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NEPA at Twenty: Mimicry and Recruitment in Environmental Law

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KEYNOTE

NEPA AT TWENTY: MIMICRY AND RECRUITMENT IN ENVIRONMENTAL LAW

By
WILLIAM H. RODGERS, JR.*

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I. INTRODUCTION: NEPA AT TWENTY

The title of this conference raises the initial question: "What is a ripe old age for a statute?" You may have noticed people wearing T-shirts these days with the inscription, "Fifty Isn't Old for a Tree." Indeed, it isn't old compared to the bristlecone pine, which boasts some individual members that germinated over 5000 years ago, about the time writing was being invented in the Middle East.¹ Fifty isn't old even for a geoduck (a long-necked clam residing in Puget Sound), since the average age of the entire population is close to forty. Fifty, however, is old for some species of microbes and bacteria that "can divide every twenty minutes or so."²

How old is old for a statute like the National Environmental Policy Act (NEPA)?³ If we were to present the life cycle of a statute on a graph, I suspect the measure of its influence would decline over time, expressed as a downwards sloping curve.⁴ Information theory, like the physical entropy laws, suggests that the statutory message will become garbled and faint as it is transmitted over time.⁵ The trick, of course, is to identify the correct decay rate—or rate of rot—for a particular legislative product.

Some statutes and administrative measures decline at a rate approximating that of fresh fish. Several of the Reagan Administration's rollbacks of environmental rules were of this ilk, including one act of tampering with the RCRA⁶ hazardous waste land ban that lived out its regulatory life in a mere twenty-five days.⁷ Other statutes and rules are more durable. The Statute of Uses⁸

1. See D. ATTENBOROUGH, *LIFE ON EARTH: A NATURAL HISTORY* 76 (1979).

2. L. MARGULIS & D. SAGAN, *MICROCOSMOS: FOUR BILLION YEARS OF EVOLUTION FROM OUR MICROBIAL ANCESTORS* 75 (1986).

3. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1982).

4. For some of the problems with this type of supposition, see Rodgers, *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 FLA. ST. J. LAND USE & ENVTL. L. 377, 384-88 (1989).

5. See J. CAMPBELL, *GRAMMATICAL MAN: INFORMATION, ENTROPY, LANGUAGE AND LIFE* (1982).

6. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1982 & Supp. V 1987). The land ban appears in § 3004(d). *Id.* § 6924(d).

7. See R. FORTUNA & D. LENNETT, *HAZARDOUS WASTE REGULATION—THE NEW ERA: AN ANALYSIS AND GUIDE TO RCRA AND THE 1984 AMENDMENTS* 12 (1987).

8. Statute of Uses of 1535, 27 Hen. 7, ch. 10.

recently celebrated its 450th birthday. The Sherman Act⁹ is pushing 100. Even the Insecticide Act of 1910,¹⁰ not one of the more celebrated enactments of this century, lived to be thirty-seven before it died of unnatural causes in a legislative accident called the Federal Insecticide, Fungicide, and Rodenticide Act of 1947.¹¹

Being old or being young, of course, is usually an indicator of other traits—health, vitality, influence. Even among statutes, we are interested not so much in the length of life but with the quality of life. Many environmental lawyers celebrate the survival of the Refuse Act of 1899,¹² but those who have paid it a visit recently regret to tell us that it slipped into an irreversible coma some fifteen years ago.

II. NEPA AS A VIGOROUS TWENTY

We are gathered here to consider not so much a twenty year-old law but a twenty year-old that has been extraordinarily far-reaching and influential. In its own special way, NEPA and the environmental assessment that it represents have become the legal equivalent of cultural fads such as Hula Hoops, Rubik's Cubes, and Air Jordans. A good portion of this conference, I suspect, will be devoted to documenting the many measures of NEPA's significance—the legal business it has generated, the institutional moves it has inspired, the precious places it is credited with saving. My opening remarks will assume that NEPA is a significant statutory presence and will explore the whys and wherefores. Two concepts borrowed from natural history will be used as the scaffolding—mimicry and recruitment.

A. *Mimicry*

Mimicry occurs in evolutionary biology when the members of one species acquire traits and appearance that closely resemble

9. Sherman Act, 15 U.S.C. §§ 1-7 (1988).

10. Insecticide Act of 1910, ch. 191, 36 Stat. 331, *repealed by* 61 Stat. 163, 172 (1947).

11. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 U.S.C. §§ 136-136y (1988). *See* 3 W. RODGERS, JR., ENVIRONMENTAL LAW: PESTICIDES & TOXIC SUBSTANCES § 5.3, at 32-34 (1988).

12. Refuse Act of 1899, 33 U.S.C. § 407 (1988). *See* 2 W. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER § 4.11 (1986 & Supp. 1988).

those of another species.¹³ Mimicry can serve defensive purposes, as with the butterflies that have evolved eye spots on their wings that give pause to potential predators. Mimicry also can serve offensive purposes, as with the hawks that have developed flying patterns quite like those of a carrion eater that are not alarming to potential prey. Mimicry often is resorted to in the life-and-death gaming of nature because the copycat gains a tactical advantage by assuming the guise, traits, or behavior of the species being mimicked. Necessarily, imitation is flattering to the model.

NEPA's environmental impact statement requirements are widely mimicked throughout the law. Impact statements have proliferated on issues of energy, inflation, economics, employment, discrimination, and a variety of other topics. This mimicry has spread to the states, in the form of the many state environmental policy acts (SEPA's), and to a large number of foreign nations, which have considered NEPA worthy of emulation and adaptation. What is it about NEPA's environmental impact statement that has loosed the flood of imitation? What do the mimics gain by advocating and acquiring an impact statement on the subject held most dear? Three possibilities come to mind: (1) early warnings, (2) a consideration of cumulative and second-level effects, and (3) the introduction of authoritative and multiple policy voices.

1. *Early Warnings*

Yesterday's choices always have had a hold on tomorrow's options, and there is a consequent advantage in being forewarned when decisions of interest are headed your way. In the 1970s, the early warning advantages of the impact statement were not lost on Adrian Fisher, General Counsel of the U.S. Disarmament Agency. He was interested in pursuing a legislative requirement that Department of Defense appropriations requests for new weapons systems include an analysis of the impact on ongoing disarmament discussions.¹⁴ Fisher was fully aware, of course, that disarmament negotiations hoping to influence the hardware only could benefit from a forewarning of weapons in the pipeline.

13. See *MIMICRY AND THE EVOLUTIONARY PROCESS* (L.P. Brower ed. 1988); D. OWEN, *CAMOUFLAGE & MIMICRY: SURVIVAL IN THE WILD* (1980).

14. This is based upon my recollection of personal conversations many years ago with Adrian Fisher.

Fisher had his way, and disarmament impact statements are still required by law,¹⁵ although citizen enforcement suits are unavailable. Legislative and administrative copying tends to be imperfect and partial, a picking and choosing of what seems to be useful.¹⁶

2. *Cumulative and Second-Level Effects*

Environmental advocates display a variety of strategies for using NEPA to encourage agencies to consider the additive effects of small decisions. The advantage of the comprehensive assessment is not lost on observers and would-be mimics. A good illustration comes from the pesticide laws,¹⁷ which require economic impact assessments to accompany certain regulatory decisions restricting the use of chemical pesticides. This phenomenon confirms that the genius of NEPA is to address government decision making in a grammar that has considerable potential for expansion. The "victims" featured in the economic impact statement, to be sure, are not the victims of pollution, but the victims of efforts to combat it: the "environment" they seek to maintain is not a back-to-nature agrarianism, but a normality built around synthetic chemicals. But these losers do share one strong bond with the classical losers of environmental pollution—a steady suffering at the hands of incremental decisions that fail to consider broader consequences.

3. *Authoritative and Multiple Voices*

NEPA's consultation and statement-circulation requirements have brought to the surface differences of opinion among agencies that would have been considered disorderly and inappropriate in pre-NEPA times. The best illustration of this point, perhaps, is the debate in the United States during the late 1960s over government support for the supersonic transport airplane (SST). The Nixon administration came out in favor of the SST. Federal agencies and leaders, including Council on Environmental Quality

15. See 22 U.S.C. § 2576 (1988); Min, *Toward More Intelligent National Security Policy Making: The Case for Reform of Arms Control Impact Statements*, 54 GEO. WASH. L. REV. 174 (1985).

16. See R. Settle, *Washington's SEPA at Eighteen: A "Little NEPA's" Family Resemblance Fades* (rev. ed. Oct. 27, 1989) (unpublished manuscript).

17. See 3 W. RODGERS, JR., *supra* note 11, § 5.18, at 242-43.

(CEQ) Chairman Russell Train, closed ranks in support of the project, in a version of agency unanimity that was common in the 1950s.¹⁸ Twenty years later, after the experience of a generation with NEPA, we would be surprised to see the major agencies of the federal government address a controversial environmental issue (for example, oil development in the Arctic National Wildlife Refuge) with a single voice. NEPA solicits varying opinions, and compels their revelation, contributing to today's more chaotic political world.

The consultation requirements alone can erode the ability of omnipotent agencies to work their will. Perhaps one reason for the enthusiastic worldwide embrace of the environmental assessment rules¹⁹ is that they can prove marginally beneficial in any political setting in which there exists a smattering of organized dissent to development decisions. Consider a country, X, with but two government agencies—an all-powerful Ministry of War and a substantially weaker Ministry of Interior Affairs. Certainly, the NEPA consultation and discussion requirements would prove helpful to the Ministry of Interior Affairs, since its opinion on development decisions will now be heard by the Ministry of War. This is hardly a sweeping political reform, to be sure, but agency disagreement can lead to policy change.

NEPA works in the United States by drawing out different voices on the subjects of the environmental consequences and appropriate responses to them. This can bring about subtle changes in institutional behavior. Michael Blumm and Steve Brown have shown that an environmental group can expect to win a NEPA case only if it finds allies within the ranks of organized government.²⁰ It could be said that environmental opinions rise above

18. See Memorandum from Russell E. Train to James M. Beggs, Chairman, SST Ad Hoc Review Committee (Mar. 21, 1969), reprinted in W. SHURCLIFF, S/S/T AND SONIC BOOM HANDBOOK 139-41 (1970). See generally Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L. REV. 205 (1989) (thoughtful and constructive article focusing on § 309 of the Clean Air Act).

19. See N. Robinson, *The Present and Future International Applications of NEPA* (rev. ed. Oct. 27, 1989) (unpublished manuscript). Compare Pollack, *Reimagining NEPA: Choices for Environmentalists*, 9 HARV. ENVTL. L. REV. 359 (1985) (urging that NEPA accommodate the "deep ecology" perspective as well as the "technocratic" and "grassroots" views it now embraces).

20. See Blumm & Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990).

the threshold of the credible when they can recruit support from within government circles.

The multiplication of views under NEPA also can attract judicial endorsement in circuitous fashion. The issue of judicial deference to administrative agencies can be reformulated: the question is not whether to defer, but to whom. The late Justice William Douglas, for example, quickly grasped these prospects within NEPA when he chose to credit the views of the environmental opposition, as voiced by the CEQ, over the opinions of the line agency defending the environmentally destructive policy choice.²¹ Expansion of the spectrum of opinion makes deference a more attractive option.

B. Recruitment

In biology, recruitment occurs when individuals of a species are brought together for a common enterprise. In recruitment, there is advantage in joining the behavior of others; in mimicry there is advantage in copying it. For my purposes, both types of activities serve as metaphors for the broad tendencies in the law to borrow from NEPA, extend it, and use it.

A recent book on the behavior of ravens explores the predilection of these birds to call loudly to their fellows to attract them to food bonanzas (such as moose or deer carcasses) discovered in the cold and snowy north woods.²² Not all species behave with such conspicuous generosity. The chickadee, for one, will fight to defend a 1200 pound moose carcass as if he hoped to consume the whole thing himself. The question arises why these ravens are ready to call friends and acquaintances to the banquet even though the food never lasts very long. The book offers a delightful inquiry into the hypotheses that might explain this unusual behavior: the birds, perhaps, are pursuing a self-interested "taster" strategy, using their friends to sample for poisons; or maybe a "nutcracker" strategy, which depends upon attracting not other birds but coyotes and their like that can break into the food bank; or possibly a "support" strategy, in which territorial de-

21. See Rodgers, *The Fox and the Chickens: Mr. Justice Douglas and Environmental Law*, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE OF WILLIAM O. DOUGLAS (S.L. Wasby ed. forthcoming 1990).

22. B. HEINRICH, *RAVENS IN WINTER* (1989).

fenders of the food will be overwhelmed if a mob of fifty or sixty is recruited; or simply a reciprocal "sharing" strategy where all are better off by passing around the caches of goodies discovered by individual scouts.

The raven vignette shows that an identical pattern of behavior might be sustained and nurtured by any number of separate motivations, and presumably also by combinations of motivations. Recruitment can serve redundant functions. Similarly, a remarkable feature of NEPA is its ability to attract and hold a broad coalition of interests with widely disparate motivations and tactics. NEPA helps the enemies and the friends of agencies, outsiders and insiders, low level staffers and high level appointees, other agencies, agency overseers, lobbyists, scholars, and journalists. There are many reasons for flocking to NEPA.

Four features of the legislation, in particular, have contributed greatly to its success. Let me refer, in order, to (1) NEPA as a sleeper, (2) its process orientation, (3) its elaboration through CEQ rules, and (4) its robustness.

1. *NEPA as Sleeper*

The environmental laws are filled with historical accidents and surprises²³ in which the enactments of yesteryear acquire influence and achieve applications far beyond those contemplated by the designers. There are theoretical reasons for suspecting the appearance of these sleepers in legislation.²⁴ One of them is that it is easier for legislators to vote for the unknown than the known. Sheer serendipity also plays a role, as it does in all human affairs;²⁵ indeed, would a NEPA enacted in 1960 or 1980 have followed the same trajectory as the NEPA of 1970?

Much of the experience with NEPA contradicts the rationality hypotheses of legislative design. It is as if the architects of NEPA drafted a blueprint for a two-story building, which ballooned into a 100-story skyscraper before the builders were finished. Details that attracted close legislative attention either were

23. See Rodgers, *The Lesson of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 J. HEALTH LAW & POL'Y 161, 169-70 (1989).

24. See 3 W. RODGERS, JR., *supra* note 11; Rodgers, *supra* note 4; Rodgers, *supra* note 23.

25. See R. ROBERTS, *SERENDIPITY: ACCIDENTAL DISCOVERIES IN SCIENCE* (1989).

smothered or destroyed; the section 101(c) "right" to a healthful environment is a good example.²⁶ Other specifics were thoroughly botched or confused, as with the Muskie/Jackson compromise that sought to reconcile NEPA with the other environmental laws.²⁷ Ironically, the possibility not discussed, mentioned, or adverted to in the legislative materials—the NEPA lawsuit—contained the seeds of the statute's explosive growth.

Other articles in this symposium will trace the extraordinary developments in the NEPA case law. Allow me to underscore the rapidity with which the NEPA lawsuit became routine—100 decisions in the lower federal courts before the Supreme Court could get a word in edgewise;²⁸ 500 before the Court wrote anything intelligible on the subject.²⁹ This flood of lawsuits represents an expression of NEPA's broad recruitment powers, offering hope not only for environmentalists against agencies, but also for developers against agencies,³⁰ and for agencies against agencies.³¹

2. NEPA as Process-Monger

This topic can be broached by a reference to currency, which is a notion widely used in ethology (the study of animal behavior) and applied in human decision and negotiations theory.³² Cur-

26. See W. RODGERS, JR., *HANDBOOK ON ENVIRONMENTAL LAW* 701 (1977) (discussing 42 U.S.C. § 4331(c) (1982)).

27. See Anderson, *The National Environmental Policy Act*, in *ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW* 243 (E. Dolgin & T. Guilbert eds. 1974).

28. Based upon a computer search of NEPA decisions predating *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP I*).

29. Based upon a computer search of NEPA decisions predating *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

30. See, e.g., *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), *aff'd on other grounds*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

31. See, e.g., *Maryland-National Capital Park & Planning Comm'n v. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973); *Montgomery v. Richardson*, 340 F. Supp. 591 (W.D. Va. 1972). On the important intra-agency effects of NEPA, see Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. *** (1990); Schmidt, *NEPA from Inside the Bonneville Power Administration*, (presentation at *NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, Oct. 27-28, 1989).

32. See F. DE WAAL, *PEACEMAKING AMONG PRIMATES* 82-83 (1989).

rency is anything of value that can be used to pay off obligations. A chimp understands currency, as do most zookeepers; a banana, duly offered, will convince most chimps to retrieve a broom left at the far end of the enclosure.³³

Legislators, too, can make their trades with different currencies, of which procedural entitlements are most common. Perhaps twenty-five percent of the written words of the major environmental laws are devoted exclusively to the process³⁴—the studies, findings, hearings, statements of reasons, and impact statements so familiar to contemporary students of the subject. Legislators often treat process as the first free good—something they can create more and more of without creating less of anything else. Like the stone discs used for money on the Pacific Island of Yap, process rights can be described as “hard to make, difficult to counterfeit, not easily lost, stolen, or destroyed.”³⁵

NEPA is the ultimate instrument of the use of process as currency. It is strongly driven by a win-win sentiment: the agencies can have their projects, and the losers get their full disclosure, consultation, and reasoned decision making. One party, *A*, is afforded an opportunity to be heard, another, *B*, gets a mandated study, and a third, *C*, is given a generous list of particularized findings.

NEPA's process orientation enhances its recruitment prospects. As the courts are well aware, process can speak a hundred languages. Process makes it possible to say “no” without saying “no.” The project thus can be unacceptable not because of its abominable environmental effects, but because alternatives were inadequately considered, or inadequately discussed if they were considered, or inadequately researched if they were discussed. Even an enthusiastic project sponsor eventually might understand this message.

There is, of course, a down side to this process frenzy. Process, without more, is fundamentally a toothless exercise, committed only to the perfection of forms. No amount of process, other than by leaps of faith, can make the environment demonstrably cleaner, healthier, or more diverse. And players in process games

33. *See id.* at 82.

34. These are my own estimates.

35. J. READER, *MAN ON EARTH* 26 (1988).

can drift to the cynical, as each loss presages the next temporary win, and each win gives way to the next provisional loss.

3. *The CEQ Regulations as Frozen Law*

Another reason for the success of NEPA and for recruitment to its design is the conspicuous and unusual elaboration of its requirements in the rules promulgated by the CEQ.³⁶ If NEPA itself is a contradiction of rationality theories, the CEQ regulations are a confirmation of them. The NEPA rules have been praised for all the usual reasons—meticulous definition, careful draftsmanship, workability, and sensitivity to context. They were written by knowledgeable and energetic attorneys who did their homework. They were developed through an elaborate, open, and deliberative process, which makes them something of a prototype of the negotiated rule before the possibilities become widely acknowledged.

The durability of the CEQ rules deserves particular mention. In the terminology of my introduction, the decay rate for the CEQ rules has been strikingly slow.³⁷ They have remained virtually intact throughout the second ten years of NEPA's twenty, and have served as the blueprint for contemporary users of NEPA not to mention the spinoff SEPAs and other versions of environmental assessment. The only formal change, initiated with great strain, produced infinitesimal modifications in the "worst case" analysis, which is now perhaps better known as a scientific uncertainty analysis.³⁸

Why have the CEQ rules endured through a decade of political change? A partial answer is that things well done have a longer staying power than the trite and superficial. But there is some irony at work as well. During the Reagan years, the CEQ was not the agency it once was, given staff cutbacks, desertions, and a general lowering of expectations. There were few lawyers

36. 40 C.F.R. §§ 1500-1517 (1988). Compare Yost, *Streamlining NEPA--An Environmental Success Story*, 9 B.C. ENVTL. AFF. L. REV. 507 (1981) with Stewart, *Rethinking Regulation: Negotiation as an Alternative To Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981). See also D. MANDELKER, *NEPA LAW & LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT* ch. 7 (1984).

37. See *supra* text accompanying notes 3-4.

38. See 3 W. RODGERS, JR., *supra* note 11, at § 5.5 (NEPA in the context of pesticides).

around to rewrite the rules even if there was a constituency for doing so. This adds a new variant to the adage, "kill all the lawyers first"—"don't kill them until they undo what gives you cause to kill them."

4. NEPA's Robustness

NEPA and its progeny tend to be robust laws in the sense that they can survive in variegated bureaucratic, legal, and cultural environments. Some of the reasons for this wide popularity are canvassed above.³⁹ Additionally, NEPA is easily reconciled with other laws. Litigators long have been aware of the ease with which NEPA is used in tandem with other environmental laws, such as the Endangered Species Act⁴⁰ or the Marine Mammal Protection Act;⁴¹ NEPA specifies the process, the other statutes the substance that binds agency decision makers.

Thus, NEPA is easily ratcheted upwards when the impact statement appears in the context of parallel substantive laws. And NEPA is easily ratcheted downwards. Congress often writes project-specific exceptions to delicate undertakings by declaring that they are not "major federal actions."⁴² Environmentalists rarely applaud these piecemeal legislative repeals of NEPA. But a point can be made in favor of piecemeal repeals—they are preferable to wholesale repeals. The robustness of NEPA is confirmed by the fact that politically popular projects can escape from the EIS requirements without putting the entire Act in jeopardy.

III. OBSTACLES TO NEPA INFLUENCE: THE DIRTY DOZEN SUPREME COURT DECISIONS

Thus far these introductory remarks have proceeded as if the

39. See *supra* text accompanying notes 8-33. See also Kent & Pendergrass, *Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation*, 5 TEMP. LAW & TECHNICAL J. 11, 16 (1986) ("while successful NEPA challenges have declined as NEPA has aged, NEPA still shows signs of vitality").

40. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988).

41. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988). See W. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 7.12 (1977) (citing many other examples).

42. See D. MANDELKER, *supra* note 36, § 5.07; Orsi, *Emergency Exceptions to NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481 (1987).

survival, elaboration, and emulation of NEPA were sustained by an irresistible accumulation of social and legal forces. We know that is not the case. NEPA has survived more than a few political and legal obstacles. The most impressive of these is an unbroken string of twelve Supreme Court decisions consistently rejecting interpretations advanced by environmental groups and accepting the narrower accounts espoused by the government as the NEPA defendant.⁴³ In few walks of legal life has the Court demonstrated such a decided tilt in its choice of prevailing parties. The Court's pronounced anti-environmentalism has not gone unnoticed.⁴⁴ My hypothesis is that NEPA has survived this twelve-part demolition job in surprisingly good condition,⁴⁵ which raises questions about the Court's motivations and methods as well as the surrounding circumstances. Motivations are not easily discovered, but one must admit that the twelve decisions can be read benignly as evidence that the Court works carefully at the margins, pruning away the extravagant excesses of NEPA interpretations.⁴⁶ My comments on methods and circumstances will address the Court's (1) timing, (2) choice of nonreplicable cases, (3) ideological and

43. *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989); *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (consolidating two cases); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 (1975).

44. Compare 1 W. RODGERS, JR., *ENVIRONMENTAL LAW: AIR & WATER* § 3.5 (1986 & Supp. 1988) and 2 W. RODGERS, JR., *supra* note 12, at § 4.6 with Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 349 (1989) and Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1 (1983) and J. BATTLE, *ENVIRONMENTAL LAW: ENVIRONMENTAL DECISIONMAKING AND NEPA* 114 (1986) and Murchison, *Does NEPA Matter?—An Analysis of the Historical Development and the Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557 (1984).

45. The most damaging decision of the 12 is *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989), which put the nail in the coffin of substantive NEPA. Legislation might be necessary to repair the damage. See *infra* note 80.

46. See Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990).

selective interventions, and (4) mistakes and contrivances. I also will discuss the inescapable indeterminacy of NEPA legal doctrine.

A. *Poor Timing*

As mentioned above,⁴⁷ the flood of NEPA litigation assumed a strong presence in the lower federal courts before the Supreme Court had occasion to review the statute. It is as if the flow of environmental history commandeered the legal ground before the Court was prepared to defend it or define it. The Court's initial choice of vehicles for addressing the meaning of NEPA, the so-called *SCRAP* litigation,⁴⁸ could not have been worse. The facts are excruciatingly complicated, the opinions unrestrainedly boring, and the outcomes are of little interest. To this day, what experts in the field can restate the holdings of *SCRAP I* or *SCRAP II*?

The timing of the Court's entry into the subject of NEPA is poor in the sense that it minimized the influence of what the Court had to say. The staying of the hand, however, was astute to the extent it allowed the subject to be defined by the accumulation of precedents in the lower federal courts.

B. *Nonreplicable Circumstances: Cans, Bombs, and Accidents*

Another circumstance that has diminished the Court's influence is its choice of nonreplicable cases for review. The leading NEPA cases address not the dredge and fill projects, highway and sewage treatment plant construction, but rather throwaway cans and bottles,⁴⁹ the siting of nuclear weapons,⁵⁰ and behavior in the wake of a nuclear power plant accident.⁵¹ These cases are utterly unrepresentative of the normal range of environmental issues litigated in federal courts.

47. See *supra* text accompanying notes 4-5.

48. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (*SCRAP I*), *aff'd*, *Aberdeen & Rockfish R. R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975) (*SCRAP II*).

49. *Id.*

50. *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981).

51. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

Why did the Court choose such exotic fare? Surely the Justices and their law clerks do not lunge for the bizarre case in the same way a cat might seize an attractive objective dangled nearby. Yet, cans, bombs, and accidents have an intrinsic interest likely to exceed that reserved, for example, for the extension of a sewer line. A charitable construction of the Court's NEPA agenda is that hard cases make bad law, and thus correctable excesses will be found at the far margins in the outrider circumstances. Still, the Court's review choices have diminished its influence in this area.

C. Ideological and Selective Interventions

Another factor limiting the Supreme Court's influence is that the Court's NEPA agenda is controlled closely by the Justice Department and its Office of Solicitor General.⁵² Decisions to seek review appear to rest on criteria no more elaborate than the discovery of provocative and disagreeable language in appellate court opinions. This hunt-and-peck tactic of opinion-prowling focuses the Court's attention on small issues, subissues, or nonissues having the single common theme of being ideologically offensive. The Ninth Circuit has started many of these brush fires, prompting the Supreme Court to respond negatively on the subjects of worst-case analysis,⁵³ hypothetical EISs,⁵⁴ and fully developed mitigation plans.⁵⁵

That the Court is the willing principal as well as the unfortunate agent of these selective and ideological review strategies is illustrated by the decision in *Amoco Production Co. v. Village of Gambell*.⁵⁶ The case holds that the native subsistence fishing rights recognized by the Alaska National Interest Lands Conservation Act do not extend to the outer continental shelf that is the site of federal oil and gas leasing activities.⁵⁷ But the importance of the decision is not its holding, but its dictum that insists that the mere violation of environmental statutes (such as NEPA) does not necessarily entitle the complaining party to injunctive

52. See Shilton, *supra* note 46.

53. *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989).

54. *Weinberger*, 454 U.S. at 139.

55. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989).

56. 480 U.S. 531 (1987).

57. *Id.* at 546.

relief.*⁵⁸ Indeed, the opinion for the Court is an oddly constructed configuration—first, no remedy, then, by the way, no right. It is the kind of advisory opinion the general counsel of an administrative agency might give to inquiring staffers.

D. Contrivances and Mistakes

Two other features of the Supreme Court's NEPA methodology have contributed to the Court's achievement of the least possible precedential mileage from a dozen major decisions—contrivances and mistakes. The contrivance strategy is illustrated by the deliberate planting of dicta to hasten the demise of substantive NEPA. At the end of Justice Rehnquist's opinion in *Vermont Yankee* appears this lonely observation: "NEPA, while establishing significant substantive goals for the Nation, imposes upon agencies duties that are essentially procedural."⁵⁹ Kept alive in *Strycker's Bay*,⁶⁰ the dictum reappears as the holding in last term's *Robertson* decision: "it is now well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process."⁶¹ The issue was so "well settled" by this scant precedent, in fact, that the Court found it unnecessary to discuss the language of section 101,⁶² which is NEPA's substantive provision. Indeed, it was so "well settled" that the Court in *Robertson* confidently could embrace its nefarious kill-all-the-deer dictum:

In this case, . . . it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of

58. *Id.* at 542-43.

59. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

60. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam).

61. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989).

62. 42 U.S.C. § 4331 (1982); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975). See also Plater & Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions* 16 B.C. ENVTL. AFF. L. REV. 661 (1989).

the mule deer herd.⁶³

Some observers find it difficult to understand how the nation's principal environmental law—the one whose birthday we are celebrating—is strictly indifferent to whether 30,000 deer in the Methow Valley live or die. Many others would ask how the issue could be “settled” beyond further discussion by a few stray phrases conveniently placed in earlier Supreme Court decisions. We may learn yet that the deer still can be saved, not by NEPA, but by the Administrative Procedure Act.⁶⁴ But a clear twelve-decision trend suggests otherwise.

Why do I count this obliteration of substantive NEPA as a debit rather than a credit in this assessment of the Court's influence? My answer, elaborated below, is that enduring judicial influence must rest on a foundation more secure than ukase and contrivance.

Turning to the methodology of mistake, it should be noted that reputation follows performance in all walks of life, including the art of judging. On the general subject of environmental law, the Court's performance leaves much to be desired,⁶⁵ even in such basic skills as statute-reading and rendering accurate historical accounts. A similar clumsiness carries over to its treatment of NEPA. For example, the leading *Kleppe* decision⁶⁶ asserts that NEPA “does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.”⁶⁷ This statement shows a lamentable ignorance of context. It fundamentally confuses the issue of statement timing, which is tied to the “proposal” language in section 102(2)(C),⁶⁸ with that of statement scope, which is controlled by the particulars of subsections 102(2)(C)(i)-(v).⁶⁹ Not surprisingly, the obligation to assess “effects” and “any irreversible and irretrievable commitments of resources” in the EIS might oblige an agency to consider possible impacts of less immi-

63. 109 S. Ct. at 1846 (these percentages consist of 30,000 animals in the Methow Valley).

64. *Strycker's Bay*, 444 U.S. at 228 n.2.

65. See *supra* note 46.

66. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

67. *Id.* at 410 n.20.

68. 42 U.S.C. § 4332(2)(C) (1982).

69. *Id.* § 4332(2)(C)(i)-(v).

ment actions when preparing a statement on a proposed action. Surely the Court does not believe an agency is excused from discussing any possible effects the agency does not propose to bring about. This is a small dereliction, perhaps, in a large context, but reputations are built on an accumulation of small endeavors. The Supreme Court's reputation on NEPA is secure.

E. Flaccidity of Principle

A fifth reason NEPA has overcome its lack of sponsorship by the Supreme Court stems more from the nature of the judicial process than it does from the particulars of the court rulings. The NEPA rules, like much judicial doctrine, tend to be flaccid, indeterminate, and highly susceptible to interpretation by the rule-applier. A dozen decisions, one way or the other, are swamped in this sea of indeterminacy. Thus, under *Vermont Yankee* the environmental impact statement need only discuss alternatives that are *reasonable*,⁷⁰ which leaves room for differences of opinion. *Baltimore Gas & Electric* counsels the courts to give a soft glance to agency choices on the "frontiers of science,"⁷¹ but *Kleppe* insists upon a hard look at other types of decisions.⁷² This difference between hard and soft is one of the great mysteries of contemporary administrative law. *Flint Ridge* and *Catholic Action* assert that NEPA must retreat if another statute bars the way.⁷³ But to the extent there is compatibility, there must be full NEPA compliance and somebody has to make the call. *Village of Gambell* makes clear that a NEPA violation will not always be corrected by injunction.⁷⁴ But the decision also confirms that environmental injury is seldom remedied by money damages.⁷⁵ The question of injunction or not is thus left to the future.

Another obvious proposition is that the Supreme Court must convince its constituencies rather than coerce them. Continued

70. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); see Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 724-26 (1979).

71. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

72. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

73. *Compare Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976) with *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981).

74. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

75. See *id.* at 545.

disobedience, especially in the lower federal courts, suggests that the words being preached are not being credited. An anecdotal account of what can happen to Supreme Court utterances is offered by looking at the lower court decisions citing *Catholic Action*. For what legal proposition does the decision stand? That an agency need not disclose its NEPA thinking if the agency is constrained by another statute. For what is the decision commonly cited? That agencies are obliged to inform the public that they have considered environmental concerns.⁷⁶ Whatever it may mean, the practice of citing a precedent for the opposite of what it held does not dignify the precedent.

IV. CONCLUSION

What does the future hold? What is NEPA's rate of rot or decline? How will the statute be perceived at age forty or fifty?

Two scenarios come to mind. One is a kind of slow death not unlike that attending the Refuse Act. Other and better-aimed statutes would appear on the flanks. NEPA would be consigned strictly to process matters, and process alone is a prospect busy staffers may be inclined to resist after a fifteen-year diet on the subject. Whether this scenario is in the wings or already underway turns upon empirical questions that may be addressed at this conference: Do staff level people within the agencies have a stake in the environmental assessment process as it appears in NEPA and the SEPA's, and do they believe it to be workable and worthy of retention?

A second scenario would be a slow march by NEPA toward substantive consequence. Prior to the *Robertson* decision,⁷⁷ a coming together of a number of considerations suggested that the impact statements would evolve into a roster of enforceable environmental obligations. The scientific community took an interest in the use of EISs as hypotheses;⁷⁸ the documents, after all, are

76. *E.g.*, *Wisconsin v. Weinberger*, 745 F.2d 412, 416 (7th Cir. 1984); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 274 (3d Cir. 1983); *Louisiana Wildlife Fed'n v. York*, 603 F. Supp. 518, 526 (W.D. La. 1984).

77. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989).

78. COMMITTEE ON THE APPLICATIONS OF ECOLOGICAL THEORY TO ENVIRONMENTAL PROBLEMS, COMM'N ON LIFE SCIENCES, NATIONAL RESEARCH COUNCIL, ECOLOGICAL KNOWLEDGE AND ENVIRONMENTAL PROBLEM-SOLVING: CONCEPTS AND CASE STUDIES (1986).

filled with predictions about how a particular project will affect the environment, so a methodology naturally suggests itself—go back and consider how accurate the predictions were. Lawyers, too, had begun to take steps to compare outcomes with predictions and to develop strategies for penalizing wrong guesses and holding agencies to promises and mitigation commitments developed in the course of the EIS process.⁷⁹ My own suspicion is that the multiple pressures to make the EISs matter will overcome the *Robertson* decision.⁸⁰

Let me close by taking one last run at this question of the age of statutes. How old is NEPA? Twenty, going on forty. Old enough to have become a legend in its time. Old enough for its words to have become symbols, and its terms cultural artifacts. This statute eventually will die—they all do—but legions will work to extend its life, prolong its memory, and relive its example. An extraordinary accomplishment for a twenty year-old.

79. See McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569 (1990). Compare Eglick & Hiller, *The Myth of Mitigation Under NEPA and SEPA*, 20 ENVTL. L. 773 (1990).

80. See S. REP. NO. 52, 100th Cong., 2d Sess. (1988); H.R. REP. NO. 219, 101st Cong., 1st Sess. (1989); Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. (ENVTL. L. INST.) 10,060 (1989).