When There are No Adverse Effects: Protecting the Environment from the Misapplication of NEPA

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A Thesis submitted to

The Faculty of
The George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws
August 31, 2013

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Abstract

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Governmental actions that benefit the environment are threatened by an incorrect interpretation of NEPA requiring an EIS for actions based solely on beneficial significant effects. At least one circuit has reached this conclusion, with others entertaining the question in dicta. By analyzing the language of NEPA, its purposes, legislative history, and the implementing regulations of CEQ, the conclusion is reached that NEPA was not intended to be interpreted to frustrate government actions that benefit the environment, by requiring an EIS. Agencies can best protect themselves from litigation, by amending their own NEPA implementing regulations to clearly indicate that an EIS is not required for actions with no significant adverse effects.

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I. INTRODUCTION

In 2012, the U.S. Army, at Fort Benning, Georgia, undertook a project to preserve and restore over 8,600 acres of long-leaf pine forest.[1] This project of habitat conservation and environmental improvement demonstrates a remarkable transformation from what was occurring in the federal government forty-three years earlier. At that time, citing the examples of the Santa Barbara oil well blow out and controversies over an assured supply of clean water, Congress expressed concern that many agencies simply did not, or even could not under existing law, consider the effects to the environment before taking a particular action.[2] This resulted in President Richard Nixon signing the National Environmental Policy Act of 1969 (NEPA) into law, on January 1, 1970, as his first official act of the decade.[3] Now, projects such as the pine forest restoration at Fort Benning, which are arguably the fulfillment of the policy vision established by NEPA, are endangered by an incorrect interpretation of the act.

At least one court has held that NEPA requires an Environmental Impact Statement (EIS) for projects with only *beneficial* significant impacts.[4] Requiring an EIS for these projects may well sound the "death knell" for agency actions that have only

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[1] Department of Defense Readiness and Environmental Protection Integration Program, *REPI in the News – 2012*, REPI, http://www.repi.mil/InTheNews/2012News.html (last visited August 5, 2013).
[2] S. Rep. No. 91-296, at 8-9 (1969).
[3] Nicholas C. Yost, The Background and History of NEPA, American Bar Ass'n, NEPA Litigation Guide 2d 1, (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds., 2012).
[4] See National Wildlife Federation v. Marsh, 721 F.2d 767, (11th Cir. 1983), and *infra*, section II.A.

beneficial significant impacts.[5] Many actions by the government result in some kind of adverse effect[6] on the environment. Yet increasingly, the government is doing a better job of undertaking projects that embrace the national environmental policy to "…create and maintain conditions under which man and nature can exist in productive harmony…"[7] These actions that benefit the environment, with no significant adverse impacts, pose a rarely considered question: Does a project with only beneficial significant environmental impacts require an agency to prepare an EIS?

Most recent cases have failed to answer the question of whether significant positive impacts on the environment trigger the need for an EIS.[8] However, looking back to the 1980s and 1990s, the Fifth and Eleventh Circuits appear to have answered this question in the affirmative, while the Sixth Circuit has concluded that no EIS is required for impacts that are solely beneficial.[9] The Fifth Circuit has arguably backed away from this assertion, but was nevertheless relied upon by the Eleventh Circuit in reaching their

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[5] See John F. Shepherd and Hadassah M. Reimer, Range of Proposals Covered by NEPA, American Bar Ass'n, NEPA Litigation Guide 2d 44 (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds., 2012), stating "There is also some feeling among agencies, project applicants, and even courts, that an EIS is the death knell of a project." (citing Cronin v. U. S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990)).

[6] CEQ definitions indicate that effect and impact are used synonymously throughout the NEPA implementing regulations. The two terms are also synonymous in this article. See Index and Terminology 40 C.F.R. § 1508.8 (2012).

[7] 42 U.S.C. § 4331 (2013).

[8] For examples, see Humane Society v. Locke, 626 F.3d 1040, 1056 (9th Cir. 2010) (noting that the question of whether an EIS is required for beneficial significant impacts has not been decided by the court and that it is not necessary to decide the issue in the present case); and Coliseum Square Ass'n v. Jackson 465 F.3d 215, 239 (5th Cir. 2006) (stating that the court has not arrived at an answer as to whether an EIS is required for significant positive impacts).

[9] See generally, Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981); National Wildlife Federation v. Marsh, 721 F.2d 767, (11th Cir. 1983); and Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501 (6th Cir. 1995).

conclusions.[10] These three cases are all more than seventeen years old. While it is not surprising that very few NEPA lawsuits are brought by individuals seeking to prevent benefits to the environment, the argument is still raised regularly. Two district courts have addressed the argument in the two years preceding this article and the Ninth Circuit has at least discussed the issue in the last three years.[11] As agencies continue to take even more environmentally conscious actions, the argument may become even more relevant.

Since NEPA was enacted, there have been more and more governmental programs that are designed to find ways to enhance the environment, while still allowing the government to complete its functions. The longleaf pine restoration at Fort Benning is one example. If NEPA requires that agencies prepare an EIS for projects with only beneficial significant impacts, agencies will comply, because that is what they are required to do. However, because of the cost and delay associated with completing an EIS, agencies will be able to undertake fewer projects that *do* benefit the environment and may be deterred from undertaking such beneficial projects at all.

The cost of preparing an EIS, in both time and money, is a substantial burden. A 2003 report from the NEPA Task Force to the Council on Environmental Quality indicated that an EIS at that time, took an average of one to six years to complete, and cost an average of $250,000 to $2,000,000.[12] In 2013 those costs are unlikely to be

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[10] See Coliseum Square Ass'n v. Jackson 465 F.3d 215, 239 (5th Cir. 2006) (stating that the court has not arrived at an answer as to whether an EIS is required for significant positive impacts); and National Wildlife Federation v. Marsh, 721 F.2d at 782-783.

[11] See Oceana, Inc. v. Bryson, No. C-11-6257EMC, 2013WL1563675, at *24-25 (N.D. Cal. April 13, 2013); Southern Four Wheel Drive Ass'n. v. United States Forest Service, No. 2:10CV15, 2012WL4106427, at *12-15 (W.D.N.C. Sept. 19, 2012); and Humane Society v. Locke, 626 F.3d 1040 (9th Cir. 2010).

[12] National Environmental Policy Task Force, Modernizing NEPA Implementation 66 (2003).

lower, and agencies have substantially diminished resources as a result of the budget cuts under sequestration.[13] Accordingly, it is in an agency's best interest to avoid an EIS whenever possible. Courts have recognized that an EIS, "…is very costly and time-consuming to prepare and has been the kiss of death to many a federal project…"[14] This has perhaps never been as true as it is now.

The possibility that courts could interpret NEPA to require an agency to prepare an EIS for a project with only beneficial significant impacts also creates a pathway for litigation from any group or individual wishing to block a project. NEPA documents have become what they are, at least in part, to avoid litigation. [15] As a result, agencies may prepare lengthy, bulky impact statements primarily to avoid a fight in court.[16] If the litigation risk is large enough, an agency may be forced to prepare an EIS, even if they believe none would be required under a correct interpretation of NEPA, simply to ensure the project can proceed. In some instances, the timing of the project can be more important than the cost to an agency, and if litigation can be precluded, it may be possible to save a project that would otherwise have died in the courts.

The Readiness and Environmental Protection Initiative (REPI) [17] of the Department of Defense provides an example of the type of projects that are at risk. In

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[13] See letter from Jeffrey Zients, Deputy Director for Management of the Office of Management and Budget, to John A. Boehner, Speaker of the House of Representatives (Mar. 1, 2013), http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjcsequestrationreport.pdf

[14] Cronin v. United States Dep't of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990) (citing River Rd. Alliance, Inc. v. Corps of Engineers of United States Army, 764 F.2d 445, 449 (7th Cir. 1985)).

[15] Yost, *supra*, note 3, at 3.

[16] Id.

[17] 10 U.S.C. § 2684a (2013).

2002, Congress authorized the various military departments to partner with other entities to acquire property and even enact conservation measures for lands surrounding military installations using REPI.[18] The purpose of this statute is to address the increasing problem of encroaching development around military bases.[19] Military installations provide a concentration of personnel that business owners find attractive. Most bases have a number of restaurants and shops right outside their gates. In addition, the bases generally employ a large number of civilians in addition to the uniformed members. Hill Air Force Base, in Utah, claims to be the largest employer in the state, with more than 23,500 civilian, military and contractor personnel.[20] All of these people have to live somewhere and the demand for housing surrounding military installations is often fierce. However, all of the developments can negatively impact the mission of the base, as among other impacts, more people living close to a base complain about the noise of aircraft, more off base lighting affects night-time training and wildlife is pushed out of the newly developed areas around the base and onto the relatively open military installations.[21]

REPI is designed to provide a tool that will help to prevent or remedy the some of the problems created by encroaching development. The most common use of REPI is to acquire some sort of easement that will prevent development of the land and leave it in its

[18] 10 U.S.C. § 2684a(d)(2) (2013).
[19] For a discussion of the issues created by encroachment on military installations, see Under Sec'y of Def. for Acquisition, Technology and Logistics, REPI 2013, 7th Annual Report to Congress 3 (2013) (hereinafter REPI 2013).
[20] See Hill Air Force Base, *OO-ALC Mission*, HILL, http://www.hill.af.mil/main/welcome.asp (last visited June 21, 2013).
[21] See REPI 2013, *supra*, note 20, at 2.

natural, or at least, its current state.[22] However, REPI projects do occasionally include enhancements to the environment. For example, working through REPI, Fort Benning, as noted above, has taken actions to benefit 8,600 acres of longleaf pine forest.[23] This REPI project goes beyond merely preserving the forest in its current state. Partners have actually altered the current landscape by restoring the native forest and replanting native species of grasses and longleaf pine, creating habitat for the endangered gopher tortoise and red-cockaded woodpecker.[24] Some might argue that this project could have a beneficial significant impact on the environment.

In 2012, there were a total of 677 REPI projects reported.[25] Total REPI funding was just over $215 million.[26] This represents approximately $318,000 per project on average. If the cheapest environmental impact statements reported in 2003 were $250,000 and some more expensive impact statements cost in the millions, it is easy to see how funding could quickly become exhausted by only a few of these projects in 2013. Obviously, the size and scope of the projects differ and not all REPI projects would require an EIS under any standard, since some would have no impact on the environment at all. Still, the cost of an EIS could make the more environmentally beneficial projects, such as the one at Fort Benning, untenable. Interpreting NEPA to require an EIS for

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[22] Department of Defense, Partner's Guide to the Department of Defense's Readiness and Environmental Protection Initiative (REPI), at 9, http://www.repi.mil/Documents/Primers/Primer_REPI.pdf.
[23] Dep't of Def. Readiness and Environmental Protection Integration Program, *REPI in the News – 2012*, REPI, http://www.repi.mil/InTheNews/2012News.html (last visited August 5, 2013).
[24] Charles Seabrook, *Wildlife and the Military Benefit from Forest Restoration*, The Atlanta Journal-Constitution (Dec. 7, 2012), http://www.ajc.com/news/lifestyles/wildlife-and-the-military-benefit-from-forest-rest/nTNN7/.
[25] See REPI 2013, *supra*, note 20, at 3.
[26] Id.

beneficial significant impacts, merely to explain how the government is going to help the environment, would result in the waste of at least $250,000, and potentially millions of dollars. Worse, it would be contrary to the declared purpose of NEPA for the statute to be used to prevent such projects, either through litigation or because of excessive cost.

This article will supplement current literature, explaining that despite some cases to the contrary, requiring an EIS for beneficial significant impacts is not consistent with the purpose of NEPA or current NEPA implementation. The definition of what might constitute a significant impact in this regard is unclear in both the National Environmental Policy Act (NEPA) and the implementing regulations promulgated by the Council on Environmental Quality (CEQ). However, by deferring to agency interpretation of agency promulgated NEPA regulations, the ambiguity can be resolved. To that end, section II of this article will provide a background overview of NEPA and its requirements. Section III will examine the case law that has interpreted the requirement to prepare an EIS for beneficial significant impacts, and analyze NEPA's legislative history and implementing regulations. Section IV will then look at the possibility of agencies relying on their own agency promulgated regulations for a solution. The deference given an agency's interpretation of its own regulations may be the strongest defense to an argument that an EIS is required for projects with solely beneficial impacts.

II. BACKGROUND AND OVERVIEW OF NEPA REQUIREMENTS

In the 1960s, there were several proposals before Congress, suggesting the need for a national environmental policy and proposing an executive council to address

growing concern over the environment.[27] The Senate committee report, addressing the proposed National Environmental Policy Act, spoke of the need for environmental legislation, noting:

> There is no general agreement as to how critical the Nation's present environmental situation has become. Some respected scholars insist that a number of crises already exist. Others maintain that there is yet time to prevent them. There is nearly unanimous agreement, however, that action is needed and that, at least in some instances, dangerous conditions exist.[28]

The National Environmental Policy Act was Congress' groundbreaking response and has been heralded as an environmental Magna Carta for the United States.[29] The act did three basic things. First, it declared a national environmental policy.[30] Second, it included a provision that requires agencies to complete what has become known as the environmental impact statement, prior to undertaking any major federal action significantly affecting the quality of the human environment.[31] Finally, it created a Council on Environmental Quality (CEQ), which among other duties, was to advise the President on environmental matters and review the programs of the federal government in light of the new environmental policy.[32]

The CEQ was set up as a three member council with the purpose of advising the President and helping to "…formulate and recommend national policies to promote the

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[27] Linda Luther, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation 2-3 (2011) .
[28] S. Rep. No. 91-269, at 13 (1969).
[29] Daniel R. Mandelker, NEPA Law and Litigation 2d §1:1 (2012), available at Westlaw NEPALL.
[30] 42 U.S.C. § 4331 (2013).
[31] 42 U.S.C. § 4332 (2013).
[32] 42 U.S.C. §§ 4342-4344 (2013).

improvement of the quality of the environment."[33] In addition, CEQ has been recognized to have the authority to arbitrate disagreements between federal agencies in implementing NEPA and the nation's environmental policy.[34] Perhaps most important, however, was that in 1970, President Nixon issued an executive order directing CEQ to issue regulations for the various federal agencies to direct their compliance with the procedural portions of NEPA.[35] This resulted in CEQ replacing their initial guidelines with new regulations in 1978, which have been held to be binding on all federal agencies.[36] These regulations will be discussed in detail in section III.D.

NEPA's declared environmental policy has remained unchanged for 43 years. Congress has stated that it is national policy to:

> …use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[37]

Agencies must comply with NEPA and this policy, "to the fullest extent possible."[38] NEPA also contains an action forcing provision which requires that for every legislative proposal or "other major federal action significantly affecting the quality of the human environment…,"[39] agencies prepare a detailed statement, which explains:

(i) the environmental impact of the proposed action,

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[33] 42 U.S.C. § 4342 (2013).
[34] See 42 U.S.C. § 4344 (3) (2013); 42 U.S.C. § 4332 (c) (2013); 42 U.S.C. §7609 (b) (2013); and Predecision Referrals to the Council of Proposed Federal Actions Determined to Be Environmentally Unsatisfactory 40 C.F.R. § 1504.1 (1979).
[35] Executive Order No. 11514, 3 C.F.R. § 123 (1978).
[36] See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[37] 42 U.S.C. § 4331(a) (2013).
[38] 42 U.S.C. 4332 (2013).
[39] 42 U.S.C. 4332 (C) (2013).

> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[40]

This detailed statement is what has become known as the Environmental Impact Statement.

Courts have recognized two main reasons for preparing an EIS. First Section 102, in addition to detailing the contents of the EIS, requires agencies to use a systematic, interdisciplinary approach to planning and decision-making, which considers environmental values.[41] Presumably, decision-makers will utilize the EIS to make, if not more environmentally friendly decisions, then at least more informed decisions. The second recognized purpose of the EIS is not so easily found in the text of NEPA. Nevertheless, the United States Supreme Court has recognized that informing the public that the agency has considered environmental concerns is one of NEPA's "twin aims."[42] Public participation while not spelled out strictly in the act itself, is required under CEQ regulations.[43]

These regulations create three tiers of NEPA analysis. For projects that will have a significant impact on the human environment, the agency must prepare an

[40] Id.
[41] 42 U.S.C. 4332 (A) and (B) (2013).
[42] Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).
[43] See Commenting, 40 C.F.R § 1503 (2012).

Environmental Impact Statement.[44] This is the most comprehensive document, and as noted above, the most expensive option for NEPA compliance. It is also the only option that actually appears in the act itself.[45] Due to the time and expense of creating the statement, there has been a marked trend in the years since the regulations were promulgated, away from preparing an EIS. In 1973 approximately 2,000 environmental impact statements were filed with the Environmental Protection Agency (EPA).[46] In 1979, that number had fallen to 1,273.[47] By 1989, a staggering reduction had occurred, with only 370 EISs filed.[48] That number has since fluctuated, but hovered around 500, with a total of 450 environmental impact statements filed in 2009, the most recent year for which CEQ has made data available.[49] Conversely, CEQ reported that by 1993, over 50,000 environmental assessments were being prepared annually.[50]

The Environmental Assessment (EA) is a shorter report that represents the second tier of environmental analysis under CEQ's NEPA regulations. Some agencies had adopted the approach of drafting an EA to document their finding that no EIS was required, even before CEQ's biding regulations.[51] However, the uniform distinction

[44] See 42 U.S.C. 4332 (C) (2013); and NEPA and Agency Planning 40 C.F.R. §1501 (2012).
[45] 42 U.S.C. 4332 (C) (2013).
[46] Council on Environmental Quality, Environmental Quality 25th Anniversary Report, 51 (1997), http://ceq.hss.doe.gov/nepa/reports/1994-95/25th_ann.pdf.
[47] Id. at 534.
[48] Id.
[49] Id.; and Council on Environmental Quality, Environmental Quality, Calendar Year 2009 Filed EISs, http://ceq.hss.doe.gov/nepa/Calendar_Year_2009_Filed_EISs.pdf.
[50] Environmental Quality 25th Anniversary Report at 51, *supra* note 46, at 51.
[51] See, Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), discussing an environmental assessment prepared by the General Services Administration in order to show that an EIS was not warranted.

between an EA and an EIS, and its mandatory use, is a creation of those regulations.[52] An EA is designed to be used when the agency is unclear if the action will result in significant impacts or if it is the type of action that normally results in no significant environmental impacts but has not been categorically excluded.[53]

In addition to creating the tiers of environmental analysis, the CEQ regulations required agencies to promulgate supplemental regulations.[54] These supplemental regulations required agencies to identify classes of actions, and criteria for classes of actions, that normally require an EIS or an EA. [55] Agencies also were required to identify classes of action that did not normally require an EA or an EIS.[56] These actions would qualify for the third tier of analysis, a Categorical Exclusion (CATEX).[57]

Categorical exclusions represent an entirely different type of analysis. As the name implies, if an agency determines that an action falls under a CATEX, that action is excluded from the requirement to prepare either an EA or EIS.[58] CEQ reports that this has become the most common way for agencies to comply with NEPA.[59] Categorical exclusions must be promulgated by agencies as formal regulations, with public notice and comment periods, and must be approved by CEQ prior to an agency availing themselves

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[52] See NEPA and Agency Planning, 40 C.F.R. § 1501 (2012).
[53] Id.
[54] See Agency Compliance, 40 C.F.R. § 1507 (2012).
[55] See Agency Compliance, 40 C.F.R. § 1507.3 (2012).
[56] Id.
[57] Id.
[58] See Terminology and Index, 40 C.F.R. § 1508.4 (2012).
[59] Council on Environmental Quality, *CEQ issued NEPA Guidance on Categorical Exclusions on November 23, 2010*, NATIONAL ENVIRONMENTAL POLICY ACT, http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html#exclusions (last visited August 5, 2013).

of their use.[60] An example of a CATEX from the U.S. Army Corps of Engineers (hereinafter Corps), would be the construction of a small floating private pier.[61] This is an action, which while subject to regulation by the Corps, has been determined not to produce any significant environmental impacts. Accordingly, the Corps can determine that a CATEX applies and no EA or EIS is required.

Any time an agency undertakes a major federal action which is not exempt from NEPA, there must be some form of NEPA compliance under the CEQ regulations. The agency must either prepare an EA, an EIS or determine that a CATEX applies. Both the EA and the EIS are released for public review and comment.[62] A CATEX generally represents a more routine project of little interest. The CEQ regulations did not specify public comment on such an activity. To indicate NEPA compliance, courts have only required that agencies create a short document, made contemporaneously with the decision to undertake the activity, indicating that environmental effects have been considered and a CATEX has been determined to apply.[63]

All major actions of a federal agency, which are not exempted from NEPA, must fall into one of the three categories. If an agency undertakes an action that is not categorically excluded and is expected to have no significant environmental impacts, the agency must prepare an EA and make a Finding of No Significant Impact (FONSI).[64] If

[60] 40 C.F.R. § 1507.3 (2012).
[61] Processing Department of the Army Permits, 33 C.F.R. § 325 Appendix B 6(a)(1) (2012).
[62] See NEPA and Agency Planning, 40 C.F.R. § 1501.4 (2012); and Other Requirements of NEPA, 40 C.F.R. § 1506.6 (2012).
[63] See, e.g., California v. Norton, 311 F.3d. 1162, 1176 (9th Cir. 2002).
[64] NEPA and Agency Planning, 40 C.F.R. § 1501.4 (2012).

the action will have significant environmental impacts, then the agency must prepare an EIS.[65] The question therefore is what is considered to be a significant impact?

In many cases, language from CEQ and the courts have assumed that significant environmental impacts would be adverse.[66] At least one early case indicated that in deciding if an action has a significant effect, the agency must review the adverse environmental effects the action will cause.[67] Early CEQ guidance also provided that to have a significant effect, the agency action would have to adversely impact the environment.[68] The 1978 NEPA regulations were not as clear, however, and the circuits are currently split as to whether an EIS is required for agency actions that will have only beneficial significant impacts, or whether an EA will suffice.

III. AN EIS SHOULD NOT BE REQUIRED FOR BENEFICIAL IMPACTS

Although NEPA can be read as to require an EIS for beneficial significant impacts to the environment, such a reading would be incorrect and makes little sense. Nevertheless, some commentators have embraced this interpretation, though there is little basis given for their opinions.[69] At least one circuit has also held that an EIS would be required for beneficial significant impacts.[70] Such an approach ignores the spirit of NEPA's implementing regulations and at times, as in the case of REPI projects discussed above, would produce results that are contrary to the purpose of the act itself.

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[65] Id.
[66] See *infra*, Part II.D.
[67] See Hanley v. Kleindienst, 471 F.2d at 830-831.
[68] See Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550-20562, 20551-20552 (August 1, 1973) (to be codified at 40 C.F.R. § 1500.6).
[69] See e.g., Neal McAliley, NEPA and Assessment of Greenhouse Gas Emissions, 41 Envtl. L. Rep. News & Analysis, 10197, 10198-10199 (2011).
[70] National Wildlife Federation v. Marsh, 721 F.2d 767, 782-784 (11th Cir. 1983).

To explain requiring an EIS for projects with only beneficial significant impacts is incorrect, this article will address the current circuit split and what seems to be origin of the beneficial EIS theory. I will look to the legislative history of NEPA and analyze the purpose of the statute. Then I will examine the CEQ regulations and how they have been interpreted since promulgation in 1978. Finally I will look to the doctrine of functional equivalence and some of the exclusions Congress has granted for statutory programs, which demonstrate that a beneficial EIS requirement is inconsistent with the courts' interpretations of NEPA and arguably the interpretation of Congress.

A. THE ORIGIN OF THE BENEFICIAL EIS AND THE CIRCUIT SPLIT

In 2010, the Ninth Circuit recognized that there was a split in the circuit courts as to whether an agency was required to prepare an EIS for projects with significant, though only beneficial, environmental impacts.[71] In spite of this, at least one author has argued that there is in fact no split in the circuits,[72] and that in accordance with the Sixth Circuit, agencies are not required to prepare an EIS under current law for beneficial significant impacts.[73] This argument makes some sense, particularly in light of a Fifth Circuit case, in which the court distanced itself from an apparent holding that an EIS was required for projects with only beneficial significant impacts.[74] However, ultimately the claim that there is no circuit split cannot be supported.

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[71] Humane Society v. Locke, 626 F.3d 1040, 1056 (9th Cir. 2010).
[72] See Shaun A. Goho, NEPA and the "Beneficial Impact" EIS, 36 WM. & Mary Envtl. L. & Pol'y Rev. 367, 375-376 (2012)(Arguing that there is no split, as the 5th and 11th circuits do not address preparation of an EIS, but only when a supplemental EIS is required).
[73] Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501, 506 (6th Cir. 1995).
[74] Coliseum Square Ass'n v. Jackson 465 F.3d 215, 239 (5th Cir. 2006) (stating that the court has not arrived at an answer as to whether an EIS is required for significant positive impacts).

The Eleventh Circuit has affirmatively held that a Supplemental EIS (SEIS) is required for changes in a project that produce only beneficial significant impacts.[75] An argument that this is distinguishable because this case deals only with the preparation of an SEIS, as opposed to an EIS, fails because the Eleventh Circuit has also held that, "The standard for determining when an SEIS is required is 'essentially the same' as the standard for determining when an EIS is required."[76] If the "…post-[original EIS] changes in the [project] will have a 'significant' impact on the environment that has not previously been covered by the [original] EIS…" an SEIS is necessary.[77] If the standard is essentially the same, it is impossible to separate the standard of when to prepare an SEIS from the standard of when an EIS is required. It is in fact the same standard. In the Eleventh Circuit therefore, the requirement for an EIS would be triggered any time there is a significant environmental impact, whether beneficial or adverse.[78]

1. The Seeming Origin of the Beneficial Impact EIS Requirement

The story of this holding and the resulting circuit split does not begin in the Eleventh Circuit, however, but in the Fifth Circuit in 1973.[79] In *Hiram Clark Civic Club, Inc. v. Lynn,* 476 F.2d 421 (5th Cir. 1973), the Department of Housing and Urban Development (HUD) guaranteed and subsidized a loan for the construction of an apartment complex.[80] Given the extent of federal involvement in the project, NEPA was applicable and HUD evaluated the project under agency regulations and determined that

[75] See National Wildlife Federation v. Marsh, 721 F.2d 767, 782-784 (11th Cir. 1983).
[76] Sierra Club v. U.S. Army Corps of Engineers 295 F.3d 1209, 1215-1216 (11th Cir. 1985), citing Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).
[77] National Wildlife Federation v. Marsh, 721 F.2d at 782, (quoting Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981)).
[78] Id. At 783-784.
[79] See Hiram Clark Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973).
[80] Id.

no EIS was required, as there were no significant adverse impacts.[81] The opponents to the project challenged this decision, in part, on the grounds that an EIS should be required for *any* significant impact, even beneficial impacts.[82] The court never ruled on this issue. Instead, they found that the district court had conducted a full evidentiary hearing and explored the controlling factors and upheld the ruling for the government.[83] They did not do this, however, without making some remarks that would prove problematic. In discussing the appellants' argument that an EIS should be required because of beneficial significant impacts, they provided language that would be relied upon in future decisions:

> We think this contention raises serious questions about the adequacy of the investigatory basis underlying the HUD decision not to file an environmental impact statement. A close reading of Section 102(2)(C) in its entirety discloses that Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment.[84]

The CEQ regulations at this time were only guidance and agencies were not bound by them as matter of law.[85] Since the guidance was not mandatory, it also did not represent a uniform approach by all agencies. More importantly, this guidance was substantially different than the regulations CEQ eventually promulgated in 1978 and appears to have lent more weight to the argument for a beneficial EIS requirement, than would later regulations. There were two important aspects of this initial guidance that explain the court's rationale. First, the guidance at issue when the case was decided, was

[81] Id. at 426.
[82] Id.
[83] Id. at 427.
[84] Id.
[85] See Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724-7729 (April 23, 1971).

published in 1971 and did not provide an option to produce an EA as opposed to an EIS, but simply referred to a single environmental statement.[86] Therefore, the court may have concluded that if any kind of NEPA compliance was required, there was only one option, the EIS mentioned in the statute.

Second, the way that the court looked at these guidelines, the concept of significant effects on the environment was much broader. Appellants relied on guideline 5(c), which stated: "Section 101(b) of the Act indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect."[87] Section 101(b) of NEPA provides a list of objectives by which federal programs could implement the national environmental policy. These are:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[88]

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[86] Id.
[87] Hyrum Clark Civic Club Inc. v. Lynn, 476 F.2d at 426 (citing 36 Fed. Reg. at 7725 (1971).
[88] 42 U.S.C. § 4331 (b) (2013).

When the court uses these goals to analyze impacts, it is easy to see how the Fifth Circuit at the time might reach the conclusion that NEPA's significant impact requirement might include beneficial impacts, especially when the EA was not an option. After all, if an agency is supposed to survey impacts to, "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice,"[89] it would seem that beneficial impacts would have to be part of the focus. The same is true for several of the other objectives. Given the court's focus on the guideline pointing to section 101(b), the court's reasoning in this case can be understood.

This was not the correct approach, however, even under the early guidelines. The court only looked at part of section 5(c) of the 1971 guidance, the portion that addressed what effects "…needed to be surveyed in any assessment of significant effect."[90] The list of goals did not define what a significant effect was. It merely provided a background for what would be affected in determining if an effect did rise to the level of significance. Ultimately, the analysis from the court in this case regarding the necessity to produce an EIS for beneficial effects was incomplete. This is understandable, as it was dicta and not a large portion of the analysis of the case, since the court repeatedly indicated that failing to comply with the CEQ guidance did not violate any substantive duty.[91] Had a more thorough analysis been performed, it is possible the court may have reached the conclusion that beneficial impacts did not require an EIS. Nevertheless, given the portion

[89] Id.
[90] Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. at 7725 (April 23, 1971).
[91] See generally, Hiram Clark Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973).

of the guidance the court chose to rely upon, the court's concern with beneficial effects is understandable.

When CEQ promulgated new regulations in 1978, they provided substantially more information as to what might be considered a significant impact. These new regulations were binding on federal agencies[92] and no longer pointed to Section 101(b) of NEPA as a guide for any measure of significant effects. CEQ instead provided a rather complex definition of "Significantly," that "requires consideration of both context and intensity."[93] Under the new regulations, context meant that analysis should focus on the affected population groups or regions of the action.[94] In other words, an agency should ask if the action affects only local populations or interests, or does it have more far reaching consequences. Significance could change under the new regulations, depending on the locales and groups affected.[95] Intensity "refers to the severity of the impact."[96] The regulations then provide a list of ten factors to consider in evaluating intensity. The new factors are much more focused on specific effects, rather than relying on policy declarations. Had *Hiram Clark* been decided under these regulations, it is entirely possible that the discussion of an EIS for impacts that are solely beneficial, would not have been addressed by the court in the way that it was.

[92] See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[93] Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[94] Id.
[95] Id.
[96] Id.

2. The Fifth Circuit

This issue again came up in the Fifth Circuit in 1981 in relation to the Tennessee–Tombigbee Waterway (TTW).[97] The TTW was a project of the U.S. Army Corps of Engineers to create a canal that was designed to connect the Tennessee River in the north, with the Black Warrier – Tombigbee Waterway in the south.[98] The TTW created a continuous route between the upper Ohio and Mississippi valleys and the Gulf of Mexico.[99] The project had been around in one form or another since it was first authorized by Congress in 1946 and the initial EIS for the project was prepared and filed in 1971.[100] The sufficiency of that EIS was challenged, but was upheld by the Fifth Circuit in 1974.[101] Subsequent to that decision, as one might expect in a project that spanned 253 miles and cost more than $2 billion, there were several design changes.[102] The project shifted on one section, from the design of a standard "perched canal" using artificial levees on both sides, to a "chain of lakes" design, with levees on only one side and flooding to the natural hill barrier on the other.[103] On another section, the Corps decided to straighten the Tombigbee River, by digging out cutoffs to connect bends.[104] The project changes also created an additional nine million cubic yards of spoil that

[97] See Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981).
[98] Id. at 986.
[99] Id.
[100] Id. at 987.
[101] See Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).
[102] Environmental Defense Fund v. Marsh, 651 F.2d at 986-990.
[103] Id. at 987.
[104] Id. at 987-988.

would require disposal.[105] In spite of these changes, the Corps maintained that no SEIS was necessary.[106]

The Corps relied on agency regulations that allowed for a more informal document, whenever it was, "…necessary only to clarify or amplify a point of concern raised after the final environmental statement was filed with CEQ (Council on Environmental Quality) (and such point of concern was considered in making the initial decision)…"[107] The court noted that by treating all post 1971 changes as informal under this section, the Corps had filed 18 volumes of informal supplemental reports as opposed to doing a formal SEIS.[108] This led to the Fifth Circuit laying out for the first time the legal standard for when an SEIS is required. They stated:

> We therefore hold that NEPA does require the supplementation of an EIS when subsequent project changes can, in qualitative or quantitative terms, be classified as "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. The standard of the need for an original EIS and of the need for a supplement to that EIS, therefore, is essentially the same; it merely focuses the inquiry on a different body of information to evaluate the "significance" of the environmental impact.[109]

The appellants pointed to several impacts that they believed were significant and had not been considered in the original EIS, as they resulted from the project changes. These included: increased traffic on the canal, which would mean increased turbidity, bank sloughing and pollution; increased loss of wildlife habitat; and the possible creation

[105] Id. at 988.
[106] Id.
[107] Id. at 989 (citing 33 C.F.R. § 209.410(g)(3) (1981)).
[108] Id. at 989.
[109] Id. at 991.

of thousands of acres of stagnant, eutrophic water.[110] The court appeared to believe that these impacts could result from the changed design and that they had not been addressed in the original EIS.[111] If that were true, it would have been reasonable for the court to conclude that these new adverse impacts required the Corps to go back and prepare a formal SEIS. But the court's analysis was not based entirely on the new adverse effects the changes may have caused.

Relying heavily on *Hiram Clark*, the court also pointed out potentially beneficial effects, and appeared to include these as impacts that could necessitate an SEIS.[112] At one point the court noted:

> …merely because some of the new land acquisitions may have been intended to "mitigate environmental impact" does not shield those acquisitions from review under NEPA and the Corps' own regulations. The proper question is not the intent behind the actions, but the significance of the new environmental impacts. And even if the Corps was correct in deciding that the new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.[113]

This language seems to come straight from *Hiram Clark*, which would make the analysis reliant on regulatory guidance that no longer existed. When the Corps attempted to argue that an SEIS was not required, as there were no new adverse impacts, the court, "… [found] no solid evidence that the Corps ever asked the right question…"[114] Instead, in response to the Corps' assertion that there were no new adverse impacts, the court again

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[110] Id at 992-995
[111] Id.
[112] Id. at 994.
[113] Id. at 993 (citing Hiram Clarke Civic Club v. Lynn, 476 F.2d at 426-427).

[114] Id. at 996.

cited to *Hiram Clark* and concluded: "…that is simply the wrong standard. NEPA requires the discussion of all significant environmental impacts, not just adverse ones."[115] According to the Fifth Circuit, the "material" question before the court was, "…does the design have any significant new environmental impacts, whether beneficial or harmful?"[116] Other than citing to *Hiram Clark*, the court provided no analysis for how it reached what seemed to be the conclusion that the requirement to produce an EIS could be triggered by a project with only *beneficial* significant impacts.

The Court's reliance on *Hiram Clark* in concluding that beneficial impacts might trigger the need for an SEIS ignored the new regulations that were promulgated in 1978 by CEQ. These regulations, as noted above, provided substantial guidance on how significant impacts should be defined[117] and were binding on the Corps.[118] Furthermore, the U.S. Supreme Court had already determined that these regulations were entitled to substantial deference.[119] Even if one were to accept that the new regulations might define significant impacts as including beneficial impacts, there is no indication that the court looked to them for any guidance on the issue. The only reference to the CEQ regulations was in determining the standard for when an SEIS might be required.[120] Accordingly, the court's analysis in this regard is highly suspect, if not outright wrong. This may be part of the reason that the Fifth Circuit in 2006, appeared to distance itself from this conclusion.

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[115] Id. at 997 (citing Hiram Clarke Civic Club v. Lynn, 476 F.2d at 426-427).
[116] Id. at 994.
[117] Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[118] See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[119] Id.
[120] Environmental Defense Fund v. Marsh, at 988-992. Footnotes 4 and 10 reference the CEQ regulations in comparison to the Corps' agency regulations.

In *Coliseum Square Association, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006), opponents to a building project financed by HUD argued that an EIS was required, "…even though the project [had] no significant negative environmental effects, so long as it [had] significant positive environmental effects."[121] In responding to that argument, the Court referenced both *Hiram Clark* and *Environmental Defense Fund v. Marsh*.[122] They noted that *Hiram Clark*, while discussing the issue did not actually provide a ruling.[123] Then, the court distinguished *Environmental Defense Fund v. Marsh*, characterizing the holding in that case as only determining that an EIS needs to discuss positive impacts.[124] Appellants likely were not expecting such a narrow interpretation from the court, given the language cited above. Nevertheless, in spite of the language in *Environmental Defense Fund v. Marsh*, the Fifth Circuit distanced itself from an affirmative holding that an EIS or SEIS is required for projects with only beneficial impacts, and refused to provide a definitive answer to the question in *Coliseum Square Association Inc. v. Jackson*.[125]

3. The Eleventh Circuit

In October 1981, the Eleventh Circuit was created from a split of the Fifth Circuit, by the Fifth Circuit Court of Appeals Reorganization Act of 1980.[126] The newly formed Eleventh Circuit published its first opinion on November 3rd, 1981, and held that:

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[121] Coliseum Square Association, Inc. v. Jackson, 465 F.3d 215, 239 (5th Cir. 2006).
[122] Id.
[123] Id. (citing Hiram Clark Civic Club, Inc. v. Lynn, 476 F.2d 421, 426-427 (5th Cir. 1973)).
[124] Id. (citing Environmental Defense Fund v. Marsh, at 993).
[125] Coliseum Square Association, Inc. v. Jackson, 465 F.3d at 239.
[126] Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1994 (1980).

> …decisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit…[127]

Environmental Defense Fund v. Marsh, was published on July 13th, 1981, and was therefore binding precedent on the newly formed Eleventh Circuit.[128] When the Eleventh Circuit in 1983 was asked to rule on a supplemental EIS for changes to a project with only beneficial impacts, they naturally turned to the Fifth Circuit decision of a few years earlier, *Environmental Defense Fund v. Marsh.*[129]

In *National Wildlife Federation v. Marsh*, 721 F.2d 767 (11th Cir. 1983), appellants were challenging the EIS for a community improvement project funded by HUD and implemented by the city of Alma.[130] The EIS was for several improvement projects resulting from Alma being selected for the Model Cities Program in 1968.[131] One of the projects was the construction of a reservoir on Hurricane Creek that became known as Lake Alma.[132] A final EIS was filed in 1976.[133] However, EPA and the Fish and Wildlife Service (FWS) objected to the project because of environmental concerns.[134] Due to these concerns, HUD refused to release funds for the project.[135] As

[127] Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981).
[128] See Generally, Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981).
[129] See National Wildlife Federation v. Marsh, 721 F.2d 767, 782-783 (1983).
[130] Id. at 771.
[131] Id. at 770.
[132] Id.
[133] Id. At 771.
[134] Id.
[135] Id.

part of settling the lawsuit that followed HUD's decision, Alma agreed to obtain a section 404 permit from the U.S. Army Corps of Engineers before proceeding further.[136]

As part of the process to obtain the permit, the Corps held a public hearing.[137] The court noted that opponents to the project at the hearing, "…included nearly all federal agencies involved with conservation and environmental issues: the EPA; the Executive Office of the President, Counsel on Environmental Quality ('CEQ'); FWS; and the Bureau of Outdoor Recreation ('BOR')…"[138] Several non-government environmental groups also opposed the project.[139] Although the District Engineer recommended denying the permit, the Corps continued to investigate it.[140] When the FWS issued a mitigation study, proposing the creation of "green tree reservoirs" to ameliorate the loss of some 1,400 acres of swamp, the Corps eventually agreed to issue the permit, contingent on the mitigation plan being implemented.[141] After several more studies, and another public hearing, EPA, FWS and BOR withdrew their objections to the permit and thus withdrew their objections to the project.[142]

The National Wildlife Federation (NWF) filed suit, arguing in part, that the adoption of the mitigation plan required the preparation of an SEIS.[143] Turning to *Environmental Defense Fund v. Marsh*, the Eleventh Circuit noted:

> …"the legal standard of the need for a supplemental EIS ... is whether the post-[original EIS] changes in the [project] will have a 'significant' impact on the environment that has not previously been

[136] Id.
[137] Id. at 772
[138] Id.
[139] Id.
[140] Id.
[141] Id. at 772-773.
[142] Id. at 773.
[143] Id. at 782.

> covered by the [original] EIS." If a "significant" impact on the environment will result, either "in qualitative or quantitative terms," from subsequent project changes, an SEIS is required.[144]

The project proponents argued that after the extensive studies, both the Corps and EPA agreed that the mitigation plan would have no new adverse effect on the environment.[145] However, the court was unhappy with that argument, noting that, "Neither of these agencies nor the Alma officials focused on the degree of mitigation, the beneficial impact, of the Mitigation Plan."[146] The Eleventh Circuit was bound by Fifth Circuit precedent, and from the view of the Eleventh Circuit, the court in *Environmental Defense Fund v. Marsh*:

> …made clear that even if post-EIS changes in a project are *beneficial* to the environment or are intended to mitigate environmental impact, if those changes are significant, a supplemental statement is required: "The proper question is not the intent behind the actions, but the significance of the environmental impacts. And even if the Corps was correct in deciding that the { "pageset": "Sc2 new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones."[147]

Unsurprisingly, the Eleventh Circuit interpreted *Environmental Defense Fund v. Marsh*, the same way that the appellants in *Coliseum Square* did – if changes to the EIS result in a new significant beneficial impact, then an SEIS is required. Accordingly, when the Eleventh Circuit concluded that "…a number of proposed project changes … are likely to have a significant, though beneficial, impact on the environment…," it led

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[144] Id. (Quoting Environmental Defense Fund v. Marsh, 651 F.2d 983, 991-992 (5th Cir. 1981)).
[145] Id.
[146] Id.
[147] Id. at 782-783, (Emphasis in original), (Quoting Environmental Defense Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981)).

the court to conclude that: "Given the plan's detailed proposals for mitigating any adverse environmental effects resulting from the creation of Lake Alma, as well as the role of the plan in allaying the environmental concerns of all relevant federal agencies, we conclude that the Mitigation Plan will have a significant qualitative environmental impact."[148] The court also spoke to this conclusion in a footnote that on one hand tends to illuminate their reasoning, and on the other, highlights the problem with it. Footnote 22 reads:

> We emphasize that we have no quarrel with the conclusion that the GTRs will cause no impact on water quality. The Mitigation Plan was intended to mitigate the effect of the project on wildlife considerations. It is this significant impact that warrants an SEIS. If there were no significant impact from the plan it would not qualify as a Mitigation Plan at all. We defer to the judgment of the FWS and the Corps that it is indeed a Mitigation Plan.[149]

It is indisputable that the Eleventh Circuit has held here that beneficial significant impacts, which were not discussed in the original EIS, necessitate an SEIS. The way the court reached this conclusion, however, has three major problems. First, the analysis relies on *Environmental Defense Fund v. Marsh*, which was based on the outdated and no longer valid or applicable reasoning from *Hiram Clark*. Second, even if a court were going to conclude that a beneficial significant impact could trigger the need for an SEIS or an EIS, it is problematic to include a mitigation plan in that category. This will be discussed in greater detail below when examining a mitigated FONSI, however, a mitigation plan, by definition, is not an independent significant effect.[150] It is rather a lessening, or mitigating, of an otherwise pre-existing adverse effect. Mitigation has been

[148] Id. at 784.
[149] Id. at footnote 22.
[150] See *infra*, Part II.D.2.

regularly accepted and even encouraged by CEQ to minimize impacts such that they fall below the threshold of significance.[151] This mitigation lessens impacts that otherwise would have created significant adverse effects and required an EIS.

Third, by making it possible for mitigation to be included as an independent significant effect which could trigger the need for an SEIS, it provides a perverse incentive for agencies to avoid adopting mitigation measures once their EIS has been filed. Given that the U.S. Supreme Court has held that an agency does not have to have a fully developed mitigation plan to have a complete EIS, it would be in an agency's best interest to avoid mitigation where possible after the EIS is filed. [152] Otherwise, an agency could find itself in court, and/or having to start the formal EIS process over with an SEIS, simply because they mitigated the adverse effects of their project. This perverse incentive to avoid beneficial effects is one of the problems with any holding which concludes that beneficial impacts trigger the need for an EIS or SEIS, as the results can actually run contrary to the purpose of NEPA. Including mitigation as an independent effect only exacerbates the problem.

Finally, while it is possible to try and distinguish this case as referring *only* to the requirement for an SEIS, the argument cannot be supported. Since the Eleventh Circuit relied on the standard expressed in *Environmental Defense Fund v. Marsh*, it is the same standard for when EIS is required.[153] The Eleventh circuit has quoted that exact language in other cases, noting that just as in the Fifth Circuit, the standard for determining when

[151] Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843-3853, 3843 (January 21, 2011).
[152] See Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (holding that NEPA does not impose a duty to include in each EIS, a fully developed mitigation plan.)
[153] Id. at 782.

an SEIS is required is "essentially the same" as the standard for determining when an EIS is required.[154] Since the court held that changes to the project that result in a significant, though beneficial, impact require an SEIS, the same would be true for an EIS. Under *National Wildlife Federation*, if a project has a significant impact, whether beneficial or adverse, an EIS is required.

4. The Sixth Circuit

In 1995, the Sixth Circuit also addressed the question of the beneficial impact EIS.[155] In doing so, a circuit court looked to the CEQ regulations and the definition of significantly for the first time since the new regulations were published in 1978. In *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501 (6th Cir. 1995), the Farmers Home Administration (FmHA) was funding the construction of a reservoir on Big Fiery Gizzard Creek to provide drinking water for the town of Tracy, Tennessee.[156] Several sites for a reservoir had been considered and the site selected was approved by EPA, FWS, the Corps, the Tennessee Valley Authority, the state Historical Commission and the Tennessee Department of Environment and Conservation.[157] FmHA prepared an environmental assessment and issued a finding of no significant impact, concluding that the project would have no adverse impacts.[158] The lawsuit that followed alleged that

[154] Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1215-1216 (11th Cir. 2002) (quoting Environmental Defense Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981)).
[155] See Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501 (6th Cir. 1995).
[156] Id. at 503.
[157] Id.
[158] Id.

since the project would have a significant *beneficial* environmental impact, an EIS was required before the project could go forward.[159]

It was clear from the record that the project would have a beneficial impact on the residents of Tracy City, in providing an assured source of clean water.[160] And as the Fifth and Eleventh Circuits concluded, it is possible to construe NEPA as including beneficial impacts as triggering the need for an EIS. However, the Sixth Circuit immediately noted that, "The statute… must be read in light of the implementing regulations."[161] While NEPA itself does not provide a definition for what "significantly affecting the quality of the human environment"[162] might mean, the CEQ regulations do provide a definition for "significantly."[163] As noted above, those regulations specify that whether an action has a significant affect, such that an EIS might be required, turns on an individual assessment of its context and intensity.[164] The court reasoned:

> In deciding, on the basis of the assessment, whether the proposed action is one affecting the quality of the environment "significantly," the agency must look at both the "context" of the action and its "intensity." 40 C.F.R. § 1508.27(a) and (b). "Intensity," § 1508.27(b) explains, means "the severity of impact." This choice of adjectives is significant, we think; one speaks of the severity of *adverse* impacts, not *beneficial* impacts.[165]

Looking beyond the regulations, the court also addressed the purpose of NEPA: "One of the central purposes of NEPA, after all, is to promote efforts which will ...stimulate the health and welfare of man.' 42 U.S.C. § 4321. Time and resources are not

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[159] Id. at 504.
[160] Id.
[161] Id.
[162] 42 U.S.C. 4332 (C) (2013).
[163] See Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[164] Id.
[165] Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d at 504 (citing Terminology and Index, 40 C.F.R. § 1508.27 (2012)).

unlimited, as the Supreme Court has reminded us…"[166] With that in mind, the court found that, "the health and welfare of the residents of Tracy City will not be "stimulated" by the delays and costs associated with the preparation of an environmental impact statement that would not even arguably be required were it not for the project's positive impact on health and welfare."[167]

The direction from CEQ in implementing NEPA was also persuasive to the court: "The regulations of the Council on Environmental Quality direct federal agencies 'to make the NEPA process *more* useful to decisionmakers and the public,' not less useful; 'to *reduce* paperwork and the accumulation of extraneous background data,' not expand them; and 'to emphasize *real* environmental issues and alternatives,'…"[168] Noting that this was the reason the environmental assessment process was created in the first place, the court concluded: "It would be anomalous to conclude that an environmental impact statement is necessitated by an assessment which identifies beneficial impacts while forecasting no significant adverse impacts, when the same assessment would not require the preparation of an impact statement if the assessment predicted no significant beneficial effect."[169]

Quite simply, the court recognized that requiring an EIS for a beneficial impact would provide no benefits and would in fact, be contrary to the purpose of NEPA. With this holding, the Sixth Circuit provided an opinion that was based on the current binding

[166] Id. at 505 (citing 42 U.S.C. § 4321 (2012), Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978), and Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 776 (1983)).
[167] Id.
[168] Id. at 505 (emphasis supplied by the court) (quoting Environmental Impact Statement, 40 C.F.R. § 1500.2 (b) (1995)) (The current regulation referenced by the court is found at 40 C.F.R. § 1502 (2012)).
[169] Id.

implementing regulations, which are entitled to substantial deference.[170] In doing so, it reached the opposite conclusion of the Eleventh Circuit and created the current split in the circuits. It also reached the correct conclusion.

5. Other Cases

There are two other lines of cases that have been cited as requiring an EIS for projects with beneficial significant impacts. The first deals with claims of exemption from the NEPA process altogether, such as cases dealing with the designation of critical habitat.[171] A claim of exemption from NEPA compliance is not the same as requiring an EIS for beneficial significant impacts. There is no question that in most federal actions, an agency must demonstrate NEPA compliance by completing an EA, an EIS, or documented reliance on a CATEX. There is no categorical exemption from NEPA compliance for beneficial impacts, and the agency must still utilize one of the above approaches. Accordingly, as other literature as demonstrated, cases holding that an activity is not exempt from NEPA compliance cannot be relied upon for the proposition that a significant beneficial impact requires the preparation of an EIS.[172]

The second line of cases arises when the argument is raised for a project that has significant impacts that are both adverse and beneficial, but will result in a net benefit over all.[173] Courts have held that an EIS is still required for these projects and note that

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[170] See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[171] See, e.g., Douglas County v. Babbit, 48 F.3d 1495 (9th Cir. 1995).
[172] For a compete discussion of cases claiming an exemption from NEPA compliance and the insufficiency of this argument for application to beneficial impacts, see Shaun A. Goho, NEPA and the "Beneficial Impact" EIS, 36 WM. & Mary Envtl. L. & Pol'y Rev. 367, 379-380 (2012).
[173] See, e.g., Environmental Protection Information Center v. Blackwell, 389 F.Supp.2d 1174 (N.D. Cal. 2004).

such an argument is contrary to CEQ regulations.[174] The CEQ regulations make clear that a, "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."[175] This has also been addressed completely in other literature, making clear that this line of cases deals with actions that *do* have significant adverse impacts, though they may include beneficial effects as well.[176]

B. STATUTORY CONSTRUCTION

The language in section 102 of NEPA is broad, and it is possible to read this section to require an EIS for *any* significant impact, including beneficial impacts. The text calling for an EIS requires the agency to:

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented…[177]

The real question is what is meant by "significantly affecting" in this section, and does that include beneficial impacts? In looking at the two requirements cited, and attempting to give each one an independent meaning, it would be plausible to conclude that Congress intended beneficial impacts to be included in the subsection (i) requirement to address the environmental impact, since subsection (ii) specifically addresses adverse effects. Yet as the Supreme Court has indicated, "We do not, however, construe statutory

[174] Id. at 1197.
[175] Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[176] For a complete analysis of this argument, see Shaun A. Goho, NEPA and the "Beneficial Impact" EIS, 36 WM. & Mary Envtl. L. & Pol'y Rev. 367, 80-381 (2012).
[177] 42 U.S.C. § 4332 (2013).

phrases in isolation; we read statutes as a whole."[178] Furthermore, when "…interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute…and the objects and policy of the law.…"[179]

To that end, it is important to look at the purpose of the statute. In 2009, President Barack Obama, indicated that, "NEPA was enacted to promote efforts that will prevent or eliminate damage to the environment..."[180] Then in 2011, the chair of CEQ also stated that NEPA was enacted to "…prevent or eliminate damage to the environment."[181] Both statements quote from the congressionally declared purpose of NEPA:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[182]

As the Sixth Circuit concluded, this purpose would be frustrated by an interpretation that would require an agency to expend substantial time and money to prepare an EIS before going forward with a project that was already in keeping with the declared intent to

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[178] U.S. v. Morton, 467 U.S. 822, 828 (1984) (Citing, Stafford v. Briggs, 444 U.S. 527, 535 (1980)).
[179] Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne 60 U.S. 183, 194 (1856)).
[180] Proclamation No. 8469, 75 Fed. Reg. 885-886 (January 7, 2010).
[181] Nancy H. Sutley, Chair, Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 2 (January 14, 2011), http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.
[182] 42 U.S.C. § 4321 (2013).

eliminate damage to the environment and stimulate the health and welfare of man.[183] Such a requirement would frustrate NEPA's declared purpose, as it would create an incentive for agencies to avoid actions that would "eliminate damage to the environment."[184] Worse yet, it could actually prevent many beneficial actions, as it would make them too expensive or cause them to take too much time to implement.

The REPI project cited in the beginning of this article is a good example of how reading NEPA to require an EIS for beneficial impacts is actually contrary to NEPA, when read as a whole. As pointed out above, REPI funds are not unlimited and the goal of the agency to create a buffer could be met by purchasing land and leaving it untouched.[185] There is no need to engage in projects that actually enhance the environment. However, by doing so, the agency not only meets the declared purpose of NEPA, by "…[encouraging] productive harmony between man and his environment…" and "…[eliminating] damage to the environment…,"[186] but also meets the objectives of the declared national policy, to "…attain the widest range of beneficial uses of the environment without degradation…" and to "…preserve important …natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity…"[187] Finally, the project is also perfectly in accord with the declared national policy to: "…to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to

[183] Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d at 505.
[184] 42 U.S.C. § 4321 (2013).
[185] For the most common uses of REPI, see Council on Environmental Quality, Environmental Quality, Partner's Guide to the Department of Defense's Readiness and Environmental Protection Initiative (REPI) at 9, http://www.repi.mil/Documents/Primers/Primer_REPI.pdf.
[186] 42 U.S.C. § 4321 (2013).
[187] 42 U.S.C. § 4331 (b) (2013).

create and maintain conditions under which man and nature can exist in productive harmony…"[188]

If an EIS were required for this project, however, it is unlikely that sufficient funds would be available to undertake it. Certainly, fewer projects of this type could be executed. Most likely, the agency would simply avoid the actions that actually enhance the environment so as to avoid any significant, though beneficial, effects. It is hard to conclude that eliminating projects that actually meet the goals of NEPA, limiting their number, or even precluding their beneficial environmental impacts could be read to be in keeping with the policies or purpose of the act.

Accordingly, another possible interpretation of section 102 (C), is that subsection (i) simply requires a statement of the overall environmental impacts, including effects that could be avoided with appropriate mitigation or by choosing environmentally friendly alternatives. Subsection (ii) then requires special attention paid to any unavoidable adverse effects. This has the effect of necessitating a discussion of mitigation in identifying the avoidable and unavoidable adverse effects. It does not necessarily follow that that this section requires beneficial significant impacts to trigger the need for an EIS. This interpretation of NEPA appears to be the one embraced by CEQ, with the creation of the distinction between the EA and the EIS.

Recognizing that NEPA is also enacted to provide information to the public, the EA, created by CEQ regulations, can provide the public with the overall statement of the environmental impact of a proposed action required by Section 102 (C) (i), when there

[188] 42 U.S.C. § 4331 (a) (2013).

are no significant adverse impacts.[189] It also demonstrates NEPA compliance, documenting the lack of impacts significantly affecting the quality of the human environment. The more detailed EIS would provide special attention and greater detail for any unavoidable significant adverse impacts, as required by section 102 (C) (ii).[190] When there are no unavoidable significant adverse impacts, it makes sense that the document would be shorter and an EA would be appropriate. CEQ has stressed the importance of reducing paperwork and focusing on real environmental issues.[191] This interpretation is further supported by the acceptance of a mitigated FONSI, where otherwise significant impacts are mitigated to something less than significant and an EA has been found to be appropriate.[192] It is compelling that CEQ has allowed a line to be drawn between an EA and the need for an EIS by the avoidance, or mitigation, of adverse impacts.[193] This fits neatly into the interpretation that *only* when there are unavoidable significant adverse impacts, is the more detailed EIS required.

The problem with this argument is that NEPA only requires an environmental statement if there *are* significant environmental impacts. So the counterargument is, why would you need a statement at all, EA or otherwise, if beneficial impacts are not included in significant environmental effects, and the project only resulted in significant beneficial impacts? The answer, and the reason that such a counterargument fails, is found in the way that CEQ has interpreted NEPA. Under the CEQ regulations, nearly all federal

[189] 42 U.S.C. § 4332 (C) (2013).
[190] Id.
[191] Environmental Impact Statement, 40 C.F.R. § 1502 (2012).
[192] See Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843-3853, 3843 (January 21, 2011).
[193] Id.

actions require some demonstration of NEPA compliance. An action must fit a CATEX or the agency must prepare either an EA or EIS.[194] This is true even for actions that an agency knows will not have a significant environmental impact or even no environmental impact at all. The purposes of NEPA are thus served, in providing information to the public, and demonstrating that environmental effects have been considered and the action will not have significant unavoidable adverse impacts.

In the end, finding the line of significance between an EA and an EIS is a regulatory distinction and not one based on statutory interpretation, save that it may illuminate the approach CEQ has taken to implement the statute. While the regulations do support the interpretation that by simply including subsections (i) and (ii) in 102 (C), Congress did not automatically intend for beneficial impacts to equate to what is meant by "…significantly affecting the quality of the human environment…,"[195] they do not provide a definitive answer. In the end, exactly what is meant by "significantly affecting" in section 102 is unclear.[196] In such a case, "In order to 'give [the Act] such a construction as will carry into execution the will of the Legislature …according to its true intent and meaning'… we turn to the legislative history."[197]

C. LEGISLATIVE HISTORY

The House and the Senate both presented bills to establish a national environmental policy and an executive council for environmental quality.[198] The

[194] Environmental Impact Statement, 40 C.F.R. § 1502 (2012).
[195] 42 U.S.C. § 4332 (C) (2013).
[196] Id.
[197] Stafford v. Briggs, 444 U.S. at 535 (quoting Brown v. Duchesne 60 U.S. 183, 194 (1856) (citing Schlanger v. Seamans, 401 U.S. 487, 490, n. 4, (1971)).
[198] Linda Luther, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation 2-3 (2011).

proposed policy contained strong language, directing the use of all "practical means and measures," to comply with its directives.[199] However, there was still a fear that a policy alone would not be enough.[200] Senator Henry "Scoop" Jackson, the chairman of the Senate Interior and Insular Affairs Committee, related his fears:

> I have been concerned with the inadequacy of the policy declaration in the bill I have introduced. Obviously, this is not enough… [W]hat is needed in restructuring the governmental side of the problem is to legislatively create those situations that will bring about an action forcing procedure the departments must comply with. Otherwise, these lofty declarations are nothing more than that.[201]

Accordingly, the committee's view was that to ensure agencies embraced the new environmental policy, any legislation needed to include action-forcing procedures.[202] With that in mind, the committee report explained:

> To remedy present shortcomings in the legislative foundations of existing programs, and to establish action-forcing procedures which will help to ensure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.[203]

The Senate committee report, does not specifically address what is meant by "significantly affecting the quality of the human environment," however, it is the only

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[199] S. Rep. No. 91-296, at 1-2 (1969).
[200] Nicholas C. Yost, The Background and History of NEPA, American Bar Ass'n, NEPA Litigation Guide 2d 2, (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds., 2012).
[201] Linda Luther, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation 1 (2011) (quoting *Hearing on S.1075 and S. 1752 Before the Committee on Interior and Insular Affairs,* 91st Cong. 116 (1969) (statement of Sen. Henry Jackson, Chairman of Committee on Interior and Insular Affairs)).
[202] S. Rep. No. 91-296, at 19 (1969).
[203] Id. at 19-20.

congressional report that speaks to the action forcing provisions in Section 102 and provides the best insight into the intent of this provision.[204]

The text of section 102 in the Senate version of NEPA, S.1075, was slightly different than what ultimately made its way to the President, and serves to explain what is actually meant in subsections (i) and (ii).[205]

Section 102 (C) S. 1075	Section 102 (C) of the final NEPA
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a finding by the responsible official that --	(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
(i) the environmental impact of the proposed action has been studied and considered;	(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided by following reasonable alternatives are justified by other stated considerations of national policy;	(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) local short-term uses of man's environment are consistent with maintaining and enhancing long-term productivity; and that	(iii) alternatives to the proposed action,
(iv) any irreversible and irretrievable commitment of resources are warranted.[206]	(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
	(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[207]

[204] Yost, *supra* note 200, at 2.
[205] S. Rep. No. 91-296, at 2 (1969).
[206] Id.
[207] 42 U.S.C. 4332 (C) (2013).

Despite the differences, if the general intent of the provision remains the same in what was ultimately passed, as it was in the Senate bill, an argument that beneficial effects were meant to be included in the requirement for an EIS makes little sense. The original language calls for a certification, and requires a study of the overall environmental impact, with special attention paid to, and justification for, unavoidable adverse consequences. In the version that was ultimately signed into law, the requirement to discuss alternatives was given additional emphasis. This is weaker than a required certification and justification for unavoidable consequences, but still requires federal agencies to consider how to avoid adverse effects. Some alternatives will obviously have an adverse environmental impact that *can* be avoided. These would still be discussed under subsection (i). Subsection (ii), however, calls for special attention for any adverse impacts that cannot be avoided under *any* alternative and tracks with subsection (ii) of the original language. The intent of both the draft and final provision is to ensure that the government takes steps to avoid adverse consequences whenever possible.

The main difference between subsections (i) and (ii) in the Senate bill and the law that was ultimately passed, appears to be the separation of the requirement to address alternatives to the action, and the deletion of a requirement for an actual finding that adverse effects are justified in light of other policy concerns. These are significant differences, as had S. 1075 passed in its original form, NEPA may not have been only a procedural statute, but could have actually called for specific environmental results. However, the original wording is still very suggestive of the intent of the final provisions.

The section by section analysis in the report provides further illumination. Subsection C was intended to require actual findings by the responsible official with

regard to major federal actions significantly affecting the quality of the human environment.[208] The finding in subsection (i) was intended to be, "…that the environmental impact of the proposed action has been studied and that the results of the studies have been given consideration in the decisions leading to the proposal."[209] This generally just expresses the need to consider environmental impacts in agency decision making. The finding in subsection (ii) was intended to be more dramatic, being that:

> Wherever adverse environmental effects are found to be involved, a finding must be made that those effects cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the proposal. Furthermore, a finding must be made that the action leading to the adverse environmental effects is justified by other considerations of national policy and those other considerations must be stated in the finding.[210]

As noted above, had the provision been enacted as originally written in S. 1075, it would have created a statute that directed substantive results or a finding that environmental quality was outweighed by other considerations. The changes seem to indicate that Congress was not comfortable with forcing that level of substantive requirement on federal agencies. In taking out the provision, there may have been a compromise. The proposed language required a finding that the adverse effects could not be avoided by reasonable alternatives and that the effects were justified. The enacted legislation instead broke the process down, calling for the discussion of environmental impacts for all alternatives, highlighting the adverse impacts that could not be avoided under any alternative. This does two things. It highlights the need for alternatives that avoid adverse impacts where possible and necessitates a discussion of mitigation.

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[208] S. Rep. No 91-296, at 20 (1969).
[209] Id.
[210] Id.

Looking at the original draft of 102 (C), the inclusion of a section requiring a discussion of over-all impacts and a discussion of why adverse impacts cannot avoided is harmonious and makes perfect sense. The two provisions have nothing to do with requiring the discussion of beneficial impacts and each has its own distinct purpose that is clear. While the redrafted version is less clear, the original intent of the provisions remains the same—to address the overall environmental impacts for all alternatives, with special attention paid to unavoidable adverse impacts under any alternative. By highlighting the need to discuss reasonable alternatives, Congress has ensured that while there may not be a substantive mandate, at least the agency will know which alternative presents the best environmental outcome. The general purpose of the bills, as expressed in the legislative history, supports this interpretation. There is nothing to suggest that in changing the provisions, congress intended beneficial impacts to be included in "significantly affecting."

The discussion of the purposes of both the Senate and House bills both focus on halting environmental degradation and solving current and future environmental problems. The House bill, H.R. 12549, called for the formation of an executive council and would have added an environmental policy to existing statutes.[211] In the very first paragraph of the report, Congress declared that the purpose of the bill was, "…to create a council that can advise the President, Congress and the American people…on steps which may and should be taken to improve the quality of the environment."[212] The House Committee felt that, "An independent review of the interrelated problems

[211] See H.R. Rep. No. 91-378 (1969).
[212] Id at 115.

associated with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation."[213]

The House bill, in addition to the creation of the council, called for a policy section that would, "recognize the impact of man's activities upon his environment and the critical importance of making that impact less adverse to his welfare."[214] Thus, the House version of the bill, while limited to the creation of CEQ and a declaration of policy, was still intended to find ways to halt environmental degradation and solve the pressing environmental problems of the day that led to the committee's quote from the New York Times,

> By land, sea, and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all these enemies is man's own undirected technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, the pesticides in the food chains, and the destruction of topsoil by strip mining are examples of the failure to foresee and control the untoward consequences of modern technology.[215]

The Senate bill was also clearly focused on halting environmental degradation. The committee began, "It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the nation faces."[216] The report then catalogues a long list of environmental problems demonstrating the environmental failures of the nation, including, "…the loss of valuable open space; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution

[213] Id. at 117.
[214] Id. at 123.
[215] Id. at 117 (quoting New York Times, May 3, 1969).
[216] S. Rep No. 91-296, at 4 (1969).

problems; diminishing recreational opportunity; continuing soil erosion; needless deforestation; the decline and extinction of fish and wildlife species; …and many, many other environmental quality problems."[217] Thus, the committee declared that, "The purpose of S.1075 is, therefore, to establish a national policy designed to cope with environmental crisis, whether present or impending."[218]

To address this challenge, the committee indicated that NEPA would contribute to better federal response to environmental decision-making in five ways.[219] These included: clarifying that agencies *do* have authority to consider environmental factors in making decisions; the inclusion of broad national environmental goals and an action-forcing provision; authority to conduct environmental studies and surveys; the establishment of CEQ; and the requirement that CEQ provide an annual environmental report.[220] Only two statements however, directly bear on this discussion. The committee indicated that the action-forcing provision, the requirement to produce an EIS, was "…designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment."[221] The very next sentence, while addressing a separate factor, is even more illuminating: "One of the major factors contributing to environmental abuse and deterioration is that actions – often actions having irreversible consequences – are undertaken without adequate consideration of, or knowledge about, their impact on the environment."[222]

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[217] Id.
[218] Id. at 9.
[219] Id.
[220] Id. at 9-10.
[221] Id at 9.
[222] Id.

These two sentences describe one of the two recognized purposes for producing an EIS – to provide agencies with enough information to adequately consider environmental affects in making decisions. It is telling that these sections both indicate that the action forcing provision, or EIS, is geared to forcing agencies to "…work toward a better environment…" and halting "…environmental abuse and deterioration…"[223] There is nothing in these "five major ways" that NEPA will improve agency decision-making, that indicates the action forcing provisions of NEPA was meant to apply to actions that had no adverse impact on the environment.[224] Quite the contrary, the committee report indicates that NEPA was intended to help the government plan and work toward a better environment, and force the agencies to consider all the affects before taking actions that would have unavoidable adverse effects. The focus in both committee reports remains on avoiding or minimizing environmental degradation. Any interpretation of NEPA that would frustrate that goal is contrary to the collective committees' declared purpose of the act.

Although not a good one, an argument can be made, that an EIS for beneficial impacts is necessary to satisfy the other recognized purpose of producing an EIS – to adequately inform and involve the public in agency decision-making. The Senate Committee report indicated that, "A primary purpose of the bill is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment."[225] Yet even with this declared purpose by the Senate, the requirement for

[223] Id.
[224] Id.
[225] Id. at 8.

public participation in the NEPA process is almost non-existent in the language of the statute itself. The current requirement for public participation is based instead almost entirely in regulation. It is possible that this statement in the report, quoted above, did not indicate a desire to involve the public to the extent the regulations ultimately did. Yet public participation is consistent with the legislative history and has been recognized by the courts as one of the two purposes of NEPA.[226]

Some support for requiring public participation can be found in NEPA's policy statement, "… it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations…,"[227] Section 102 does also require that agencies, "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."[228] However, the explicit requirement for public participation is found in CEQ's implementing regulations.[229] While the legislative history does indicate a desire to involve the public in environmental agency decision making, any argument that an EIS for beneficial impacts is required to meet this purpose, must still inevitably turn on the regulations promulgated by CEQ.

These regulations provide an elegant solution, ensuring that this second primary purpose of NEPA is met even when there are no significant effects on the quality of the environment. In most cases, the agency must still prepare an EA that will be available to interested parties and the public.[230] While the requirement for public participation in the

[226] See Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council, 462 U.S., at 97.
[227] 42 U.S.C. § 4331 (2013).
[228] 42 U.S.C. § 4332(G) (2013).
[229] See Commenting, 40 C.F.R § 1503 (2012)
[230] See NEPA and Agency Planning, 40 C.F.R. § 1501 (2012).

drafting of an EA is not as extensive as that required for an EIS, it is still sufficient, given the lower risk to the environment of a project that has no significant environmental impacts. The EA can still satisfy NEPA's purpose in involving and informing the public, without the expense and delay of an EIS. To fully explore this argument though, it is necessary to turn to the source of the specific requirement, the regulations promulgated by CEQ.

D. CEQ REGULATIONS

In 1978, CEQ promulgated regulations for implementing the procedural aspects of NEPA.[231] These regulations have remained almost entirely unchanged for nearly 35 years. The original regulations were merely guidance for federal agencies, which as noted above, did not result in a uniform approach to the statute.[232] The regulations of 1978, however, were binding on all federal agencies and have been held to be entitled to substantial deference by the courts.[233]

1. Defining Significant Effects on the Environment

While the regulations do not provide a bright-line rule as to what might be considered a significant impact on the environment, the definitions were substantially expanded and include a fairly complex definition of "significantly," as well as a helpful definition of effects.[234] In first reading the statute, it might seem that that there would be some disagreement as to what qualifies as a major action for purposes of significantly affecting the environment. However, CEQ has stated that, "Major," as defined by the

[231] Implementation of Procedural Provisions of NEPA, 43 Fed. Reg. 55978-55990 (November 29, 1978).
[232] See Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724-7729 (April 23, 1971).
[233] See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[234] Terminology and Index, 40 C.F.R. § 1508 (2012).

regulations as part of a major federal action, "reinforces but does not have a meaning independent of significantly."[235] Therefore, in determining what actions require an EIS, the key is not whether the action is a major one, but whether the action would have a significant effect on the quality of the human environment.

As noted in the discussion of *Friends of Fiery Gizzard v. Farmers Home Admin.*, the term "significantly" is not given a simple definition in the regulations. [236] Instead, guidelines are provided to help determine when an action has significant effects. Determining if an effect might be significant requires "consideration of both context and intensity."[237] Context means that the "significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance can vary with the setting of the proposed action."[238] In other words, if all the environmental effects are limited to one small geographic area, such as the construction of a parking lot, significance must be analyzed in the context of that geographic area. Conversely, if the effects are across the nation as a whole, such as the adoption of some new governmental program or standard, the effects must be analyzed in the context of how it will affect the entire nation, not just an isolated area.

Intensity, as it is defined in the regulation, "refers to the severity of the impact."[239] This language was particularly persuasive to the Sixth Circuit, as they

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[235] Terminology and Index, 40 C.F.R. § 1508.18 (2012).
[236] See Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501, 504 (6th Cir. 1995) (citing Terminology and Index, 40 C.F.R. § 1508.27 (2012)).
[237] Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[238] Id.
[239] Id.

concluded that "one speaks of the severity of *adverse* impacts, not *beneficial* impacts."[240] In order to determine the intensity of an effect, the regulation provides a list of ten factors for an agency to consider.[241] Most of these factors are what would be expected: the degree of risk to the environment; the "degree to which the action affects public health or safety"; the proximity of the action to unique, protected or culturally significant geographic areas; and the degree to which the action might affect a threatened or endangered species.[242] All of these represent adverse impacts where analyzing the severity makes sense. However, two of the factors are different. One requires the agency to consider whether the action is connected to other actions which cumulatively might have a significant impact.[243] This is an understandable way to prevent the temptation for agencies to simply break projects into multiple parts that individually do not have a significant impact. The remaining factor is the one that presents the confusion. This factor states that agencies, when evaluating intensity, must consider, "Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."[244]

A plausible interpretation of this is that beneficial impacts could be significant. Read in isolation, that is reasonable. But, there is one other definition that also mentions beneficial effects – the definition of "effects." It is important to note that in the regulations, the term "effects" and the term "impacts" are synonymous and used

[240] Friends of Fiery Gizzard v. Farmers Home Admin, 61 F.3d at 504 (emphasis in original).
[241] Terminology and Index, 40 C.F.R. § 1508.27 (2012).
[242] Id.
[243] Id.
[244] Id.

interchangeably. [245] The very last sentence in the definition of effects provides, "Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."[246] This section when read literally, implies that in order to have *anything* that would qualify as a beneficial *effect* under NEPA, it must first be part of an action that has *both* beneficial and detrimental effects. If that is the case, then without an adverse impact, we never reach the stage of analyzing the effect's intensity or significance. This is supported by the fact that nowhere in the regulations does the term beneficial effects ever appear independent of some adverse effect in the same action. This interpretation is also supported somewhat by the CEQ guidance documents.

In a guide for aligning NEPA with Environmental Management Systems (EMS), CEQ described the NEPA process, in part as, "…forecasting the impacts of a proposed action and reasonable alternatives, and identifying mitigation measures for those impacts prior to making decisions and taking action ('predict-mitigate-implement" model.')"[247] This explanation of NEPA presupposes that any analysis of impacts must include adverse impacts. It is telling that in no NEPA regulation, CEQ guidance, CEQ memorandum or policy document, does CEQ ever indicate that beneficial effects must be analyzed for significance, independent of adverse effects. Nowhere, are beneficial effects even discussed, absent some adverse effect in the same action.

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[245] Terminology and Index, 40 C.F.R. § 1508.8 (2012).
[246] Id.
[247] Council on Environmental Quality, Aligning National Environmental Policy Act Process with Environmental Management Systems A Guide for NEPA and EMS Practitioners, 2 (2007).

The most convincing support for effects only including those actions with adverse impacts can be found in the CEQ guidelines that predate the current regulations. The portion of the definition of effect and the portion of the intensity factor that discusses both beneficial and adverse impacts in the 1978 regulations have very similar language. Both appear to be drawn from language that existed in the 1973 CEQ guidance.[248] Just like the 1978 consideration of intensity, the 1973 guidance also provided a long list of things to consider in evaluating the significance of an impact on the environment.[249] One of those things to consider in determining the significance of an effect was that "Significant effects can also include actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."[250]

This wording is slightly different than the 1978 regulations, but the intent appears to be the same. In this version it is clearer that to have a significant effect, there must be *both* adverse and beneficial effects. To the extent that it is still unclear, toward the latter end of section 1500.6, CEQ explains what is required for an action to significantly affect the environment: "Finally, the action must be one that significantly affects the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment."[251] Here, CEQ has explicitly stated that for an impact to be significant, it must be an adverse effect.

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[248] See Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550-20562,20551-20552 (August 1, 1973) (to be codified at 40 C.F.R. § 1500.6).
[249] Id.
[250] Id.
[251] Id.

This language does not exist in the 1978 regulations, but the reason it was removed was not because CEQ intended for beneficial effects to result in the kind of significant impact that would trigger an EIS. Rather, the focus of the impact on the environment that was to be analyzed changed somewhat. As one can see in additions to the factors in evaluating intensity in the 1978 regulations, it is not just the effect on human beings that must be considered. Agencies now must also consider effects to endangered species and unique or scenic geographic areas.[252] Yet even with this change of focus, it would, of course, still have been possible for CEQ to leave in language that expressly stated that impacts must be adverse to be significant.

So why then, was the language from 1973 regulations that expressly indicated that an impact must be adverse to rise to the level of significantly affecting the environment, absent from the 1978 regulations? It is impossible to say for sure, but again, this simply is not an issue that arises frequently, and was probably not a priority in the minds of the council when working on the regulations. After all, the procedural provisions that these regulations address were created to force the government take a better environmental approach with less environmental damage. Most of the statements from CEQ discussing the regulations, presuppose an adverse environmental impact is present. Neither CEQ nor the drafters of the legislation likely put much thought into government actions that *benefit* the environment, other than to encourage them. Still, the intent that only actions with adverse effects rise to the level of significance remains demonstrated in the purposes of the act, the purpose of the regulations, and the way that CEQ has interpreted the act and regulations in the last 35 years.

[252] Terminology and Index, 40 C.F.R. § 1508.27 (2012).

2. Purpose of the Regulations and CEQ's Interpretation

The preamble to the new regulations in 1978 set out their purpose, "We expect the new regulations to accomplish three principle aims: To reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[253] No good argument can be advanced that requiring an EIS for beneficial impacts reduces paperwork or delays. Both of these purposes in fact, argue that no EIS should be required when there are no adverse impacts.

CEQ stated that to reduce paperwork, "The environmental analysis is to concentrate on alternatives, which are the heart of the process…"[254] As discussed above in the legislative history, the separate requirement for a discussion of alternative was intended to look at ways to avoid adverse effects and ensure agencies were aware which alternative produced the least adverse impacts. In keeping with that, CEQ stated that the, "… record of decision must indicate which alternative (or alternatives) considered in the EIS is preferable on environmental grounds."[255] This requirement neatly captures the intent of the alternatives discussion in the legislative history; that of finding the alternative that avoids the greatest adverse environmental impacts. Preparing an EIS when there are no adverse impacts to try to avoid, makes little sense and in no way reduces paperwork. Again, this purpose can best accomplished by an EA.

CEQ indicated that to reduce delays, "If an action has not been categorically excluded… but nevertheless will not significantly affect the human environment, the

[253] Implementation of the Procedural Provisions of NEPA, 43 Fed. Reg. 55978-55990, 55978 (November 29, 1978).
[254] Id.
[255] Id at 55980.

agency will issue a finding of no significant impact as a basis for not preparing an EIS."[256] The regulations provide that the discussion of impacts in an EIS should be limited to what is necessary: "As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted."[257] If no alternatives produce a significant adverse impact on the environment, it is very hard to justify the additional study that an EIS would provide.

An argument can be raised that an EIS is needed to accomplish the third purpose, that of making better decisions, but the argument is not well supported. If alternatives are the heart of the EIS process, as quoted above, then the argument would be that an EIS is needed to provide alternatives that will allow the decision-maker to identify the course of action *most* beneficial to the environment. Yet this argument fails, as an EA accomplishes the same thing, in a shorter format. The EA still must discuss alternatives and their impacts on the environment.[258] If one alternative is more beneficial than another, that will still be revealed and can still be relied upon in making decisions. Quite frankly, once it is demonstrated that there are no adverse impacts, no more study is warranted when viewed in light of the purposes of both the statute and the regulations. This appears to be the interpretation of CEQ as well, as demonstrated by the concept of a mitigated FONSI.

CEQ has discussed the mitigated FONSI several times. The basic concept is that even if an action would have a significant impact on the environment, if that impact is mitigated as part of the proposal so that the ultimate impact is less than significant, then a

[256] Id. at 55979.
[257] Environmental Impact Statement, 40 C.F.R. § 1502.2 (2012).
[258] Terminology and Index, 40 C.F.R. §1508.9 (2012).

FONSI can still be issued.[259] Later guidance from CEQ is suggestive of not just what is expected of mitigated FONSIs, but also when an EA is appropriate in general. As noted above, in discussing the appropriate use of mitigation and mitigated FONSI's the Chair of CEQ noted that "NEPA was enacted to promote efforts that will prevent or eliminate damage to the environment."[260] The mitigated FONSI does that by encouraging agencies to "…[commit] to mitigate significant environmental impacts, so that a more detailed EIS is not required."[261]

CEQ and the California Governor's Office recently released a handbook for integrating state and federal environmental review, which explained the NEPA process for a mitigated FONSI: "If the potentially significant impacts can be mitigated to a point where clearly no significant effects would occur, then the lead agency may prepare a Finding of No Significant Impact..."[262] This language presupposes that any significant effect is by nature, adverse. The CEQA process was also explained: "If the project will not have any adverse impacts, or such impacts can be mitigated to a point where clearly no significant effects would occur, the lead agency may adopt a Negative

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[259] See Forty Most Asked Questions Regarding CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026-18038, 18038 (March 23, 1981).
[260] Nancy H. Sutley, Chair, Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 2 (January 14, 2011), http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.
[261] Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843-3853, 3843 (January 21, 2011).
[262] CEQ and the California Governor's Office of Planning, NEPA and CEQA: Integrating State and Federal Environmental Reviews, 12 (*Draft for Public Review and Comment*) (March 2013).

Declaration…"[263] This language specifically spells out that a significant effect must be adverse, and it is telling that CEQ and the Governor's office then conclude: "NEPA and CEQA largely dictate the same process for determining the need for an EIS or EIR."[264]

In fact, when highlighting the differences between the two processes, the handbook noted that:

> There is some divergence between the laws in the standard for determining significance. Under CEQA, an EIR is required if substantial evidence supports a *fair argument* that a project *may* have a significant impact, even if other substantial evidence indicates that the impact will not be significant. Under NEPA, more deference is given to the agency's determination based on its assessment of the context and intensity of the potential impacts (40 CFR § 1508.27), where that determination is demonstrated in the NEPA document and supported by the administrative record.[265]

While this is only draft guidance and even in its final version would not amount to a legally binding document, it is nevertheless compelling in its demonstration of how CEQ interprets significant effects. According to this handbook, the real difference between NEPA and a law that specifically requires that effects be adverse to be significant, is that federal agencies receive *more* deference in their determinations of whether an impact is significant.

This discussion of the NEPA FONSI process presupposes that a significant effect is adverse and the state process requires that an effect be adverse to be significant, and the handbook indicates that the two processes are largely the same. The conclusion to draw from the language here and in other discussions of the mitigated FONSI, is that if you can structure an action such that there are no significant adverse impacts, then a

[263] Id. at 13. A Negative Declaration is roughly the California equivalent of a FONSI.
[264] Id. Environmental Impact Report (EIR) is roughly the California equivalent of an EIS.
[265] Id. (emphasis in original).

FONSI is appropriate. There can of course be beneficial effects, and these may need to be discussed in NEPA documents, such as an EA, but a significant effect on the environment requiring an EIS, only exists where there are significant adverse impacts, and only where it is not possible to mitigate those adverse effects sufficiently.

Critics of this analysis might point out that mitigation would not apply to beneficial effects, and thus, there can be no mitigated FONSI for beneficial significant impacts, thereby explaining that any discussion of a mitigated FONSI would *have* to be based on adverse impacts. This observation however, would be untrue. It is, of course, possible for agencies to avoid beneficial effects in many cases, such as REPI, where the agency need only obtain land or an easement, as opposed to any action that might actively enhance the environment. In fact, it seems quite likely that should NEPA be interpreted to require an EIS for beneficial significant impacts, agencies would do their best to avoid or "mitigate" beneficial significant impacts. Projects like the one to restore the longleaf pine forest in Georgia, noted at the beginning of this article, would likely not exist. Such a result would be exactly the opposite of what this action-forcing provision of NEPA was intended to produce. Certainly the purpose of helping and encouraging agencies to make better, more environmentally conscious decisions would not be served. Accordingly, such an interpretation cannot be found to be in harmony with the policies and purposes of the act or their implementing regulations. When discussing the procedural provisions of the new regulations CEQ stated:

> Most of the features described above will help to improve decisionmaking. This, of course, is the fundamental purpose of the NEPA process, the end to which the EIS is a means. Section 101 of NEPA sets forth the substantive requirements of the Act, the policy to be implemented by the "action-forcing" procedures of section

> 102. These procedures must be tied to their intended purpose, otherwise they are indeed useless paperwork and wasted time.[266]

This is a strong statement on the need for the NEPA document to advance the purposes of the act. Since requiring an EIS for beneficial impacts will not advance the purpose of preventing or eliminating environmental damage, the only remaining purpose of NEPA that could be served by an EIS for beneficial impacts, is informing and involving the public in agency decisions, yet that argument fails as well.

3. Requirement for Public Participation

The argument that an *EIS* for beneficial impacts is required because of the need for public participation fails at the outset. All agency actions not covered by a CATEX, or exempt from NEPA compliance require at least an EA. An EA is still a document available to the public and in most cases allows for public comment. While courts do not agree on the level of public participation required for an EA, it is important to note that no court has held that an EIS needs to be prepared simply because it provides enhanced opportunities for public involvement. For this argument to succeed, all EAs would have to be invalidated categorically. Such a position is contrary to the intent of NEPA and CEQ's interpretation and is simply not legally supportable. Nevertheless, this section will address the argument and demonstrate that from a policy perspective, an EIS is not required for beneficial significant effects, due to an argument based on the need for public participation.

As discussed above, very little is said in the statute or the legislative history about how *much* public participation should be required in the NEPA process. It is possible

[266] Implementation of Procedural Provisions of NEPA, 43 Fed. Reg. 55978-55990, 55979 (November 29, 1978).

that Congress intended to limit public participation to information sharing, particularly the results of studies, in order to further research into enhancing the environment and limiting pollution.[267] It is also possible, that to the extent that Congress intended public participation, they may have only intended it for projects that were determined to have a significant adverse effect on the environment, as NEPA only discusses one environmental statement.[268] Whatever was intended, the regulations promulgated by CEQ require substantial public participation in the drafting of an EIS, beginning with the publication of a notice to prepare the EIS, soliciting comments on scoping and then the draft, and even holding public hearings when appropriate.[269] The requirement for public participation in drafting an EA is less well defined, but still includes information sharing and, in most cases, opportunities for public comment. Considering the statements in the legislative history and the statute, these procedures set out in the regulations for public notification and involvement in the EA process, are more than sufficient to satisfy this purpose of NEPA.

Implementation of public participation for an EA is varied, and courts disagree as to exactly what is required. Early NEPA cases required the government to provide enough information for the public to evaluate the environmental factors that influenced the agency decision, and then required that information from the public be able to flow

[267] See e.g., 42 U.S.C. § 4332 (G) (2013).
[268] 42 U.S.C. § 4332 (C) (2013).
[269] See NEPA and Agency Planning, 40 C.F.R. § 1501.7 (2012); Environmental Impact Statement 40 C.F.R. § 1502.19 (2012); Commenting 40 C.F.R. § 1503 (2012); and Other Requirements of NEPA, 40 C.F.R. § 1506.6 (2012).

back to the government.[270] Since the 1978 regulations, some courts have required that when an EA is used as the basis of a decision, it must be made available to the public for the full 45 day comment period, the same as an EIS.[271] But not all courts agree. Some have declined to require that EAs be made available for public comment in all cases prior to agency decisions.[272] Much like the courts, the regulations have two categories of requirements for public participation: A requirement that environmental information be made available to the public and public officials;[273] and a requirement to "…solicit appropriate information from the public.

Not surprisingly, agency approaches vary. Some agencies mirror the process for an EIS, while others just make the EA and a draft FONSI available to the public.[274] The regulations do not specify the exact amount of public involvement required and merely direct agencies to involve the public to the extent practicable.[275] Even so, in most cases, agencies provide some opportunity for public feedback prior to drafting an EA, and then allow comments after a draft EA is produced and before a final EA is issued.[276] Examining all agency public participation regulations is far beyond the scope of this article, but the Department of Defense (DoD) may provide an example of how public participation for an EA is actually handled.

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[270] Joseph Feller, Public Participation Under NEPA, American Bar Ass'n, NEPA Litigation Guide 2d 122, (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds. 2012).
[271] See Save Our Ecosystems v. Clark, 747 F.2d 1240, 1247 (9th Cir. 1983).
[272] See Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1279 (10th Cir. 2004), citing (Pogliani v. U.S. Army Corps of Engineers, 306 F. 32 1235, 1238-1239 (2d Cir. 2002).
[273] See Purpose, Policy, and Mandate, 40 C.F.R. § 1500.1 (2012).
[274] CEQ, A Citizen's Guide to NEPA Having Your Voice Heard, 12 (2007).
[275] NEPA and Agency Planning 40 C.F.R. § 1501.4 (2012).
[276] Feller, *supra* note 270, at 138.

As would be expected, within the DoD, the EA and FONSI are generally considered public documents and are available for review, save only for classified portions.[277] Both the Army and Navy requirements mimic the CEQ regulations, pointing out how important public participation is and requiring that the public be involved to the extent practicable.[278] The Air Force, however, spells out a little more clearly how public participation for routine EAs is to be handled by the Environmental Planning Function (EPF). The Air Force regulations indicate that:

> The EPF must make the EA and unsigned FONSI available to the affected public and provide the EA and unsigned FONSI to organizations and individuals requesting them and to whomever the proponent or the EPF has reason to believe is interested in the action, unless disclosure is precluded for security classification reasons.[279]

The regulations then allow for a flexible comment period, depending on the magnitude of the action.[280] While the agency is given latitude to adopt an appropriate comment timeframe, the regulations never mention less than a 30 day comment period.[281] Environmental documents are provided to interested parties free of charge and the public is given an opportunity to express concerns and shape the project prior to a decision being made.[282]

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[277] See Procedures for Implementing the National Environmental Policy act, 32 C.F.R. §§ 775.11, 775.5 (2012); Environmental Analysis of Army Actions, 32 C.F.R. §§ 651.36, 651.13 (2012); and Environmental Impact Analysis Process (EIAP) 32 C.F.R. § 989.15, 989.26 (2012).
[278] See Procedures for Implementing the National Environmental Policy act, 32 C.F.R. § 775.11 (2012); and Environmental Analysis of Army Actions, 32 C.F.R. § 651.36 (2012).
[279] Environmental Impact Analysis Process (EIAP) 32 C.F.R. § 989.15 (2012).
[280] Id.
[281] Id.
[282] Id.

This process is not unique to the Air Force or DoD and is merely an example of how the NEPA process for an EA satisfies a recognized purpose of public participation; that of providing information to the public and allowing information from the public to flow back to the government. With the EA process satisfying this purpose of NEPA, even from a policy perspective, the only remaining public participation argument for an EIS over an EA, is simply that an EIS is needed because it provides more information and more detailed analysis. To analyze this argument, it is useful to look at the history and development of the EA.

Looking back at the history of NEPA and given the scarce direction in the statute itself regarding providing information to the public, the courts drastically influenced agency approaches to environmental analysis and documents. In early cases, courts found enough fault with the contents of EISs that many agencies began to include as much information as possible in their analysis so that they could not be challenged in litigation. [283] While this approach might produce a comprehensive document, it undermined NEPA's goals, as the documents were useful to too large and too full of extraneous information to be readily useful in identifying the environmental effects and best approach for a project.[284] In large part, the 1978 regulations were created to deal with the increasing problem of environmental documents becoming so large and bulky that they were of little use to the public or to decision-makers.[285] While the purpose of providing information to the public was being met, at least in name, such large

[283] See Nicholas C. Yost, The Background and History of NEPA, American Bar Ass'n, NEPA Litigation Guide 2d 14, (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds. 2012) (Citing Exec. Order No. 11991 (1977)).
[284] Id.
[285] Id.at 13.

documents may have actually been detrimental to the true purpose of public education and participation.[286]

President Carter observed: "But to be more useful to decision-makers and the public, environmental impact statements must be concise, readable and based upon competent, professional analysis. They must reflect a concern with quality, not quantity. We do not want impact statements that are measured by the inch or weighed by the pound."[287] With this direction, CEQ drafted the 1978 regulations with the three purposes discussed above, saving time, reducing paperwork and producing better decisions.[288] It should not have been surprising that CEQ specified in its regulations how long a typical EIS should be. According to the regulations, a final EIS should "…normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages."[289] Even with a normal maximum 300 page limit, CEQ included a provision that for lengthy statements, just the summary could be circulated with the full document available on request.[290] Presumably, it was the position of CEQ that a summary of the EIS was sufficient in many cases to fulfill the NEPA purpose of providing information to the public.

No data is available to show just how much impact these page limits had on the preparation of an actual EIS, but a CEQ report from 2003, indicated that a typical EIS would "range from 200 to more than 2,000 pages in length," and "require 1 to more than

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[286] Id.
[287] Id at 14, citing CEQ, The President's Environmental Program, M-12 (1977).
[288] Implementation of the Procedural Provisions of NEPA 43 Fed. Reg. 55978-55990, 55978 (November 29, 1978).
[289] Environmental Impact Statement, 40 C.F.R. § 1502.7 (2012).
[290] Environmental Impact Statement, 40 C.F.R. § 1502.19 (2012).

6 years to complete."[291] Conversely, an EA can be produced by an agency relatively quickly. Depending on the project and its complexity, it can take anywhere from a few weeks to approximately 18 months.[292] A typical EA for a small project is also usually only about 10 to 30 pages, or 50 to 200 pages for a more complicated project.[293] Understanding that a normal EIS should be less than 150 pages under CEQ regulations, and that in many cases, only circulating the summary of the EIS was sufficient to meet the requirement of informing the public, it is hard to argue that more information is needed than what is already found in an EA that could easily rival the size of what an EIS was intended to be.

Assuming that the EA has met its burden of providing quality analysis, it would also provide the amount of information that is necessary "…to show why more study is not warranted."[294] Accordingly, it would have satisfied the public information requirement under the CEQ regulations, even for an EIS. It would also have met the purposes outlined in the statute and discussed in the legislative history. A project with no adverse impacts, does not require a multi-volume, multi-million dollar document to assess the context and intensity of the beneficial impacts, or to provide over-analysis of which beneficial alternative is the most beneficial.

"Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster

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[291] The NEPA Task Force, Report to Council on Environmental Quality Modernizing NEPA Implementation, 66 (2003).
[292] The NEPA Task Force, Report to Council on Environmental Quality Modernizing NEPA Implementation, 66 (2003).
[293] Id. at 66.
[294] Environmental Impact Statement 40 C.F.R. § 1502.2 (2012).

excellent action."[295] Arguably, for an action with only beneficial impacts, the policies in NEPA have already done this, by providing direction to agencies to engage in this type of activity. Requiring an EIS for such an action is not in keeping with any of the purposes of NEPA, and serves only to frustrate the goals of the act.

E. FUNCTIONAL EQUIVALENCE

The doctrine of functional equivalence bears discussing not for its own sake, but because it illustrates a general interpretation of NEPA by the courts, and arguably, even congress. The most cited case for the creation of the functional equivalence doctrine came out of the D.C. Circuit in 1973.[296] The controversy was over the promulgation of a new source performance standard by EPA.[297] EPA published proposed standards in 1971, with final regulations and additional justification for them following in 1972.[298] The standards and regulations were issued without preparing an EIS.[299] The time table for adoption of new standards only allowed a total of 210 days from proposal to adoption.[300] Accordingly, it would have been possible for the court to conclude that preparation of an EIS was not possible. Instead, the court found that EPA was exempt from NEPA compliance for promulgation of new source standards, because the process to produce those standards was functionally equivalent to the NEPA EIS process.[301]

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[295] Purpose, Policy, and Mandate, 40 C.F.R. § 1500.1 (2012).
[296] See Daniel R. Mandelker, NEPA Law and Litigation 2d §5:15 (2012), available at Westlaw NEPALL, (citing Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).
[297] Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375, 378 (D.C. Cir. 1973).
[298] Id. at 379.
[299] Id.
[300] Id at 380-381, (citing 42 U.S.C. § 1857c-6 (b) (1) (1972).
[301] Id. at 386-387.

The court also discussed a broader exemption for all actions taken by the EPA.[302] While not actually ruling on that issue, the D.C. Circuit set out several factors for consideration, two of which are relevant to this discussion:

> 1) An exemption from NEPA is supportable on the basis that this best serves the objective of protecting the environment which is the purpose of NEPA... (4) An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance with any impact statement requirement as a tactic of litigation and delay.[303]

The court did not ultimately conclude that EPA was exempted from NEPA compliance for all actions, but presumably these factors weighed into the decision to exempt the promulgation of new source performance standards.[304]

The rule-making procedures arguably provided the equivalent of the public participation requirement of NEPA. The court also seemed to rely on EPA's function of protecting the environment, concluding that NEPA's purpose was similarly to protect the environment. The court reasoned:

> EPA's proposed rule, and reasons therefor, are inevitably an alert to environmental issues. The EPA's proposed rule and reasons may omit reference to adverse environmental consequences that another agency might discern, but a draft impact statement may likewise be marred by omissions that another agency identifies. To the extent that EPA is aware of significant adverse environmental consequences of its proposal, good faith requires appropriate reference in its reasons for the proposal and its underlying balancing analysis.[305]

[302] Id. at 383-384.
[303] Id.
[304] Id.
[305] Id. at 386.

Subsequent to this ruling, Congress statutorily exempted actions taken under the Clean Air Act (CAA) from compliance with NEPA section 102, by amendments to the CAA in 1974.[306]

Prior to the D.C. Circuit's decision and the amendments to the CAA, Congress had already exempted certain actions under the Federal Water Pollution Control Act (FWPCA).[307] This exemption reads:

> Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969[308]

As the D.C. Circuit highlighted, "…the debate of a later Congress [has] been described by the Supreme Court as offering a hazardous basis for inferring the intent of the earlier Congress."[309] Nevertheless, when looking at this exemption and the exemption for actions under the CAA, they have one striking thing in common: the exempted actions are ones that will presumably *benefit* the environment.

The promulgation of new source standards is designed to effectuate the reduction of air pollution "…through the application of the best system of emission reduction which … the Administrator determines has been adequately demonstrated."[310] Other actions under the CAA, such as designating criteria pollutants or setting ambient air

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[306] 15 U.S.C. § 793 (2013).
[307] An Act to Amend the Federal Water Pollution Act, P.L. 92-500, 86 Stat. 816 (1972).
[308] 33 U.S.C. § 1371 (c) (2013).
[309] Portland Cement Assoc. v. Ruckelshaus, 486 F.2d at 315, (citing United States v. Southwestern Cable co., 392 U.S. 157, 170 (1968).
[310] Id. at 378, (quoting 42 U.S.C. § 7411 (a) (1) (2013).

quality standards, also are designed to benefit the environment. Likewise the exempted portions of the FWPCA are designed to reduce and limit water pollution. The two actions specifically not exempt from NEPA compliance, are the construction of new treatment facilities, and the permitting of new pollutant sources.[311] Construction of a treatment facility could obviously have adverse environmental impacts, depending on the location and size of the facility. Permitting a new pollutant source also presents a very real danger of adverse environmental impacts. In fact, some adverse impact is almost guaranteed. Seemingly, Congress by providing these exemptions subsequent to its enactment, is interpreting NEPA to require an EIS for adverse actions and exempting actions that are designed to benefit the environment. It is very difficult to argue that the CAA and the FWPCA have not had, and continue to have, beneficial significant effects on the environment.

The functional equivalence exemption has also been held to apply to EPA's actions under other statutes that have no subsequent exemption by Congress, including the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Safe Drinking Water Act, the Resource Conservation and Recovery Act and the Clean Water Act (CWA).[312] A full discussion of the functional equivalence doctrine is beyond the scope of this article, but two cases highlight how courts have interpreted this exemption as consistent with the interpretation of NEPA requiring an EIS only for significant adverse impacts. These two cases come from the Ninth Circuit and the Tenth Circuit.

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[311] 33 U.S.C. § 1371 (c) (2013).

[312] See generally, Daniel R. Mandelker, NEPA Law and Litigation 2d § 5:15 (2012), available at Westlaw NEPALL; and Andrea Berlowe and Albert M. Ferlo, Litigating NEPA Cases, American Bar Ass'n, NEPA Litigation Guide 2d 245-247, (Albert M. Ferlo, Karin P. Sheldon and Mark Squillance, eds. 2012).

In 1975, the Tenth Circuit addressed an order from the EPA Administrator, suspending the registration of certain pesticides under FIFRA.[313] The administrator did so without producing an EIS.[314] Ultimately the court concluded that the report produced by EPA studying the problem was sufficient to comply with NEPA.[315] In doing so, the court reasoned:

> Furthermore, the substance of NEPA is such as to itself exempt EPA from the requirement of filing an impact statement. Its object is to develop in the other departments of the government a consciousness of environmental consequences. The impact statement is merely an implement devised by Congress to require government agencies to think about and weigh environmental factors before acting. Considered in this light, an organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it. To so require would decrease environmental protection activity rather than increase it.[316]

In this analysis, the Tenth Circuit has embraced the interpretation of NEPA, recognized two decades later by the Sixth Circuit in *Friends of Fiery Gizzard v. Farmers Home Admin*. NEPA is designed to empower and direct agencies to consider environmental impacts and ultimately take less harmful actions, not inhibit actions which are beneficial.

In 1992, the Ninth Circuit addressed a claim that EPA and the U.S. Corps of Engineers failed to comply with NEPA by entering into a memorandum of agreement as to guidelines for dredge and fill permits.[317] Arguably, the 1972 exemption discussed above, created by the amendment to the FWPCA, exempted EPA's action in the case.[318]

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[313] See State of Wyo. V. Hathaway, 525 F.2d 66 (10th Cir. 1975).
[314] Id. at 66-67.
[315] Id. at 72-73.
[316] Id. at 71-72.
[317] Municipality of Anchorage v. United States, 980 F.2d 1320, 1322 (9th Cir. 1992).
[318] Id. at 1327-1328.

Ultimately, however, the court did not rule on that issue, instead finding that the obligations of EPA and the Corps are functionally equivalent to those imposed by NEPA.[319] The court reasoned that:

> The purpose of NEPA is to ensure that federal agencies consider the environmental impact of their actions. Under the CWA, Congress has charged the Administrator of the EPA with the duty of cleaning up the nation's navigable waters. We are convinced that in the circumstances of this case an exemption from NEPA will facilitate the EPA's efforts to clean up the nation's waters… [320]

Essentially, the Ninth Circuit has recognized that the purposes of NEPA and the CWA would not be served by requiring an EIS in situations where doing so would be adverse to the ultimate beneficial environmental outcome. In rejecting the plaintiffs' argument against the exemption, the court stated:

> [Plaintiffs] would have us hold that the EPA, the agency charged with protecting the environment, has violated NEPA, a statute designed to ensure that environmental considerations are weighed appropriately before federal agencies act, by interpreting its guidelines in a manner that is too protective of the environment. Because such a reading skews the logical intent of the statutes, we reject it.[321]

Just like the Tenth Circuit, the Ninth Circuit has embraced the idea that NEPA was enacted to prevent and eliminate environmental degradation and using the statute to prevent beneficial actions is counter-productive. It is important to note that this article does not argue that agencies should be exempt from NEPA compliance for actions with only beneficial consequences. Any actions not categorically excluded would still require an EA. However, the development of the functional equivalence doctrine, especially the exemptions provided by congress, demonstrate that NEPA is consistently interpreted as

[319] Id. at 1329.
[320] Id.
[321] Id.

being primarily concerned with actions that have adverse consequences for the environment. An interpretation that would require an agency to produce an EIS, "…just to be issuing it…,"[322] would "…[skew] the logical intent of the statute…,"[323] and should therefore be rejected.

F. THE CORRECT RESOLUTION OF THE CIRCUIT SPLIT

When the Eleventh Circuit held that an SEIS was required for changes to a project that resulted in only beneficial impacts, the holding necessarily meant that an EIS for projects with beneficial significant impacts was required as well, since the standard for when an SEIS is required is the same as the standard for when an EIS is required.[324] This holding was based on a case from the Fifth Circuit which, while appearing to support exactly the conclusion drawn by the Eleventh Circuit, has had such an interpretation disavowed.[325] Neither the Fifth Circuit nor the Eleventh Circuit provided any analysis of the regulations promulgated by CEQ in 1978, and which the U.S. Supreme Court had already determined were due substantial deference by the courts.[326] It wasn't until the Sixth Circuit addressed the issue in 1995, that an analysis was accomplished that relied upon the current regulations promulgated by CEQ. The Sixth Circuit looked at the regulations and definitions to correctly conclude that NEPA, as interpreted by CEQ and implemented by the CEQ regulations, did not intend for agencies to have to prepare an EIS for projects with only beneficial significant impacts.[327]

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[322] State of Wyo. V. Hathaway, 525 F.2d at 72.
[323] Municipality of Anchorage v. United States, 980 F.2d at 1329.
[324] See *supra*, Part III.A.
[325] See *supra*, Part III.A.1.
[326] See *supra*, Part III.A.; and Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[327] See *supra*, Part III.A.4.

The legislative history and the text of the bill originally proposed by the Senate, demonstrate that what is actually required in an EIS is a discussion of the overall environmental impacts of the project, with special attention paid to the significant adverse environmental effects, which cannot be avoided under any alternative.[328] The highlighted requirement for discussion of alternatives in the final law, combined with a requirement to discuss adverse impacts which cannot be avoided, creates a process very similar to the original text from the Senate bill.[329] The original bill focused on requiring the avoidance of adverse impacts and justifying those that could not be avoided.[330] In the final version, the alternatives analysis simply provides a way to discuss mitigation and avoidance of those impacts identified in subsection (i), while subsection (ii) requires notice of any adverse impacts which cannot be avoided or mitigated.[331]

Both the Chair of CEQ and President Obama, have recently emphasized that, "NEPA was enacted to promote efforts that will prevent or eliminate damage to the environment..."[332] This has been the focus of NEPA since the beginning. NEPA was drafted and enacted to prevent continued environmental degradation, not prevent environmental enhancement. The CEQ regulations were drafted to promote better decisions while reducing paperwork and time. Requiring an EIS for actions with only beneficial significant impacts will not result in an environmentally better decision.

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[328] See *supra*, Part III.B-C.
[329] 42 U.S.C. § 4332 (C) (2013).
[330] S. Rep. No. 91-296, at 2 (1969).
[331] 42 U.S.C. § 4332 (C) (2013).
[332] Proclamation No. 8469, 75 Fed. Reg. 885-886 (January 7, 2010); and Nancy H. Sutley, Chair, Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 2 (January 14, 2011).

Instead, if requiring an EIS for projects with only beneficial impacts does not kill the project outright, it will result in potentially multi-year delays and multi-millions of dollars in additional cost. The correct interpretation of NEPA is therefore is that an EIS is not required for actions with only beneficial significant impacts.

The REPI project at Fort Benning, is a perfect example of the kind of project NEPA may have envisioned 43 years ago. With NEPA's stated policy of the federal government to "…create and maintain conditions under which man and nature can exist in productive harmony…,"[333] this project seems to be the embodiment of the spirit of NEPA. The project at Fort Benning, in restoring and preserving the pine forest, is doing exactly what NEPA calls for— creating and maintaining "…conditions under which man and nature can exist in productive harmony…,"[334] ensuring military training can continue by avoiding conflicting development, and restoring and protecting natural habitat for endangered species and public enjoyment.

There are only a very limited number of EISs filed each year by federal agencies. In 2009, across the entire federal government, there were only 450.[335] The fact that this is such a small percentage of the hundreds of thousands of federal actions is both a testament to how well NEPA has worked at minimizing the environmental impacts of the government, and an indication of how assiduously agencies avoid projects with the costs associated with an EIS. Agency budgets are only so large, and are even smaller with the

[333] 42 U.S.C. § 4331 (2013).
[334] 42 U.S.C. § 4331 (2013).
[335] Council on Environmental Quality, Environmental Quality, Calendar Year 2009 Filed EISs, http://ceq.hss.doe.gov/nepa/Calendar_Year_2009_Filed_EISs.pdf.

unexpected effects of sequestration.[336] When an agency has to prioritize its actions, at a time when it is also making decisions about furloughing employees, agency actions like the REPI project at Fort Benning are not going to make the cut if the agency has to complete an EIS. Many projects that result in only beneficial impacts are simply not going to be vital enough to the function of the agency to justify the cost. Such projects will not be funded, or at best, all beneficial environmental effects will be avoided. Interpreting NEPA to require an EIS for this type of project turns the act on its head, effectively creating a situation where the environment must be saved from an act that was designed to protect it. Such an interpretation cannot be, and is not, correct.

IV. A SUGGESTED AGENCY APPROACH

No matter how well reasoned, sensible or even correct an argument that no EIS is required for actions with only beneficial impacts might be, it would be naïve to expect that no group would raise the argument if such an argument stood to benefit the group's position in a dispute. Since funding for litigation is not unlimited on either side, the best way to prevent such an argument from being raised is to be clearly prepared to defeat it. With that in mind, agencies can and should take steps to be ready to handily defeat this argument.

The best solution from the perspective of an Agency would be, of course, for Congress to amend NEPA and set out clearly that for an EIS to be required, there must be

[336] See letter from Jeffrey Zients, Deputy Director for Management of the Office of Management and Budget, to John A. Boehner, Speaker of the House of Representatives (Mar. 1, 2013), http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjcsequestrationreport.pdf

a significant *adverse* impact on the environment. However, given that NEPA has remained virtually unchanged for 43 years, this solution seems unlikely. Almost as good a solution would be for CEQ to add back into the regulations, language that used to appear in 1973, specifying that impacts must be adverse to trigger the need for an EIS.[337] Yet these regulations also have remained virtually unchanged since they were published in 1978. Any change at this point, would be unlikely.

The best option left for an agency is amending their own regulations to ensure that an agency may rely on these for an interpretation that an EIS is not required for actions with no significant adverse impacts. It would be tempting to simply refer to CEQ regulations and argue that the appropriate interpretation is that set out in part III.D. of this article, the same interpretation reached by Sixth Circuit.[338] Such an argument would hopefully be persuasive, but there is no guarantee that the court would accept it. Furthermore, since CEQ will not be there arguing the case, the court may well afford no deference to the agency's interpretation of NEPA.[339] Accordingly, relying on the CEQ regulations will do little to prevent the argument from being raised. However, by amending their own regulations to set out the interpretation clearly, an agency would be entitled to substantial deference in the interpretation of its own regulations.[340] While

[337] See Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550-20562, 20552 (August 1, 1973) (to be codified at 40 C.F.R. § 1500.6), stating that in order to be a significant impact, there must be an adverse effect on human beings.
[338] See Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501 (6th Cir. 1995).
[339] See Grand Canyon Trust v. F.A.A., 290 F.3d 339, 341-342 (D.C. Cir. 2002
[340] See Auer v. Robbins, 519 U.S. 452, 461 (1997); and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414 (1945).

agency NEPA regulations are somewhat unusual in the context of agency deference for implementing regulations, agencies are nevertheless entitled to this deference.[341]

In *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.,* the U.S. Supreme Court established two rules for determining if an agency's interpretation of a statute it administers is entitled to deference.[342] First, the court must determine if the language at issue is ambiguous, for if congress has clearly spoken to the issue, then there can be no interpretation other than the one congress has directed.[343] If the statute is silent or ambiguous, on the other hand, then the reviewing court must defer to an agency's interpretation, if that interpretation is based on a permissible construction of the statute.[344] As noted by the Second Circuit, the language of NEPA, "…has been characterized as 'opaque' and 'woefully ambiguous'…"[345] Certainly, NEPA has failed to define "significantly," in terms of what exactly is meant by "significantly affecting the quality of the human environment."[346]

NEPA is unusual though, in that no single agency implements the act. Each agency is responsible for complying with NEPA and preparing its own environmental impact statements and assessments as appropriate. In analyzing compliance with acts

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[341] See e.g. Ohio Valley Envtl. Coal. v. Aracoma Coal Co. 556 F.3d 177, 193-194 (4th Cir. 2009) (holding that Corps regulations implementing NEPA are entitled to highly deferential review, or Auer Deference); and Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 399 (9th Cir. 1989) (holding that the Corps' NEPA regulations are entitled to deference).

[342] Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984).

[343] Id.

[344] Id.

[345] Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (quoting City of New York v. United States, 337 F.Supp.150, 159 (E.D.N.Y. 1972), and Larry H. Voight, The National Environmental Policy Act and the Independent Regulatory Agency, 5 Natural Resources Lawyer 13 (1972)).

[346] 42 U.S.C. § 4332 (C) (2013).

that similarly apply to all agencies, some courts have concluded that no single agency's interpretation of a statute would be controlling, and thus entitled to deference.[347] Yet, unlike some acts, such as the Freedom of Information Act that has no single agency overseeing its implementation, NEPA also created CEQ. CEQ *is* a single agency with authority to interpret NEPA. Early on, the U. S. Supreme Court held that CEQ's interpretation of NEPA, and the regulations promulgated by CEQ, were entitled to substantial deference.[348] CEQ *has* offered a definition of "significantly," though that definition also fails to specify whether beneficial effects alone qualify under that definition.[349] Had CEQ clearly provided an answer as to whether beneficial effects alone can qualify as a significant effect, the analysis would be over. Unfortunately, while it is possible to ascertain an answer, as discussed in part III.D. of this article, CEQ did not set that answer out clearly.

CEQ is entitled to deference in the interpretation of its regulations, but agencies may not be. The D.C. Circuit is the only Circuit to squarely address this issue since the publication of the 1978 regulations, and they have held that an agency is entitled to no deference in the interpretation of NEPA or CEQ's implementing regulations.[350] The D.C. Circuit has recognized that agencies are entitled to deference in the interpretation of their own regulations, however, including their NEPA implementing regulations.[351] Other circuits have not addressed the issue of interpreting CEQ regulations quite as

[347] See e.g. Al-Fayed v. C.I.A. 254 F.3d 300, 307 (D.C. Cir. 2001) (holding that because the Freedom of Information Act applies across all federal agencies and no single agency administers the act, a single agency interpretation is not entitled to deference).
[348] Andrus v. Sierra Club, 442 U.S. 347, 357 (1979).
[349] See 40 C.F.R. § 1508.27 (2012), and *supra*, Part III.D. of this article.
[350] Grand Canyon Trust v. F.A.A., 290 F.3d at 341 – 342.
[351] National Trust for Historic Preservation in U.S. v. Dole, 828 F.2d 776, 782 (D.C. Cir. 1987).

squarely, but some have been more generous in upholding what could be characterized as an agency interpretation of NEPA, based on agency regulations.

The Ninth Circuit, has applied the *Chevron* test to NEPA and agency regulations with the U.S. Army Corps of engineers.[352] In that case, the Corps was interpreting its regulations to define the scope of what ultimately would be subject to environmental analysis.[353] The development project which was the subject of the dispute included skiing facilities, a resort village and a golf course.[354] The Corps was involved because a permit was required for the filling of wetlands in the area where the golf course was to be located.[355] No other portion of the project required a permit from the Corps or any other form of Corps involvement.[356] Interpreting their own agency regulations, the Corps determined that they should limit their NEPA analysis to the golf course, as that was the extent of the Corps' agency action.[357] Mr. Sylvester disagreed and filed suit.[358] In applying the *Chevron* test for deference, the Ninth Circuit held:

> First, the court must follow any unambiguously expressed intent of Congress... Second, when a statute is "silent or ambiguous" with respect to a specific issue, the court must defer to the agency's interpretation if based on a permissible construction of the statute…When we apply these rules to the facts, we find no clear intention in the NEPA with respect to the proper resolution of the issue before us. Moreover, we cannot say that the Corps' interpretation is an impermissible reading of the statute. We hold, therefore, that the district court should have deferred to the Corps' regulations as approved by the CEQ.[359]

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[352] Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394 (1989).
[353] Id.
[354] Id. at 396.
[355] Id. at 396-397.
[356] Id.
[357] Id.
[358] Id.
[359] Id. at 399, (citing Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984)).

Arguably, the Ninth Circuit has allowed the Corps to not only interpret their own regulations, but NEPA as well. The court appears to grant the Corps the same deference as if the interpretation had come from CEQ. Such an approach makes sense when one follows the Ninth Circuit's reasoning:

> …the CAA requires the EPA to review the Corps' regulations and designates the CEQ as the arbitrator in disputes between federal agencies on environmental issues…This is not done as an idle exercise. It is to provide guidance to all who may be concerned, including courts. Thus, even though the Corps actually promulgated the regulations, we believe that the principles underlying *Chevron* entitle them to, and require us to extend, deference.[360]

The Ninth Circuit essentially concluded that even though the Corps promulgated the regulations, because those regulations had to be reviewed and approved by EPA and CEQ, the regulations were at least arguably entitled to as much deference as the CEQ regulations in their interpretation of NEPA.[361]

The Ninth Circuit appears to be on one end of the deference spectrum, while the D.C. Circuit is on the other end, with other circuits falling somewhere in between. What all circuits which have addressed the issue agree upon, is that an agency interpreting its own regulations, even regulations implementing NEPA, is entitled to substantial deference.[362] Accordingly, an agency's best option to ensure that litigation is minimized

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[360] Id. (citing 42 U.S.C. §7609 (a)-(b) (1989)).
[361] Id.
[362] See Ohio Valley Envtl. Coal. V. Aracoma Coal Co., 556 F.3d 177, 193-194 (4th Cir. 2009) (holding that the Corps is entitled to substantial deference in interpreting its own NEPA implementing regulations); Mississippi River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000) (holding that the regulations of CEQ and the Corps are entitled to substantial deference); Iowa Citizens for Envtl. Quality, Inc. v. Volpe, 487 F.2d 849, 855 (8th Cir. 1973) (holding that the Federal Highway Administration's Administration's administrative interpretation of NEPA was entitled to great deference); and Utah Envtl. Cong. V. Dale Bosworth, 443 F.3d 732, 742-743 (10th Cir. 2006)

is to set out clearly in its own regulations that in order for an action to trigger the need for an EIS, it must have a significant *adverse* effect on the quality of the human environment. Courts would have great difficulty in reaching a different conclusion, if the requirement for a significant adverse effect to be present is set out in an agency regulation, approved by CEQ.

V. CONCLUSION

While at least one circuit has interpreted NEPA to require an agency to prepare an EIS for actions with only beneficial significant effects, that interpretation of NEPA is not consistent with the purposes of the act, or the act's legislative history. NEPA was enacted, in part, to empower and direct the government to deal more effectively with growing environmental problems. It was not intended to be a roadblock to agency actions that actually serve to enhance the human environment. While actions that do have both adverse and beneficial effects do require an EIS, actions with no significant adverse effects should not. Requiring agencies to prepare an EIS for actions with no significant adverse effects will frustrate the purposes of NEPA, causing agencies to abandon projects that might have benefited the environment, or at the very least, cause agencies to avoid the beneficial effects that could have resulted from their actions.

Opponents to an agency action will inevitably raise in litigation, the argument that an EIS is required for *any* significant effect. To that end, the best defense an agency can muster is to amend its own regulations to set out clearly that no EIS is required when the action has no significant adverse impacts. Such an inclusion in agency regulations is

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(holding that an agency's interpretation of its own categorical exclusion regulation was entitled to substantial deference).

supported by the legislative history of the act, the previous versions of the CEQ regulations, and the preamble to the implementing regulations. Both President Obama and the Chair of CEQ have recently noted that the purpose of NEPA is to "…prevent or eliminate damage to the environment…"[363] CEQ has also wisely noted that NEPA procedures, including those for the production of an EIS, must further the purposes of the act, "…otherwise they are indeed useless paperwork and wasted time."[364] By clearly setting out in agency regulations that an action must have a significant *adverse* effect in order to trigger the need for an EIS, agencies can avoid wasted time and resources, and further the goals of NEPA by engaging in projects that benefit the environment. For if NEPA is interpreted to require an EIS for these projects with beneficial significant impacts, there may not be sufficient funding or time to complete them.

[363] Proclamation No. 8469, 75 Fed. Reg. 885-886 (January 7, 2010); and Nancy H. Sutley, Chair, Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 2 (January 14, 2011).
[364] Implementation of Procedural Provisions of NEPA, 43 Fed. Reg. 55978-55990, 55979 (November 29, 1978).