by some concrete action."[4] Traditionally, courts have approached the jurisdictional requirement of ripeness pragmatically and flexibly, reviewing cases that actually or potentially affect people's rights.[5]

Environmental disputes, however, are often dismissed because courts do not consider the issues ripe for review.[6] The jurisdictional barrier of ripeness has been used to dismiss numerous environmental cases on summary judgment.[7] The reason environmental disputes are not ripe at the time of litigation, or ever, is the nature of environmental decision-making: many of the decisions

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1. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370 (1988).

2. A.A. MILNE, WINNIE-THE-POOH 48 (New Uniform ed. 1935).

3. A case that is "ripe" is one that has been "brought to a final determination, and everything seems to have been done which ought to be done before the entry of a final adjudication on the rights of the parties." 77 C.J.S. *Ripe* (1952).

4. Lujan v. National Wildlife Fed'n., 497 U.S. 871, 891 (1990).

5. *See, e.g., infra* notes 106-107 and accompanying text.

6. *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 4.08[2] (2d ed. 1992).

7. The other restrictive barrier to environmental litigation is standing. In order to bring an action, a plaintiff must have "standing," i.e., "sufficient interest in the outcome of a litigation to warrant consideration of its position by a court." 1A C.J.S. *Actions* § 59 (1985). *See, e.g.,* Lujan v. National Wildlife Fed'n., 497 U.S. 871 (1990).

Environmental disputes concerning the National Environmental Policy Act of 1969 (NEPA) and other cases involving review of agency action "customarily" are decided on summary judgment. Plaintiffs' Brief in Opposition to Defendant's Motion for Judgment on the Pleadings at 28 n.14, Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992) [hereinafter Brief]. *See e.g.,* Citizens for Envtl. Quality v. United States, 731 F. Supp. 970 (D. Colo. 1989)(Finesilver, C.J) (granting summary judgement in NEPA case).

that affect the environment are made, in some significant may, by the federal government through administrative agencies.[8]

According to the National Environmental Policy Act of 1969[9] (NEPA), administrative agencies are required to consider the environmental impact of their "recommendation[s] or report[s] on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[10] Agencies, however, can avoid this requirement by labelling their actions something other than "actions or proposals,"[11] regardless of whether the activity at issue will have a real, irreversible effect on the environment. Through these procedural tactics, agencies can avoid the requirements of NEPA and at the same time subvert the judicial review guaranteed under NEPA.[12]

Statutorily, the courts are empowered to force agencies to comply with NEPA. The Administrative Procedure Act of 1946[13]

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8. The federal government has the power to own and regulate land under the Property Clause: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

In 1990, the federal government's land ownership was estimated to be nearly 662 million acres, just under 30% of the total United States. Almost one-half of the federal government's land is located in Alaska and the vast majority of the remainder is in the West. A significant portion of the land is administered by the Bureau of Land Management (272 million acres), as well as by the National Park Service, Fish and Wildlife Service, and the Bureau of Reclamation. 175 BUREAU OF LAND MANAGEMENT, U.S. Department of the Interior, Public Land Statistics, 1990, at 1, 5 (1990). The Bureau of Land Management also manages 300 million subsurface mineral acres. *BLM Said It Collected Some $50 Million in Bonus Bids in FY-90*, INSIDE ENERGY/WITH FEDERAL LANDS, Jan. 6, 1992, at 16.

Because of the government's massive landownership, environmental disputes often arise in the context of a nonprofit legal group challenging a federal administrative agency action affecting the environment. *See* MANDELKER, *supra* note 6, § 2:03(3). NEPA gives a statutory basis to force review of agency decisions that affect the environment. Timothy A. Vanderver, Jr. et al., *National Environmental Policy Act (NEPA)*, in ENVIRONMENTAL LAW HANDBOOK 250 (11th ed. 1991).

9. 42 U.S.C. §§ 4321-4370 (1988).

10. *Id.* § 4332(2)(C).

11. In Lujan v. National Wildlife Fed'n., 497 U.S. at 890, the Supreme Court claimed that the Bureau of Land Management's "land withdrawal review program" was exempt from the NEPA process of considering the environmental impact of the program, because the program was not an "agency action." Although the BLM had already completed approximately 1250 individual classification decisions converting 4,500 acres of wilderness into possible mining areas, the Court held that there was no identifiable agency action. Thus, NEPA was inapplicable. *Id.* at 885, 890-94.

12. NEPA authorized the creation of The Council on Environmental Quality (CEQ). 42 U.S.C. § 4342 (1988). The CEQ is the government body that issues regulations pursuant to NEPA. 40 C.F.R. §§ 1500-1517 (1992). The CEQ regulations attempt to restrict judicial review until the environmental review process is completed, that is until a final impact statement has been prepared or until the agency has determined that no impact statement is necessary or "take[s] action that will result in irreparable injury." 40 C.F.R. § 1500.3 (1992).

13. 5 U.S.C. §§ 500-599 (1988).

(APA) contains provisions granting courts the authority to review agency decisions[14] in order to serve as a "a check against excess of power and abusive exercise of power in derogation of private right."[15] While the APA limits the scope of judicial review to "final agency action for which there is no other adequate remedy,"[16] the Supreme Court has declared that the APA's legislative history supports the presumption that judicial review covers "a broad spectrum of administrative actions."[17] Moreover, the Supreme Court has also noted that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation."[18] The judicial system, however, has increasingly narrowed the definition of "final agency action." In 1990, the Supreme Court declared that "final agency action" must be in the form of an agency order or a regulation. The APA, however, does not define "final agency action" as such.[19]

Because agencies have the power to issue orders and regulations, they also have the power to control when a "final agency action" occurs. This gives agencies the power to institute programs without issuing orders or regulations, thus precluding "final agency action." Indeed, the move towards less "formal" agency action is well noted.[20] Through "less" formal procedures, agencies can en-

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14. 5 U.S.C. §§ 702, 704 (1988). *See infra* text accompanying note 16.

15. U.S. ATTORNEY GENERAL'S COM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 76 (1941); *See also* Califano v. Sanders, 430 U.S. 99, 104 (1977) (stating that the APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.")

16. Section 10(c) of the APA reads as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Administrative Procedure Act of 1946, § 10(c), 5 U.S.C. § 704 (1988).

17. Abbott Lab. v. Gardner, 387 U.S. 136, 140-41 (1967)(citations omitted).

18. *Id.* (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)).

19. Lujan v. National Wildlife Fed'n., 497 U.S. 871, 890-94 n. 2 (1990). Yet, NEPA does not entail formal decision making processes as envisioned by the APA, but rather more informal types of decision making. MANDELKER, *supra* note 6, § 1.05.

20. Agencies have moved towards more "notice and comment" rulemaking, which merely requires agencies to publish rules and allows time for public response. 5 U.S.C. § 555 (1988). This is a much less intrusive process than "on the record"

sure that any action they take will be insulated from judicial review.[21]

As a result of the judicial interpretation of "final agency action" and the deference courts give to the agencies' labels, many cases involving environmental issues are deemed not ripe for review. While many cases that are dismissed may truly be "unripe," a review of the cases reveals that many courts are misapplying the ripeness doctrine by looking only at the labels agencies give their actions rather than to the practical effect on the public of such agency actions.[22] In doing so, the courts also fail to consider other factors that determine when a controversy is "ripe."[23]

This judicial deference has given agencies license to avoid the NEPA requirements.[24] Administrative agencies are not considering the impact of their activities on the environment,[25] even though they are legally required to do so.[26] When agencies avoid the NEPA decision making process, they are not just harming the environment;[27] they are harming the public and denying the public's right to participate in the process.

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rulemaking, which requires agencies to publish proposed rules, hold hearings, and republish rules over a period of several months to several years. 5 U.S.C. § 556-557 (1988). *See* E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 644 n.8, 647-49 & n.36 (1991).

21. Yet, judicial review has become the primary means through which NEPA's environmental decision making responsibilities are enforced. MANDELKER, *supra* note 6, § 3.01.

22. *See infra* discussion Part I & Part II.

23. Abbott Lab. v. Gardner, 387 U.S. 136, 148-52 (1967) created the test to determine when a case is ripe for judicial review. The test requires a consideration of: (1) the fitness of the issues for judicial decision and (2) the extent of the hardship imposed on the parties from withholding judicial review.

24. NEPA requires federal agencies to "utilize a systematic, interdisciplinary approach" to consider the environmental impact of government actions. 42 U.S.C. § 4332 (1988).

25. In *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1473, 1478-83 (W.D. Wash. 1992), the court found that the Forest Service failed to fully examine the impact of a proposed sale of logging rights in a national forest which is habitat area of the northern spotted owl. Even though the Forest Service had completed a final EIS report, the court claimed the EIS was too conclusory and did not consider realistic dangers of the proposed plan. The court quoted Friends of the Earth (FOE) v. Hall, 693 F. Supp. 904, 937 (W.D. Wash 1988), which claimed: "An agency must candidly disclose in its EIS the risks posed by its proposed action. Otherwise the EIS cannot serve its purpose of informing the decision maker and the public before the decision to proceed is made." For a discussion of the EIS, *see infra* Part I.

26. 42 U.S.C. § 4332 (1988).

27. In Seattle Audubon Soc. v. Moseley, 798 F.Supp. at 1478-83, the court held that because of the Forest Service's failure to comply with NEPA, it had not adequately considered the evidence that their proposed logging project would result in the extinction of the northern spotted owl. *See supra* note 25.

NEPA imposes a duty on agencies to inform and involve the public in the process.[28] Agencies are required to release documents detailing the basis behind their decisions and, in many cases, hold public hearings, request public comments, and respond to public comments.[29] If agencies can insure that their projects will never be "ripe" for litigation or for the NEPA process, they will be allowed to proceed with many projects and be virtually unaccountable — either to the public or to other governmental branches. The public will be denied their legal right to participate in government actions that may affect their communities. The loss of these participation and information rights is a legally cognizable injury.[30]

This article will argue that strictly construing the ripeness doctrine in environmental cases defies precedent and the intent of the APA and NEPA. Federal agencies were not meant to govern without accountability. NEPA was drafted to provide accountability; avoiding its requirements injures not only peoples' rights but also may damage the environment. Part I of this article will provide the background of judicial review of the agency decision-making process in the environmental area. Part II compares two recent cases. Part III will document the reasons that favor analyzing these problems flexibly.

Part I: Background

The National Environmental Policy Act of 1969[31] (NEPA) proclaims that it is the policy of the federal government "'to use all practicable means' to protect environmental values."[32] Congress directed that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance

28. 42 U.S.C. § 4332 (1988); 40 C.F.R. § 1503(4) (1992).

29. Seattle Audubon Soc. v. Moseley, 798 F. Supp. at 1478-83; 40 C.F.R. § 1503 (1992).

30. City of Los Angeles v. National Highway Safety Admin., 912 F.2d 478, 492 (D.C. Cir. 1990)("The procedural and informational thrust of NEPA gives rise to a cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental harm may occur."); Competitive Enterprise Inst. v. NHTSA, 901 F.2d 107, 123 (D.C. Cir. 1990)("NEPA creates a right to information on the environmental effects of government actions . . . any infringement of that right constitutes a constitutionally cognizable injury, without further inquiry into causation or redressibility.").

31. 42 U.S.C. § 4321-4370 (1988).

32. Calvert Cliffs' Coordinating Comm. v. United States AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971). NEPA states that such means must be "consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b) (1988). Specifically, NEPA requires agencies "to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." *Id.* § 4331(b)(1).

with [the environmental values furthered by NEPA]."[33] To achieve that policy, NEPA requires federal agencies[34] to follow several procedures.

Initially, agencies are required to complete an "environmental assessment," which is a brief document analyzing whether a proposed agency action will have an environmental impact.[35] The environmental assessment must describe the environmental impact of the proposed action and any alternatives to the proposed action.[36] If the agency determines that the proposed action will not have a significant impact on the environment, the agency must file and make public a "finding of no significant impact."[37] If the agency decides that the proposed action will have a significant impact on the human environment, the agency must complete an "Environmental Impact Statement" (EIS). The EIS[38] is a comprehensive examination of the proposed action. It must "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[39]

As originally drafted, NEPA was vague on exactly when agencies had to complete an EIS. NEPA states that agencies must prepare a "detailed statement"[40] for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[41] The

33. *Id.* § 4332(1).

34. The regulations define "federal agency" as including all agencies of the federal government, plus States, other units of general local government, and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974. The definition of "federal agency" does not include "the Congress, the Judiciary or the President, including the performance of staff functions for the President in his Executive Office." 40 C.F.R. § 1508.12 (1992).

35. 40 C.F.R. §§ 1501.3, 1508.9 (1992).

36. 40 U.S.C. §§ 4332(2)(C), (2)(E) (1988); 40 C.F.R. § 1508.9 (1992).

37. 40 C.F.R. §§ 1501.4, 1508.13 (1992).

38. The most important part of an EIS is the section that describes the alternatives to the proposed action and compares the alternatives to the main proposal. 40 C.F.R. § 1502.14 (1992). This section, which the regulations call the "heart" of the EIS, "sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the public." *Id.* § 1502.14. *See* 42 U.S.C. § 4332 (1988) and 40 C.F.R. § 1502 (1992) for the regulations which cover the EIS.

39. 40 C.F.R. § 1502.1 (1992). The actual EIS process entails a draft, EIS, a comment period, and a final EIS. *Id.* §§ 1503.2, 1503.4.

40. The "detailed statement" must be completed by "the responsible official." 40 U.S.C. § 4332(2)(C) (1988).

41. 42 U.S.C. 4332(2)(C) (1988). It should be noted that there have been only a few, explicit exclusions from NEPA, such as the Alaskan oil pipeline and the San Antonio Freeway. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW, 105 n.k. (1991) [hereinafter FINDLEY & FARBER]. In addition, many EPA actions are exempt from NEPA requirements. *Id. See, e.g.*, Clean Water Act, 33 U.S.C.

Council on Environmental Quality (CEQ) regulations clarify the definitions of the terms "proposal" and "major federal action."[42]

The regulations define "proposal" as follows:

> "Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal *should be timed* ([40 C.F.R.] § 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may *exist in fact* as well as by agency declaration that one exists.[43]

Although this definition appears to be quite flexible, implying that an EIS should be completed prior to the time when an agency makes a recommendation or report on a proposed action, the Supreme Court has strictly construed this requirement. In *Kleppe v. Sierra Club*,[44] the Court held that courts may only force agencies to complete an EIS at the time of proposal and that the EIS need only cover the exact agency proposal as the agency has labelled it, not the proposal in fact.[45] Despite this decision, courts of appeal have continued to refer to the CEQ regulations.[46]

As to when agency actions constitute "major" federal actions, the courts generally determine this issue on a case-by-case basis.[47]

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§ 1371(c)(1988); The Federal Energy Administration Act of 1977 (1974), 15 U.S.C. § 793(c)(1) (1988) (exempting the Clean Air Act, 42 U.S.C. § 7401 (1988)).

42. 40 C.F.R §§ 1508.23, 1508.18 (1992).

43. *Id.* § 1508.23 (emphasis added).

44. 427 U.S. 390 (1976). In *Kleppe*, the petitioners claimed that the federal government failed to comply with NEPA, because it did not complete an EIS for a proposed mine leasing program. *Id.* at 395. While the government completed individual EIS reports for each lease, it did not complete one for an area covering four states. *Id.* at 396-400. The petitioners claimed that the mining program would involve interrelated environmental effects and that a single EIS was necessary for the entire four state region. *Id.* at 408. Because the Court claimed that there was "no evidence in the record of an action or a proposal for an action of regional scope," an EIS for the region was not necessary. *Id.* at 400, 414-15.

45. *Id.* at 408-415. When interpreting the term "proposal," the Court was very mechanical and unhelpful. The Court assumed that the "presence or absence of a 'proposal' is self evident. FINDLEY AND FARBER, *supra* note 41, at 136. It has been noted that in dealing with this issue, the Court was "overly deferential to [the] agency decision and ignored the overriding policies of NEPA. *Id.*

46. *Id.* at 137.

47. Although the CEQ regulations do not specifically define "major federal action," the regulations do state that federal actions tend to fall within one of the following categories: (1) the adoption of official policy, such as rules and regulations, (2) the "adoption of formal plans . . . which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based," (3) the adoption of programs, systematic and connected agency actions which implement a specific statutory program or executive directive, and (4) the approval of specific projects, such as construction, management activities located in a defined geographic area, and ac-

Although the definition of "major" is difficult, the cases generally focus on the "magnitude and size of the action as an indicator of its potential impact on the quality of the human environment."[48] Whether an action is "major" is ultimately related to whether it "significantly"[49] affects the human environment, and indeed, many courts examine these two questions together.[50] Other factors which courts may consider to determine whether an agency action is "major" are: the environmental impact; the economic magnitude of the project; and the extent of government resources, planning, time, and expenditures.[51]

NEPA requires the federal government to examine the effect any "major federal action" or legislation will have on the environment, but it does not require the federal government to take substantive actions to protect the environment.[52] Yet, as Judge Skelly Wright proclaimed in 1971, NEPA establishes a strict standard of compliance:

> NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. . . . [I]f the [agency] decision was reached procedurally without individualized consideration and balancing of environmental

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tions approved by permits or other regulatory decisions as well as federal and federally assisted activities. 40 C.F.R. § 1508.18 (1992), MANDELKER, *supra* note 6, § 8.04. The following projects have been held to be "major": a $14 million bridge with 60% federal funding, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); the conversion of a large federally subsidized housing project, Jones v. United States Dept. of Housing and Urban Dev., 390 F. Supp. 579 (E.D. La. 1974); and a $1.5 million dollar water channel project that used $706,000 of federal funding, Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (D. NC. 1972).

The following projects have been held to be not "major": a replacement bridge, Sierra Club v. Hassel, 636 F.2d 1095 (D. Cal 1981); the demolition of a historic building to which $25,000 of federal money was committed, Committee to Save Fox Bldg. v. Birmingham Branch of Fed. Reserve Bank of Atlanta, 497 F. Supp. 504 (D. Ala. 1980); and minor traffic improvements, Julis v. City of Cedar Rapids, Iowa, 349 F. Supp. 88 (D. Iowa 1972). For more examples, see MANDELKER, *supra* note 6, § 8.06[3].

48. MANDELKER, *supra* note 6, § 8.06[3]. The regulations define "human environment" as referring "comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (1992). An EIS will not be prepared solely to examine the economic and social effects of an agency action. If, however, an EIS is required and the economic and social effects of an agency action are interrelated to the natural and physical effects of agency action, the EIS will consider the economic and social effects. *Id.*

49. "Significantly" refers to the extent of the effect of the agency action on a particular locale. 40 C.F.R. § 1508.27 (1992).

50. MANDELKER, *supra* note 6, § 8.06[3].

51. *Id.*

52. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting that although the preparation of an EIS will probably affect an agency's decision, NEPA does not mandate particular results.)

> factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.[53]

The rational of NEPA is that if the federal government incorporates into its procedures an examination of environmental concerns, the environment will be, in fact, protected substantively.[54]

Integral to the NEPA process is public involvement in the agency decision-making process.[55] The CEQ regulations specifically require that agencies "make diligent efforts to involve the public in preparing and implementing NEPA procedures."[56] Agencies are required to provide public notice of meetings or hearings related to agency action, inform affected persons of agency action, solicit appropriate information from the public, and explain to the public where information concerning the agency action can be obtained.[57] Agencies are required to hold public hearings or meetings if there is a "substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing" or when another agency requests a hearing or meeting.[58] If courts allow agencies to preempt the NEPA process by denying judicial review,

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53. Calvert Cliffs' Coordinating Comm. v. United States AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

54. *Id.* at 1111-15; Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 368 (D. Colo. 1992).

Section 102(2)(A) of NEPA provides:

> [A]ll agencies of the Federal Government shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment.

MANDELKER, *supra* note 6, § 6.02.

Section 102(2)(B) of NEPA states:

> All agencies of the Federal Government shall identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.

MANDELKER, *supra* note 6, § 6.03.

55. 42 U.S.C. § 4369(b) (1988).

56. 40 C.F.R. § 1506.6 (1992).

57. *Id.*

58. 40 C.F.R. §§ 1506.6(c)(1) & (2) (1992). In Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 836 (2d Cir. 1972), *cert. denied*, 409 U.S. 908 (1973), the court held that the agency "must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts." Although the court claimed that a "full-fledged formal hearing" was not required, the court stated that, based on NEPA § 102(2)(B), a hearing of some sort was advisable to hear community concerns "where emotions are likely to be aroused by fears, or rumors of misinformation." *Id.* at 835-36.

While some courts have followed the *Hanly II* holding, others have explicitly stated that no hearing or other opportunity for public participation is required by NEPA. MANDELKER, *supra* note 6, § 7.04[7][b]. However, the plain language of NEPA and the CEQ regulations supports strong public involvement:

NEPA's purpose of involving the public in government actions is eviscerated.

The NEPA process informs the public of agencies' decisions and analyses documented in the EIS.[59] The EIS assures the public that the agencies did consider the environmental impact and provides the public with the basis and analysis of government decisions.[60] Moreover, if an EIS is faulty, for example, if mining values of land are assessed higher than the actual fair market value or if the recreational value of land is not properly assessed, public participation can correct the faulty information.[61]

In addition, the process provides an opportunity for the public to communicate directly with Congress.[62] The NEPA regulations

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> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and *public scrutiny are essential to implementing NEPA.*

40 C.F.R. § 1500.1(b)(1992) (emphasis added). *See also id.* § 1506 (public involvement).

59. 40 C.F.R. § 1502.19(c) (1992) provides that agencies must furnish the entire impact statement to "[a]ny person, organization or agency" who requests the entire environmental impact statement.

60. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)(stating publication of an EIS, "both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decision-making process,' *Baltimore Gas & Electric Co.* 462 U.S. 87, 97 (1982), and perhaps more significantly, provides a springboard for public comment.")

61. The regulations provide that after preparing a draft EIS, but before issuing a final EIS, agencies are required to request comments from the public, particularly soliciting comments "from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(4) (1992).

For example in their brief for Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (1992), the plaintiffs claimed that they would have corrected certain information:

> The preparation of a Supplemental Environmental Impact Statement would also provide the Coalition and its members with an opportunity to prepare written comments and participate in public hearings on the reliability and accuracy of the [Secretary of Interior's mineral dollar-assessment] . . . Specifically, the Coalition would argue that the estimation of the value of minerals in the Red Cloud Peak and Handies Peak wilderness study areas has been drastically over-estimated. Furthermore, the United States Geological Survey, in preparing the dollar-assessment, failed to consider the economic costs of extracting the minerals. The Coalition would like to take advantage of the opportunity available to it under the National Environmental Policy Act to have its comments incorporated into a Draft Supplemental Environmental Impact Statement and to have the Interior Department respond to those comments in the Final Supplemental Impact Statement.

Brief, *supra* note 7 (declaration of Rocky Smith 4-5).

62. The regulations state that:

> [t]he primary purpose of an environmental impact statement 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 Fed-

direct agencies to solicit comments from the public.[63] Those comments are incorporated into the final EIS report.[64] Federal officials are required to use the EIS "to plan action and make decisions."[65] Without the preparation of an EIS, the public is frustrated in communicating its wishes to Congress, thus not only curtailing public participation in the legislative process but also preventing the public from challenging agencies' decisions.[66] If the public is excluded from this process, the public may suffer a substantive legal wrong.[67] Finally, and most importantly, the EIS process provides Congress with the most accurate information possible through a "cross-pollinization of views,"[68] so Congress can legislate under the best circumstances, considering the full environmental impact of any agency decision.

Although NEPA allows for the preparation of the EIS and for public participation in the legislative process, NEPA itself does not

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> eral Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan action and make decisions.

40 C.F.R. § 1502.1 (1992).

63. *Id.* §§ 1503.1(4), 1506.6 (1992).

64. *Id.* § 1503.4.

65. *Id.* § 1502.1.

66. For example, a declarant for the plaintiffs in *Colorado Envtl. Coalition v. Lujan* stated:

> Secretary Lujan's failure to prepare a Supplemental Environmental Impact Statement also has frustrated the Coalition's ability to participate in the legislative process. The official NEPA comment and hearing procedure is an important means that the Coalition uses to communicate with Congress regarding the wilderness designation process. By not preparing a Supplemental Environmental Impact Statement and thus foreclosing formal comment through the NEPA process, Secretary Lujan has cut off an important form of communication with Congress. Without a Supplemental Environmental Impact Statement and the detailed information concerning the methodology and reasoning supporting the dollar-value assessment that a Supplemental Environmental Impact Statement would provide, the Coalition is hampered in rebutting Secretary Lujan's decision and in participating effectively in the legislative process.

Brief, *supra* note 7, Declaration of Rocky Smith.

67. Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 368, (D. Colo. 1992) ("some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that a plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty" (citing Lujan v. Defenders of Wildlife, —U.S.—, 112 S.Ct. 2130, 2160) (1992) (Blackmun, J., dissenting)). *See supra* note 30 and accompanying text.

68. Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) (outlining the number of avenues for public involvement in the NEPA process including notification and consultation of agency actions and reports).

create a private right of action to challenge the inadequacy of an EIS.[69] Suits must be brought through section 10(c) of the APA,[70] allowing for judicial review of agency decisions. When the APA is used to bring a NEPA case, judicial review is only allowed when the issues are "ripe."

The standard of review of NEPA cases is not entirely clear. In *Marsh v. Oregon Natural Resources Council*,[71] the Supreme Court held that an "arbitrary and capricious" standard applies to judicial review of an agency's decision *not* to prepare a Supplemental EIS.[72] The "arbitrary and capricious" standard allows courts to be very deferential to agency determinations.[73] It is unclear, however, whether the *Marsh* holding will be expanded to apply to all future NEPA cases, as *Marsh* was a very special situation. The plaintiffs in *Marsh* were requesting a Supplemental EIS.[74] NEPA, itself, does not require an agency to prepare a Supplemental EIS, but the CEQ regulations do require a Supplemental EIS whenever there is significant new information relating to the environmental impact of the proposed action or whenever the "agency makes substantial change in the proposed action."[75] Because NEPA does not specifically require a Supplemental EIS, it is unclear whether *Marsh* will be followed in all NEPA cases.[76]

In *Citizens to Preserve Overton Park v. Volpe*,[77] the Supreme Court held that courts must use a "clear error of judgment" standard when reviewing the agency's findings of fact.[78] This standard is complementary to the "arbitrary and capricious standard.[79]

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69. The federal courts have held, nevertheless, that judicial review is implied in NEPA. MANDELKER, *supra* note 6, § 3.01; Calvert Cliffs' Coordinating Comm., 449 F.2d 1109, 1115 (D.C. Cir. 1971)(stating "NEPA . . . creates judicially enforceable duties.") Also, Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 470 F.2d 289, 298-300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) suggested substantive review is based on "common law."

70. The Supreme Court held in Califano v. Sanders, 430 U.S. 99, 104-07 (1977) that the APA is not an independent source of jurisdiction. Jurisdiction in NEPA cases is usually asserted under the federal question statute, 28 U.S.C. § 1331 (1988).

71. 490 U.S. 360 (1989).

72. *Id.* at 375-76.

73. *See* MANDELKER, *supra* note 6, § 8.02[4][a].

74. 490 U.S. at 368.

75. 40 C.F.R. § 1502.9 (1992).

76. Already, in Goos v. Interstate Commerce Comm., 911 F.2d 1283, 1292 (8th Cir. 1990), an Eighth Circuit opinion applied the "reasonable" standard of review in effect prior to *Marsh*. The *Goos* court distinguished *Marsh* and claimed it did not control. *Id.*

77. 401 U.S. 402 (1971).

78. *Id.* at 416.

79. *Id.* The Supreme Court held that the "arbitrary and capricious" standard is the same as "clear error of judgment" standard in Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

Many courts have cited the "hard look" doctrine when reviewing NEPA cases.[80] Although the doctrine is difficult to define, it requires the court to investigate whether the agency took a "hard look" at the environmental impact of the proposed action.[81] In essence, whatever the terminology the standard of review for NEPA cases is very high.[82]

When determining if a particular case is ready for judicial review under the APA, courts focus on whether the agency has made a definitive determination which has a permanent effect on a party's rights or obligations.[83] The seminal case that outlined the test to determine whether a case is ripe is *Abbott Laboratories v. Gardner*.[84] The plaintiff, Abbott Laboratories, was part of a group of drug manufacturers that brought action seeking an injunction against regulations that the Secretary of Health, Education, and Welfare and the Commissioner of Food and Drugs had promulgated. The regulations required that labels, advertisements, and other printed material prominently display the "established name" of a drug, i.e., the name of the drug designated by the Secretary of the Health, Education, and Welfare,[85] along with the proprietary trade name of the prescription drug every time the trade name was

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80. MANDELKER, *supra* note 6, § 3.04[4].

81. *See* Public Citizen v. National Highway Traffic Safety Administration, 848 F.2d 256, 266-67 (D.C. Cir. 1988)(discussing the extent of the "hard look" it demands of agencies). *See also* MANDELKER, *supra* note 6, § 3.04[4] for a discussion of the "hard look" doctrine.

82. While the judicial review standard currently may be high, one commentator stated:

> Experience with NEPA may justify a more rigorous judicial review standard. The Council on Environmental Quality regularly reports that the number of cases in which federal agencies decide not to prepare impact statements vastly exceeds the number of impact statements which are prepared.

DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 8.02 (1984 & 1990 Supp.) The Council on Environmental Quality's report entitled Environmental Quality 1980: 11th Annual Report on the Council on Environmental Quality 384 (1980), stated that in 1979 approximately 1400 EIS reports were prepared, but federal agencies also prepared thousands of environmental assessments that concluded that no EIS was required. This trend may have only deteriorated. In 1987, federal agencies prepared only a third as many EIS reports as were prepared in 1977. FINDLEY & FARBER, *supra* note 41, at 164.

83. *See* Abbott Lab. v. Gardner, 387 U.S. 136, 151 (1967).

84. 387 U.S. 136 (1967). Drug companies sued the Secretary of Health and Education to challenge a regulation which required labels, advertisements, and other printed matter to reveal the 'established' name of a drug every time the trade name was used. *Id.* at 137-39. The regulations were held to be null and void by the District Court. *Id.* at 139. The Third Circuit reversed. *Id.* The Supreme Court held that the issues were ripe for review, and remanded the case. *Id.* at 148-57.

85. The Secretary of Health, Education, and Welfare designates an "established name" to a prescription drug pursuant to the Federal Food, Drug, and Cosmetic Act of 1962, 21 U.S.C. § 352(e)(2)(1988).

used.[86] Because the regulations required drug companies to spend considerable amounts of money changing labels and promotional material, the Court considered the action brought by the drug companies "ripe," even though the Department of Health, Education, and Welfare had not yet enforced the regulations.[87] The Court outlined a "ripeness test" which has evolved into the following:

> (1) whether the issue[s are] fit for judicial resolution, considering whether they [are] purely legal and whether the agency action was final; and (2) the extent of hardship to the parties of withholding judicial review, considering the direct impact on the day-to-day activities of the parties challenging the agency action.[88]

The first prong of the *Abbott Laboratories* test centers on whether a court can pass judgment on a solidified issue. Courts are much less deferential when reviewing agencies' legal positions than when reviewing agencies' findings of fact.[89] A court may consider whether an agency action is at all legal. Thus, a court considers whether there are only legal questions at issue rather than factual questions.[90] For example, a court will examine closely an agency decision not to complete an EIS for a proposed action but will be more deferential when determining whether an agency complied properly and adequately with NEPA.[91] The courts, however, tend to require a factual situation to test whether there is only a legal question in order to flesh out a dilemma into "manageable proportions . . . by some concrete action."[92]

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86. Abbott Lab. v. Gardner, 387 U.S. at 138. The purpose of the regulation was to make the public aware that many drugs sold under trade names are available under "established names" at significantly lower prices. *Id.*

87. *Id.* at 148-156.

88. Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D.Colo 1992)(citing Sierra Club v. Yeutter, 911 F.2d 1405, 1415 (10th Cir. 1990)).

89. MANDELKER, *supra* note 6, § 3.04[2].

90. The courts are more likely to reverse or modify agency decisions in NEPA cases when the issues are a combination of legal and factual issues rather than only factual issues. MANDELKER, *supra* note 6, § 1.05.

91. *Id.*

92. Lujan v. National Wildlife Fed., 497 U.S. 871, 891 (1990). For example, in *Lujan*, the Court stated that:

> the individual actions of the [Bureau of Land Management] identified . . . can be regarded as rules of general applicability (a "rule" is defined in the APA as agency action of "general or particular applicability *and future* effect," 5 U.S.C. § 551(4)(emphasis added [by Court])) announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities and to take other particular action if requested. It may well be, then, that even those individual actions will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs. But it is at least entirely certain that the flaws in the entire "program" — consisting principally of the many individual actions referenced in the com-

Part of the consideration of whether there is some concrete action that a court can review is determining the "final agency action" at issue.[93] Final agency action is a jurisdictional requirement, i.e., the court must be satisfied that there has been final agency action before it can proceed to review a case on the merits. Finality is "an essential precondition to ripeness."[94] This is a practical determination[95] and, in NEPA cases, finality is a "severable procedural issue," meaning that a court can review whether there has been some "final agency action" that has violated NEPA, even though under existing law, the agency action itself could not be reviewed until a later action.[96] Yet, "final agency action" is not defined in the APA, and courts have struggled since the passage of the APA in 1946 to define "final agency action."[97]

> plaint, and presumably action yet to be taken as well — cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of the respondent's members.

Id. at 892-93.

93. Abbott Lab. v. Gardner, 387 U.S. at 148-49. E. Gates Garrity-Rokous, *supra* note 20, at 646-47 n.31 ("While courts assess ripeness . . . to determine whether a case meets either prudential or Article III 'case or controversy' requirements, finality is a jurisdictional requirement that a litigant must meet to state a claim under § 10 of the APA.) *See* Eagle Picher Ind. v. United States EPA, 759 F.2d 905, 915 (1988)("Ripeness law overlaps at its borders with Article III requirements of case or controversy.").

94. E. Gates Garrity-Rokous, *supra* note 20, at 647 n.31.

95. In Atlantic Terminal Urban Renewal Area Coalition v. NYC Dept. of Envtl. Protection, 697 F. Supp. 666, 674-76 (S.D.N.Y. 1988), the court held that HUD's action of giving preliminary approval to a housing project was final, even though no final decision had been made:

> There is certainly merit to the municipal defendant's argument that HUD's act in this case is not final, and therefore not reviewable, until all steps in the application process . . . have been completed. However, although that may be the point at which HUD views its action final, 'the label an agency attaches to its action is not determinative,' Continental Air Lines v. CAB, 522 F.2d 107, 124 (D.C. Cir. 1974) (en banc) . . . the finality requirement is interpreted in a 'flexible' fashion. Abbott Laboratories v. Gardner, 387 U.S. at 149-50.

In Town of Rye, NY v. Skinner, 907 F.2d 23, 23-24 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 673 (1991), the court held that the FAA's action of approving an airport project was ripe for review (even though the funding for the airport project was uncertain), because no further action was required to evaluate the environmental impact of the project.

96. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (Scrap II), 422 U.S. 289, 319 (1975)("When agency or departmental consideration of environmental factors in connection with [a] 'federal action' is complete, notions of finality . . . do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the [agency action] are not ripe for review.")

97. Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991) held that an agency's refusal to prepare an EIS is not a final agency action for the purposes of APA review, yet Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992) held an agency's refusal to prepare a Supplemental EIS is "final

To further complicate matters, the only time "final agency action" is an issue is when the agency claims that its own determination is inconclusive.[98] In such a situation, a court must make a practical determination balancing the agency's desire to complete its decision-making process without interference against the possibility that withholding review will ultimately preclude a remedy for a plaintiff's potential injury.[99] A plaintiff could be denied a remedy if the agency proceeds with some activity that irreparably harms the plaintiff or the environment. To avoid such an undesirable result, courts generally "resolve the finality question by focusing on whether an agency has made a 'definitive' determination that has a conclusive effect on a party's rights or obligations."[100]

Once a court has decided whether the issues in a case are legal and whether there has been final agency action, the court then considers the second prong of the *Abbott Laboratories* test — the effect on the plaintiffs of withholding review. There have been cases where the circumstances are such that withholding review would have an irreversible environmental effect and would impose a great hardship on the plaintiffs.[101] In such a case, the court may decide

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agency action." Furthermore, the decision not to file an EIS is known as a "threshold" question under NEPA, which is judicially reviewable. MANDELKER, *supra* note 6, § 3.02.

The CEQ's regulations state that it is the Council's "intention" that judicial review of agency decisions take place only after an agency has either filed an EIS or has made a final finding of no significant impact or takes "action that will result in irreparable injury." 40 C.F.R. § 1500.3 (1992). The regulations also state that there should be no cause of action for "any trivial violation of [the CEQ's] regulations." *Id.*

98. In Blue Ocean Preservation Soc. v. Watking, 754 F. Supp. 1450, 1460-88 (D. Haw. 1991), the Department of Energy planned a four phase project to encourage the development of geothermal energy. The Department of Energy claimed that the litigation was not ripe because they had not entered into certain contracts. The court held, however, that the action was ripe, because Congress had already funded a major portion of the project and much of the project was already constructed and operational. The court stated "To rule that a proposal on which Congress had already acted is not ripe for NEPA purposes, i.e., does not trigger NEPA obligations, would elevate form over substance." *Id.* at 1462. *Cf. Public Citizen v. U.S. Nuclear Regulatory Comm'n.*, 940 F.2d 679, 681 n.3 (D.C. Cir. 1991) where the court held that there was no final agency action, even though the agency conceded finality. The court claimed that finality is a judicial question and the agency had no power to concede the issue. *Id.*

99. Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1484, 1488 (W.D. Wash 1992)("To postpone judicial review until specific timber sales were designed and about to be auctioned would defeat the interests of not only the plaintiffs but also the agency and loggers as well.").

100. E. Gates Garrity-Rokous, *supra* note 20, at 644.

101. *See* Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1481-83 (W.D. Wash. 1992)(detailing evidence that if the Forest Service was allowed to continue with its timber harvesting program, the northern spotted owl would become extinct). In Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239 (2d Cir. 1980), the Corps of Engineers recommended, on the basis of a report, an "early action" water supply project, which would drain water from the Hudson River. *Id.* at 240. The

to consider the merits of a case, even if it is obvious that the agency has not completed its decision-making process.[102] If an agency will take years to resolve an issue, a court may deem the issues ripe in order to avoid permanent damage.[103]

The *Abbott Laboratories* test, although easily stated, has been applied in various ways and has been a source of major confusion. Indeed, "the categorization of a case as unripe for federal adjudication cannot be reduced to an orderly, much less a highly principled and predictable, process."[104] The ripeness doctrine boils down to whether a court can "intelligently" decide an issue "in the abstract."[105]

Traditionally, the *Abbott Laboratories* test has been applied in a pragmatic, flexible and functional manner.[106] Yet, recently the Supreme Court has favored a much more formalistic approach to ripeness questions.[107] In *Lujan v. National Wildlife Federation*[108]

Corps did not intend to issue a final EIS until the three to five year study of the project was completed. *Id.* The Second Circuit held that the Corps' Report was not "final agency action." *Id.* at 241. The dissenting judge urged that an interim action should be considered "final agency action," because he believed that alternatives to the project would not be considered, and that made the action final. *Id.* at 242-47. The dissenting judge criticized the majority's holding:

> An astute agency, I fear, would take great advantage of such a rule, by deferring formal decision on a project until the last possible moment, even though it fully planned to build the project.

Id. at 247 (Oakes, J., dissenting).

102. MANDELKER, *supra* note 6, § 4.08[2] ("A holding that an agency action is not ripe for review until a final project or permit decision is made may unnecessarily delay judicial review. A court should find an interim agency action ripe for review if it commits the agency to a course of action which has environmental consequences.").

103. *See, e.g.*, Seattle Audubon Society v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992). *Moseley* was a sequel to Seattle Audubon Society v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991). *Id.* at 1487. The plaintiffs were suing to challenge the Forest Service's standards and guidelines to ensure the viability of the northern spotted owl in national forests located in Forest Service Regions Five and Six. *Id.* In particular, the plaintiffs alleged the Forest Service had failed to comply with NEPA. *Id.* The court issued an injunction prohibiting the Forest Service from auctioning or awarding any additional timber sales that would log suitable habitat for the northern spotted owl until the Forest Service complied with NEPA. *Id.* at 1493-94. The court stated:

> The harm will be done here if the Forest Service adopts an unlawful regulation under which forest management plans are to be adopted and logging rights sold. To postpone judicial review until specific timber sales were designed to and about to be auctioned would defeat the interests not only of the plaintiffs but of the agency and the loggers as well.

Id. at 1488.

104. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 82 (2d ed. 1988).

105. R. PIERCE, JR. ET. AL., ADMINISTRATIVE LAW AND PROCESS 203 (1985).

106. Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1990); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992).

107. *See, e.g.*, Lujan v. National Wildlife Fed., 497 U.S. 871, 890-94 (1990)(holding that there was no agency action for purposes of review although thousands of decisions had been made under a "land withdrawal review program").

(*NWF*), the Supreme Court declared that an agency must publish a rule or regulation before the Court would declare an agency action ripe.[109] The rationale behind this formalistic approach is to preserve the integrity of the administrative agency system by allowing agencies to complete the decision-making process before being challenged.[110] In addition, the Court urged in *NWF*[111] that if the plaintiffs were truly being injured, they should look to other branches of the government, specifically the legislature, to correct the wrong. The Court stated that under the APA the judicial system was not given the power to correct the administrative system unless there was final agency action.[112] In its refusal to grant judicial review,

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108. 497 U.S. 871 (1990).

109. *Id.* at 890 n.2 (stating there must be a regulation which is final and applies across the board.)

110. Abbott Lab. 387 U.S. at 148-49. The Court stated:

> Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts' through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Id.

111. The plaintiffs in *NWF* challenged the Department of Interior, Bureau of Land Management's (BLM) "land withdrawal review program," claiming it was in violation of NEPA and the Federal Land Policy and Management Act of 1976 (FLPMA). 497 U.S. at 875. The "land withdrawal review program" classified public land, favoring a policy in favor of retaining public lands for multiple use management. *Id.* at 876-77. In this process, plaintiffs alleged that some land would be opened for mining activities, thus destroying the natural beauty of the public land. *Id.* at 879. The plaintiffs alleged that the BLM focussed inordinately on mining exploitation and failed to notify the public of the BLM's decision. *Id.* Although the BLM had made "1250 or so individual classification terminations and withdrawal revocations," the court found that the program did not entail "agency action" within the meaning of the APA. *Id.* at 890 (citing the district court, National Wildlife Federation v. Buford, 699 F. Supp. 327, 332 (D.C. Cir. 1988)). While the Court based its decision on standing, the Court also concluded that there was no "final agency action":

> The term "land withdrawal review program". . . does not refer to a single BLM order or regulations, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which [BLM has] occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of the public lands and developing land use plans as required by the FLMPA.

Id. Justice Blackmun in his dissent noted that the issue of ripeness was not briefed or argued in this case. Furthermore, the Government made precisely the opposite argument, asserting that the action was barred by laches. The Government contended: "[T]he [plaintiff] offers no explanation why, despite its detailed knowledge of BLM's revocation and termination activities, it has waited so long to institute litigation." *Id.* at 915 n.16 (Blackmun, J., dissenting)(citing the Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (August 22, 1985)).

112. *Id.* at 891.

the Court ignored the other factors provided in *Abbott Laboratories*.[113] The Court did not examine the potential hardship on the parties of withholding review and disregarding the potential environmental effect of the agency action[114] at issue in *NWF*. The Court, however, acknowledged that a case would be ripe if a plaintiff was required to immediately adjust his or her conduct due to a substantive rule, regardless of whether statutory review was provided apart from the APA.[115]

The Court admitted a "case-by-case approach . . . is understandably frustrating to an organization . . . which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it."[116] Many federal courts, particularly in the West and in the Ninth Circuit, sympathize with this frustration and use all the factors of *Abbott Laboratories* to analyze if a case is ripe.[117] These courts look pragmatically at the effect of the agency action on the litigants and the hardship of delaying judicial review. There is a possibility that if judicial review is withheld, the case will become "moot" before becoming "ripe."[118] The damage to the environment will already have occurred before the agency completes "final agency action."[119]

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113. The Court did not consider (1) whether the issues were fit for judicial resolution, (2) the extent of the hardship on the parties from withholding judicial review, or (3) whether there was "final agency action" in fact, if not in name. *See, id.* at 890-94. *See supra* text accompanying note 88.

114. In approximately 1250 individual determinations, the BLM removed the wilderness protection on 180 million acres spread over seventeen states. National Wildlife Fed. v. Buford, 699 F. Supp. 327, 332 (D.C. Cir. 1988).

115. Lujan v. National Wildlife Fed., 497 U.S. at 891.

116. *Id.* at 894.

117. *See, e.g.*, Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1992); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992); Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1484, 1488 (W.D. Wash 1992). Although not a NEPA case, recently the Seventh Circuit stated:

> The ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require [the plaintiff] to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall.

Triple G Landfills, Inc. v. Board of Comm'rs. of Fountain County, 977 F.2d 287, 291 (7th Cir. 1992)(invalidating a county ordinance that precluded the plaintiffs from developing a landfill).

118. The plaintiffs in Public Citizen v. United States Trade Representatives, 970 F.2d 916 (D.C. Cir. 1992) claimed that their "NEPA claim might become moot before it ripened because courts would refuse to enjoin lawfully approved international agreements on the basis of NEPA violations." *Id.* at 921-22. The court disagreed, stating that there is a chance that Congress could change the existing rules and laws that would force a situation where a court would be prevented engaging in any meaningful review in time. *Id.*

119. In *NWF*, over 180 million acres of wilderness were reclassified, removing the protections provided by a "wilderness" classification. Although the Court found that there was no "final agency action," Justice Blackmun stated: "Abundant record evi-

Furthermore, even before there has been "final agency action," the legal wrong may have already occurred in NEPA cases. NEPA creates informational rights and participation rights.[120] Specifically, NEPA allows the public to receive information about government activity and to challenge agency determinations.[121] Many times, the EIS is a vital source of public information concerning an agency action that may affect the environment.[122] This information is the best ammunition the public has to challenge agency decisions.[123] The public comment and participation process is the only time to challenge an agency decision before the action permanently destroys the environment.[124] If NEPA is not followed and the public is deprived of information and the right to participate, there has

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dence supported the [plaintiff's] assertion that on lands newly opened for mining, mining in fact would occur. . . [and that] mining activities can be expected to cause severe environmental damage." 497 U.S. at 915 (Blackmun, J., dissenting). *See supra* note 101 for a discussion of *Seattle Audubon Soc. v. Moseley*.

120. 42 U.S.C. § 4332(2) (1988); 40 C.F.R. § 1506.6 (1992); Sierra Club v. Hodel, 848 F.2d 1068, 1093-94 (10th Cir. 1988). *See supra* note 30 and accompanying text (1988).

121. 42 U.S.C. § 4332(2) (1988); 40 C.F.R. §§ 1502.19, 1506.6 (1992).

122. *See* Brief, *supra* note 7 (declaration of Cynthia Shogan, at 3-4). ("As the legislative process proceeds . . . I will be called upon to give detailed information to members of Congress and their staffs about the Secretary's rationale for dropping Turtle Canyon and the public reaction to it. I will need to be able to present the technical basis for our rebuttal of the Secretary's decision and to explain whether the Secretary has any viable support for his decision in light of our rebuttal. . . . For example, I might refer to the comments of mining companies to inform members of Congress or their staffs about the presence or absence of conflicts with that use in a given area. In the case of the decision to drop Turtle Canyon, the Secretary made the decision without preparing a Supplemental EIS and without public comment or hearing, and I am unable to present either the mining industry's viewpoint or the agency's response to our scientific rebuttal of the Secretary's rationale for the decision to drop. There is no alternative source for this type of information. . . . In my experience, it is far easier and more efficient to obtain and organize such information in the actual EIS . . . process than to do so later, in the turmoil of the final legislative process."); Brief, *supra* note 7 (declaration of Andrew Wiessner, at 2) (Counsel to the Public Land Subcommittee of the Interior Committee of the U.S. House of Representatives from 1977 to 1985)("The [EIS] serve[s] as a baseline source of data about the areas, their attributes, and the possible resource conflicts. They also contain[ ] comments from the public, government agencies, affected industries and others on the proposed wilderness designation, and the agency's responses to those comments. It [is] also very important to have written information as to why the Administrative Branch or the land managing agency . . . decided to recommend or not recommend an area for wilderness and to have their official written reasons for making the decision. I frequently refer to the data, comments and responses to ascertain some of the important basic facts necessary to advise the [Public Lands Subcommittee of the Interior Committee of the U.S. House of Representatives] and to draft legislation. There [is] no other single source of the type of information contained in the [EIS]. While not an exhaustive source, the [EIS is] a valuable tool to me, to other staff members, and to the Representatives themselves in the legislative process.").

123. *See supra* note 66 and accompanying text.

124. *See supra* note 66 and accompanying text.

already been a legal wrong, regardless of whether there has been final agency action.[125]

Part II: Current Ripeness Doctrine and NEPA

Because *NWF*, the most recent Supreme Court case on ripeness and NEPA, was mainly a standing case, the application of the ripeness doctrine in environmental cases is still far from clear. Despite the Supreme Court's rigid application of the ripeness doctrine,[126] some federal courts have been returning to the traditional, more flexible approach.[127] With some courts following *NWF* and others citing *Abbott Laboratories*, the ripeness doctrine is currently more confused than ever. For example, a case that may be "unripe" in the D.C. Circuit may be ripe in the Ninth Circuit.

Public Citizen v. Office of the United States Trade Representatives[128] (*Public Citizen*) and *Colorado Environmental Coalition v. Lujan*[129] (*CEC*) exemplify the different treatment ripeness inquiries are currently receiving.

Public Citizen took a very formalistic approach to the ripeness doctrine. The plaintiff in this case, Public Citizen,[130] sued the United States Trade Representative negotiating both the Uruguay Round of the General Agreement on Tariffs (GATT) and the North America Free Trade Agreement with Canada and Mexico (NAFTA) for failing to prepare an EIS as required by section 102(c) of NEPA.[131] The D.C. Circuit Court did not reach the merits of the case.[132] Despite the fact that the Trade Representative had refused a request to prepare an EIS,[133] the court dismissed the case because it could not identify any "final agency action."[134] In so ruling,

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125. In City of Los Angeles v. National Highway Safety Admin., 912 F.2d 478, 492 (D.C. Cir. 1990), the court stated:

> The procedural and informational thrust of NEPA gives rise to a cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental harm may occur.

126. *See* Lujan v. National Wildlife Fed., 497 U.S. 871, 890-94 (1990).

127. *See* Sierra Club v. Yeutter, 911 F.2d 1405, 1417, (10th Cir. 1990); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992); Seattle Audubon Society v. Moseley, 798 F. Supp. 1484, 1488 (W.D. Wash 1992).

128. 970 F.2d 916 (D.C. Cir. 1992).

129. 803 F. Supp. 364 (D. Colo. 1992).

130. Public Citizen is a nonprofit legal watchdog group.

131. *Public Citizen*, 970 F.2d at 917.

132. The District Court failed to reach the merits of the case as well. The case was dismissed on summary judgement because the plaintiffs lacked standing. Public Citizen v. USTR, 782 F. Supp. 139, 144 (D.C. Cir. 1992).

133. *Public Citizen*, 970 F.2d at 918. Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991) held that refusal to prepare an EIS is not final agency action.

134. *Public Citizen*, 970 F.2d at 917.

the D.C. Circuit failed to recognize that failing to prepare an EIS at that stage of the negotiations most likely would preclude any decision to prepare an EIS at all. The trade treaties at issue are under a "fast track statute,"[135] which forces Congress to approve or reject the treaty within 60 days.[136] Although Congress does have the power to extend this time period,[137] as the law stands, there would be no time to prepare an EIS, and thus the environmental impact of these treaties would not be considered.

The court dismissed the other factors of the ripeness test, i.e., whether the issues were purely legal and whether there would be hardship on the plaintiffs, as irrelevant to the inquiry into the requirement of final agency action.[138] The court claimed that final agency action is an independent jurisdictional requirement.[139] The court completely ignored the practical effect of the Trade Representative's[140] decision: the treaties would be presented to Congress without any consideration of the impact the treaties would have on the environment.

In contrast to the D.C. Circuit Court, a district court in Colorado, a little more than one month after the *Public Citizen* decision, did consider the practical effect of an agency decision in Colorado Environmental Coalition v. Lujan, (CEC).[141] The Colorado Environmental Coalition, the Southern Utah Wilderness Alliance, and the Wilderness Society[142] sued the Secretary of the Interior for failing to prepare a supplemental EIS, claiming that their information and participation rights had been violated.[143] Specifically, the plaintiffs claimed that they could not challenge the Secretary's assignment of unusually high mining values to five wilderness areas in Colorado and Utah and his decision to drop the wilderness protection from those areas.[144] The court held that the Secretary of the Interior's refusal to prepare such a supplemental EIS was sufficient to constitute "final agency action."[145] In *CEC*, the court de-

135. 19 U.S.C. § 2903(1988).

136. *Id.* § 2191(c) & (e).

137. *Id.* § 2191(a).

138. *Public Citizen*, 970 F.2d at 921-22.

139. *Id.* at 921.

140. The court did not reach the question of whether the United States Trade Representative was an agency within the definition of the APA. *Id.* at 917-18.

141. Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369-70 (D. Colo. 1992) (CEC).

142. The plaintiffs are all non-profit corporations from Colorado, Utah, and the District of Columbia dedicated to wilderness protection in Colorado, Utah, and Nevada. *Id.* at 367.

143. *Id.* at 367-69.

144. *Id.* at 368-69; Brief, *supra* note 7, at 2-5, 17-22.

145. *CEC*, 803 F. Supp. at 369.

fined final agency action as "when it was definitive rather than tentative, when it has a direct and immediate effect on the day-to-day business of the parties, and when it has the status of law and requires immediate compliance."[146] The court declared that the Secretary's refusal to prepare a supplemental EIS already had a "direct and immediate effect on the day-to-day business of the parties"[147] because their information and participation rights had been violated. In addition, the court noted the practical effect of the Secretary's decision:

> [T]he Secretary has reached an irreversible decision. Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendations by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that the question presented is legal in nature and that the challenged agency action is final.[148]

Both *Public Citizen* and *CEC* focused on a decision *not* to consider the environmental impact of the agency's recommendations. The *CEC* court looked at the practical effect of such a decision, realizing that the decision at issue was in violation of NEPA, while the *Public Citizen* court only focused on what the Trade Representative herself labeled the decision — not final. The practical result of the Trade Representative's decision was that the environmental impact of the treaties would not be considered when they were presented to Congress.

Part III: The Pragmatic Approach is More Sensible

Considering the legislative histories of the APA and NEPA, precedent, and the nature of agency decisions, the pragmatic approach of *CEC* is the more proper approach.

The APA's legislative history proves Congress intended to grant to the courts wide powers to review agency decisions.[149] Agency decisions, if they affect peoples' rights, should not be insulated from judicial review. There must be some vehicle to redress a legal wrong, such as a violation of NEPA which results in the denial of notification and participation in a government decision that will adversely affect the environment. While the courts should be concerned about interrupting the decision-making process, there is no reason why the courts should allow agencies to systematically avoid

146. *Id.* (citing Abbott Lab. v. Gardner, 387 U.S. 136, 151-52 (1967)).
147. *Id.*
148. *Id.*
149. *See discussion supra* introduction; Abbott Lab. v. Gardner, 387 U.S. at 140-41.

the NEPA process. The NEPA process triggers the public's right to participate in and contribute to a decision which may affect them. By not allowing the legal rights to trigger, the courts are denying the legal rights absolutely.[150]

A person is deprived of the NEPA right to be notified and participate when an agency that is planning to engage in a "major federal action" or preparing a proposal to Congress for legislation decides *not* to comply with NEPA and decides *not* to prepare an EIS. An agency may claim that the action at issue is exempted from the NEPA requirements because there is no "final agency action" at the current time. This, however, misses the point: the legal wrong occurs when an agency decides not to prepare an EIS and denies the public its information and participation rights. These rights are vitally important to the public because they enable people to participate in the democratic process of governing and also to protect themselves from government action that is detrimental to their environment.

In *CEC*, the Secretary of Interior prevented the plaintiffs from challenging the agency's determination that five wilderness areas had high mining values.[151] The Secretary formally recommended to the President that these areas not be protected permanently as wilderness areas because of the areas' alleged mining potential.[152] The Secretary made this determination immediately before sending his recommendations to the President.[153] Importantly, the Secretary did not file an EIS or hold public hearings, thereby failing to comply with NEPA requirements. As a result, the public was denied an opportunity to participate in the wilderness designation process.[154]

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150. Justice Harlan stated that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Lab.*, 387 U.S. at 140.

151. *See supra* text accompanying notes 141-144.

152. Brief, *supra* note 7, at 2-5, 29.

153. *Id.*

154. James Gehres, who was denied the right to participate in public hearings because the Secretary refused to complete a Supplementary Environmental Impact Statement concerning the five wilderness areas at issue in *CEC*, stated:

> I would like for Secretary Lujan to issue a Supplementary Environmental Impact Statement on his decision to drop these areas from his wilderness recommendation so that I can make formal comments and participate in any public hearing on the subject. In my comments, I would describe the spectacular beauty of these two wilderness study areas and their value as recreational areas. Also, I would report that I have seen no indication of current mining activity. Nor have I seen any indication of new stakes in the wilderness study areas. The only evidence of mining interest in the areas that I have observed is a narrow crude road which was built approximately four year ago up Silver Creek Canyon, but that road has since been abandoned. I would report

Furthermore, information was kept from people who needed it for the legislative process.[155] The EIS is the best source of information for Congress to use in evaluating an agency action, because EIS reports are required to be comprehensive and probative.[156] In *CEC*, the EIS reports would have contained information concerning the areas' attributes, other resources available to the areas other than wilderness, public comments including declarations from people who use the wilderness areas on a regular basis,[157] government comments, agency comments, industry comments, and agency responses to those comments. This information is vital to a complete balancing of all the competing interests so that a decision can be made concerning the full impact of an agency activity, examining the most efficient use of environmental resources whether they be mining or recreational, conservation or preservation.[158]

It is clear that NEPA was intended to lessen the environmental impact of federal actions through procedural requirements.[159] Yet, agencies can insulate their activities from judicial review by claiming that they have not yet reached a stage when the EIS process is necessary. Agencies may then claim that their decisions are a part of an ongoing "process" which should not be reviewed until its completion. Because of the irreparable nature of environmental injuries, however, agency manipulation of the NEPA process is unconscionable. One court, which recently issued an injunction prohibiting the Forest Service from auctioning or awarding logging rights in areas which would harm the spotted owl stated:

> Environmental injury, by its very nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is suffi-

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> my conclusion that there is no visible interest in the area by modern mineral developers. I do not believe that developers would ignore these areas if they were as rich in minerals as the [Secretary's] dollar-value assessment claims.

Brief, *supra* note 7, Declaration of James Gehres, at 6. Mr. Gehres visits the areas at issue annually and had planned a return visit to the area at the time of litigation. Mr. Gehres had also participated in public hearings in 1982 concerning the wilderness study areas. *Id.*

155. Brief, *supra* note 7, at 4-5.

156. 42 U.S.C. § 4332 (1988); 40 C.F.R. §§ 1500.1(b), 1502.1, 1506.8 (1992).

157. The EIS is an important vehicle for those that use wilderness areas on a regular basis to voice their views. Wilderness recreational use is an important economic consideration that may outweigh mining value, particularly if the mineral is of poor quality. *See, e.g., supra* note 154.

158. *See* 42 U.S.C. § 4332 (1988); 40 C.F.R. §§ 1502, 1506.8 (1992); Calvert Cliffs' Coordinating Comm. v. United States AEC, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971).

159. Calvert Cliffs' Coordinating Comm. v. United States AEC, 449 F.2d at 1112-15.

> ciently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.[160]

To deny judicial consideration because of agency manipulation is contrary to the purpose of NEPA.

Judicial precedent supports the position that courts should look at the practical effect of agency decisions on litigants[161] rather than the labels the agencies give to their actions. If the courts look only at the labels of the decisions, agencies are given the power to declare when their determinations are "final," and, thus, agencies are given the power to control when their decisions receive judicial review.[162] The labels agencies give to their decisions — either final or not final — ignores the true impact of the legal wrongs those decisions have on litigants.

Furthermore, in some cases, denying judicial review may not be the best use of judicial resources. If it is clear that litigants' legal rights are being injured by an agency action, it would be in the best interest of all the parties involved to solve the dispute rather than deny review.[163] Resolving disputes early may also save judicial resources, e.g., some cases have been litigated repeatedly because of court's denial of review.[164]

Courts should consider the true impact of an agency action on the plaintiffs rather than apply a formalistic test to determine if the issues are ripe. Under the formalistic approach, the agencies have the power to insulate their activities from judicial review simply by claiming that there has been no final agency action, regardless of

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160. Seattle Audubon Society v. Moseley, 798 F. Supp. 1484, 1491 (W.D. Wash. 1992) (citing Amoco Prod. Co. v. Village of Gambell 480 U.S. 531, 545 (1987)).

161. *See* Abbott Lab. v. Gardner, 387 U.S. 136 (1967); Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1992); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992); Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1484, 1488 (W.D. Wash. 1992).

162. *See supra* note 20 (discussing the trend of agencies towards more "informal" decision-making processes).

163. Furthermore, the CEQ regulations explicitly state that the NEPA process should be implemented early, as it will only be effective if the environmental impact of an agency action will be considered concurrently with the main agency proposal:

> Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

40 C.F.R. § 1501.2 (1992).

164. *See, e.g.*, State ex rel. Sullivan v. Lujan, 969 F.2d 877 (10th Cir. 1992)(involving the exchange of a conservation easement located in the Grand National Park for federal coal). This case has been litigated since 1986, Ash Creek Min. Co. v. Lujan, 934 F.2d 240, 241 (10th Cir. 1991), and has spawned no less than three cases that went to the Circuit level: Ash Creek Min. Co. 969 F.2d 868 (10th Cir. 1992); State ex rel. Sullivan v. Lujan, 969 F.2d 877 (10th Cir. 1992); Ash Creek Min. Co. v. Lujan, 934 F.2d 240, 241 (10th Cir. 1991).

the true impact of their decisions. The more flexible approach to the ripeness question penetrates the labels and scrutinizes the true, legal impact of an agency decision.

Conclusion

The court system is designed to protect rights that are being violated by invidious application of law.[165] Judicial review is an integral part of the legal system that protects rights. A presumption of judicial review was granted in *Marbury v. Madison*.[166] This presumption should not be eliminated because administrative agencies desire to govern without impediment.

An agency decision should not be deemed "not final" because an agency states it is not final.[167] The real impact of such a decision must be examined to determine if the decision affects rights granted by NEPA. A court should delve into whether the issues can be decided by a court and into the true impact of withholding judicial review. Formalistic approaches ignore such impacts. Functional, pragmatic approaches do not.

Author's Postscript

Public Citizen filed another action against the Office of Trade Representative (OTR), again trying to compel the OTR to complete

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165. Alexander Hamilton affirmed this principle:

> [The] independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppression of the minor party in the community . . . the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them . . . Considerate men of every description ought to prize whatever will tend to beget or fortify [the independent] temper in the courts, as no man can be sure that he may not be tomorrow the victim of a spirit of injustice by which he may be a gainer today.

THE FEDERALIST No. 78, at 173-75 (Alexander Hamilton)(Ralph H. Gabriel ed., 1954).

166. 5 U.S. (1 Cranch) 137 (1803).

167. What's in a name? That which we call a rose
By any other word would smell as sweet.

WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2.

an EIS on the NAFTA treaty.[168] The D.C. Circuit held in *Public Citizen v. Office of the United States Trade Representatives (Public Citizen I)*[169] (the first round of litigation discussed in the article) that the OTR had not completed its negotiating process, and therefore the action was not ripe for judicial review. Once the OTR was finished negotiating NAFTA and had finalized the treaty, Public Citizen filed another action, *Public Citizen II*, claiming that there was not a "final agency action" to trigger the NEPA requirements.[170] Furthermore, NAFTA will be submitted to Congress under the "fast track" statute,[171] precluding any changes to NAFTA.[172]

However, once again the D.C. Circuit held that the issues were not ripe for review because there was no identifiable "final agency action."[173] The court held that there would be "final agency action" when President Clinton submitted NAFTA to Congress, which he has not yet done.[174] However, NAFTA is scheduled to take effect January 1, 1994, leaving insufficient time to complete the EIS process.[175] Even the court's concurring opinion recognized that the court's holding was inconsistent with past precedent and frustrated NEPA's objectives:

> The nub of the problem is that judicial review under the APA demands "final agency action" whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmaker considers environmental effects prior to taking action. This is why in *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15, 96 S.Ct. 2718, 2728 n.15, 49 L.Ed.2d 576 (1976), the Court — without mentioning § 704 [the final agency action requirement] of the APA — identified the "time at which a court enters the process" to be "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." [The court's holding],[176] as applied to NEPA suits may have to be reconciled with the portion of *Kleppe v. Sierra Club* just quoted.

Public Citizen filed a petition for certiorari on October 8, 1993.[177]

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168. Public Citizen v. Office of the United States Trade Representative (Public Citizen II), __ F.3d __, 1993 WL 371802 (D.C. Cir.).

169. 970 F.2d 916 (D.C. Cir. 1992).

170. *Public Citizen II*, 1993 WL at *1.

171. 19 U.S.C. §§ 2191-2194, 2902-2903.

172. *Public Citizen II*, 1993 WL at *1.

173. *Id.*

174. *Id.*

175. *Id.*

176. The D.C. Circuit based its decision on *Franklin v. Massachusetts*, __ U.S. __, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), a case that did not deal with NEPA or the environment, but with census data collection.

177. 62 USLW 3289.