

“WE DON’T FISH IN THEIR OIL WELLS, AND THEY SHOULDN’T DRILL IN OUR RIVERS”:* CONSIDERING PUBLIC OPPOSITION UNDER NEPA AND THE HIGHLY CONTROVERSIAL REGULATORY FACTOR

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INTRODUCTION

In July 2008, a group of fishermen celebrated a district court’s decision that prohibited an oil company from drilling under a revered Michigan river.¹ The court stopped the drilling after finding that federal agencies arbitrarily and capriciously decided that the project would have no significant impact on the environment.² Interestingly, the fishermen, who had zealously opposed this project for years, had little influence on the court’s ultimate decision.³ This Note takes issue with this apparent irony: the affected people who voice concerns have little input on whether a project will significantly affect the quality of their environment.

Under the National Environmental Policy Act of 1969 (NEPA),⁴ whether a proposed federal project will “significantly [affect] the quality of the human environment”⁵ is a “threshold determination”⁶ that directs an agency to develop an environmental impact statement.⁷ To determine what is meant by “significantly,” the executive branch’s Council on Environmental Quality⁸ has set

* Jeff Kart, *Anglers to Sue to Stop Drilling Near Mason Tract*, BAY CITY TIMES, June 8, 2005, at A1.

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1. *See Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 840 (E.D. Mich. 2008); *see also Sheri McWhirter, Judge Won’t Allow Drilling in Mason Tract*, THE RECORD-EAGLE, July 13, 2008, at State and Regional News.

2. *Anglers II*, 565 F. Supp. 2d at 815-16.

3. *See id.* at 827-29.

4. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006).

5. *Id.* § 4332(C) (“[A]ll agencies of the Federal Government shall . . . 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 . . .”).

6. William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 175, 185-86 (1997).

7. *Anglers II*, 565 F. Supp. 2d at 823-24.

8. Council on Environmental Quality, 40 C.F.R. §§ 1500.1 to -.6 (2010). The Council on Environmental Quality was created by NEPA and is authorized “to establish regulations setting forth environmental review procedures to be followed by federal agencies.” *Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng’rs*, 453 F. Supp. 2d 289, 299 (D. Mass. 2006) (citing 42 U.S.C. §§ 4342, 4344).

forth regulations which require a federal agency to consider both context and intensity of the project and has offered ten factors to evaluate intensity.⁹ This Note concentrates on the fourth of these regulatory factors, “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”¹⁰ In focusing on what it refers to as “the highly controversial factor,” this Note considers Professor William Murray Tabb’s decade-old proposal in *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*.¹¹ Although his proposal had little effect on the traditional interpretation of the highly controversial factor, this Note submits that now, over a decade later, the argument to include public opposition under this factor is even more persuasive. Indeed, this proposal seems even more appropriate in light of the growing criticisms of NEPA,¹² recent attention given toward advancing public participation in NEPA,¹³ and increasing environmental justice concerns.¹⁴

Specifically, this Note focuses on a recent case applying the traditional interpretation of the highly controversial factor, *Anglers of the Au Sable v. U.S. Forest Service*.¹⁵ As referred to in this Note, “the traditional interpretation” recognizes that highly controversial in most jurisdictions “means more than mere public opposition; it requires ‘a substantial dispute . . . as to the size, nature, or effect of the major federal action.’”¹⁶ According to this interpretation, “[a] substantial dispute exists when ‘evidence, raised prior to the preparation of an [environmental impact statement] or [finding of no significant impact], casts serious doubt upon the reasonableness of the agency’s conclusions.’”¹⁷ The district judge in *Anglers* applied the traditional interpretation and declined to credit the magistrate judge’s finding that significant public opposition met the

9. See 40 C.F.R. § 1508.27.

10. *Id.* § 1508.27(b)(4).

11. Tabb, *supra* note 6, at 185-86.

12. See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 343 (2004); MATTHEW J. LINDSTROM & ZACHARY A. SMITH, *THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, & EXECUTIVE NEGLECT*, 10 (2001).

13. See COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, *A CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD* (2007).

14. See Uma Outka, *NEPA and Environmental Justice: Integration, Implementation and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 602-8 (2006).

15. 565 F. Supp. 2d 812, 827-29 (E.D. Mich. 2008).

16. *Id.* at 827 (citations omitted); see also *Nw. Bypass Group v. U.S. Army Corps of Eng’rs*, 552 F. Supp. 2d 97, 135 (D.N.H. 2008) (“‘Controversial’ is not synonymous with ‘opposition.’” (quoting *Coliseum Square Ass’n v. Jackson*, 465 F.3d 215, 234 (5th Cir. 2006))). *But see San Luis Valley Ecosystem Counsel v. U.S. Forest Serv.*, No. 04-CV-01071-MSK, 2007 U.S. Dist. LEXIS 36242 at *32 (D. Colo. May 17, 2007) (“[E]ffects of the exchange in this case are highly controversial, as evidenced by the number of public comments received by the Agency.”).

17. *Anglers II*, 565 F. Supp. 2d at 827-28 (quoting *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001)).

highly controversial factor.¹⁸

This Note argues that interpreting the highly controversial factor in this traditional, narrow manner limits the apparent purpose of NEPA and deprives the public of its full participation in the statute's procedures. Part I provides an overview of NEPA's history, procedural requirements, and developments, including both the beginnings of the highly controversial factor's traditional interpretation and Tabb's proposal to measure public opposition. Part II examines this interpretation in action by highlighting its irony and ineffectiveness in *Anglers*. Finally, Part III outlines the reasoning behind the traditional interpretation and revives Tabb's proposal by discussing why public opposition should be considered more fully under the highly controversial factor today. Specifically, courts should consider public opposition because the opposing public who must resort to challenging a finding of no significant impact in court faces many barriers and because the existence of opposition in a democratic society, even if ill-informed, should warrant more information and participation in decisionmaking.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969¹⁹

NEPA sets forth the federal government's broad approach to environmental policy, which is focused primarily on requiring agencies to consider the environmental impact of federal projects.²⁰ Most criticisms of this approach, however, are not aimed at NEPA itself but, rather, attack the failure of the executive and judicial branches to effectuate NEPA's purposes through its implementation.²¹ In particular, federal agencies and courts have misinterpreted the highly controversial factor for decades by ignoring public opposition, thereby undermining the purposes of NEPA.²²

A. NEPA's History and Development

Referred to as the "natural environment's Magna Carta,"²³ Congress enacted NEPA in 1969 as "the first comprehensive statement ever issued by the government articulating a stance on the environment."²⁴ Its passage in the late 1960s was a product of increased environmental awareness, as Congress had already passed several acts during the decade to address specific environmental

18. *Id.* at 828-29.

19. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006).

20. LINDA LUTHER, ORDER CODE RL 33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 1-6 (2005).

21. LINDSTROM & SMITH, *supra* note 12, at 10, 27.

22. Tabb, *supra* note 6, at 188.

23. LINDSTROM & SMITH, *supra* note 12, at 4.

24. Adrienne Smith, Note, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B.U. L. REV. 633, 634 (2005). For more information on NEPA's beginnings see generally LUTHER, *supra* note 20.

issues.²⁵ These acts, however, failed to incorporate specific issues into management of the environment as a whole.²⁶ With NEPA, Congress finally announced a coordinated national environmental policy.²⁷ In other words, “[i]t was the intention of NEPA’s authors that a coordinated and comprehensive analysis of ecological and social impacts of federal decisionmaking replace the ad hoc, fragmented status quo in policy formulation.”²⁸

As its primary enforcer, the judicial branch has held an extraordinary role in NEPA’s interpretation and implementation.²⁹ The Supreme Court identified NEPA’s dual aims in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*³⁰ First, agencies must “consider every significant aspect of the environmental impact of a proposed action.”³¹ Second, the agency must “inform the public that it has indeed considered environmental concerns in its decisionmaking process.”³² Because of the second aim of the statute, “NEPA has become one of the primary mechanisms through which the public is able to participate in the federal decision-making process.”³³

Unlike other environmental statutes, NEPA does not contain substantive regulations.³⁴ Instead, it provides a framework for promoting the environmental values it contains.³⁵ NEPA’s stated purposes reflect these values:

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 of Environmental Quality.³⁶

These stated purposes indicate that NEPA’s authors were concerned with not only the environment but also the human population’s interaction with its environment.³⁷ This “harmony” presumably includes both the negative effects of

25. LINDSTROM & SMITH, *supra* note 12, at 18-21.

26. *Id.* at 20-21 (“Until the passage of NEPA, attempts to deal with environmental issues were routinely isolated, ad hoc, and incremental. . . . The evolution of federal institutions lacked a clear doctrine and locus of political responsibility for the whole natural environment.”).

27. *Id.* at 24.

28. *Id.*

29. LUTHER, *supra* note 20, at 9-10.

30. 462 U.S. 87 (1983).

31. *Id.* at 97 (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

32. *Id.* (citations omitted); *see also* *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 823 (E.D. Mich. 2008).

33. LUTHER, *supra* note 20, at 1.

34. LINDSTROM & SMITH, *supra* note 12, at 9.

35. *Id.*

36. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

37. *See id.*

human interaction and the welfare gained by humans who enjoy the environment.³⁸ Consider also Congress's declaration of national environmental policy:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with . . . concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in productive harmony³⁹

Notwithstanding this statement of notable environmental policy, a federal agency may proceed with a project at the quality of the human environment's expense as long as it complies with NEPA's requirements.⁴⁰

NEPA has been criticized in its execution despite its ambitious purposes and goals.⁴¹ In *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, & Executive Neglect*, Matthew J. Lindstrom and Zachary A. Smith contend that both the executive and judicial branches have undermined NEPA's effectiveness by applying "a very narrow, crabbed interpretation in implementing [the Act]" and failing to recognize "the comprehensive core and long-term view embedded within NEPA."⁴² They spread the blame for NEPA's failure among each branch of government.⁴³ Similarly, NEPA has been criticized for being a mere procedural hurdle to federal action.⁴⁴ As such, citizens may only challenge procedural defects and not substantive results of agencies' actions.⁴⁵ However, Lindstrom and Smith argue that "[t]he authors of NEPA intended more from their work than the watered-down, expensive, procedural paper chase that characterizes NEPA's implementation in federal agencies today."⁴⁶ Nonetheless, courts' decisions to treat NEPA as merely procedural have "expand[ed] the range

38. *Id.*

39. *Id.* § 4331(a). Congress also charged the federal government with the responsibility "to use all practicable means, consistent with other essential considerations of national policy, to . . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." *Id.* § 4331(b)(2).

40. LUTHER, *supra* note 20, at 1.

41. See LINDSTROM & SMITH, *supra* note 12, at 10.

42. *Id.*

43. *Id.*

44. *Id.* at 27; see also Karkkainen, *supra* note 12, at 342-43 n.41 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (noting "that although NEPA establishes 'significant substantive goals for the Nation, it imposes upon agencies duties that are 'essentially procedural,' designed to ensure fully informed decision-making'")).

45. Smith, *supra* note 24, at 636 (citing *Strycker's Bay*, 444 U.S. at 227-28).

46. LINDSTROM & SMITH, *supra* note 12, at 27.

of agency discretion and weaken[ed] NEPA's influence."⁴⁷ The argument that courts have similarly misinterpreted the highly controversial factor to exclude public opposition is yet another example of how various judicial interpretations have drastically undermined the legislative purposes of NEPA.

B. The Procedural Requirements—Significant and Environmental Impact Statements

Although NEPA embodies the legislative branch's national environmental protection goals, the executive branch's Council on Environmental Quality (CEQ) provides the regulations to implement the statute's broad aims.⁴⁸ First, the CEQ grants much discretion to any federal agency, regardless of its environmental expertise, that proposes a project with a potentially significant impact on the human environment.⁴⁹ Known as the "lead agency,"⁵⁰ the proposing agency determines whether the project will in fact have a significant impact on the quality of the human environment that would require an environmental impact statement, identifies other federal agencies to assist in developing the environmental impact statement, and decides whether to proceed with the project despite detrimental effects on the environment or disapproval of experts.⁵¹ The CEQ directs the lead agency to classify federal actions under three categories.⁵² The first category includes those actions that typically require an environmental impact statement; the second includes those that normally require neither an environmental impact statement nor an environmental assessment; and

47. Karkkainen, *supra* note 12, at 343.

48. LUTHER, *supra* note 20, at 1; *see* 40 C.F.R. §§ 1500-1508 (2010). The CEQ recognized its purpose:

[NEPA] is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

Id. § 1500.1(a). The CEQ also reinforced NEPA's policy: "Federal agencies shall . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."

Id. § 1500.2(d).

49. Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 37 (2006); *see also* 40 C.F.R. § 1501.5.

50. *See* 40 C.F.R. § 1508.16 (noting that "[l]ead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement").

51. Davis, *supra* note 49, at 35-37.

52. Tabb, *supra* note 6, at 180-81 (citing 40 C.F.R. § 1507.3(b)(2)); *see also* 40 C.F.R. § 1501.4.

the third includes those that typically require an environmental assessment but not necessarily an environmental impact statement.⁵³ The second category, known as “categorical exclusions,”⁵⁴ includes routine agency actions with traditionally non-significant environmental impacts that are altogether exempted from the NEPA process.⁵⁵

The lead agency’s first step in the NEPA process is to develop an environmental assessment (EA),⁵⁶ a concise summary and analysis of the proposed federal action that aids in the determination of whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI).⁵⁷ An EA simply determines whether a project will significantly affect the environment—“it does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project’s other objectives”⁵⁸ In determining what is meant by “significantly,” the CEQ directs agencies to consider both the context and intensity of the project and offers ten factors to evaluate intensity.⁵⁹

53. Tabb, *supra* note 6, at 180-81 (citing 40 C.F.R. § 1507.3(b)(2)).

54. *Id.* at 181 (quoting 40 C.F.R. § 1508.4, 1507.3).

55. *Id.*

56. See 40 C.F.R. § 1508.9 (“Environmental assessment: Means a concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI] . . .”).

57. See *Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng’rs*, 453 F. Supp. 2d 289, 299 (D. Mass 2006) (quoting 40 C.F.R. § 1508.9(a)(1)).

58. *Id.* at 301 (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985)).

59. See 40 C.F.R. § 1508.27:

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an 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 varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) 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.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

If the lead agency determines that the proposed action will have a non-significant effect on the human environment, it issues a FONSI.⁶⁰ More or less, the “practical effect of a determination of ‘no significant impact’ is that it limits agency responsibility to investigate, study, consider alternatives to, and disclose to the public, the potential adverse effects of a project.”⁶¹

A lead agency only develops an EIS for those projects deemed to have a significant effect on the quality of the human environment.⁶² An EIS is a detailed statement that fully discloses “all information pertaining to significant environmental impacts of major federal projects for the benefit of the wider audience of the public and other governmental units.”⁶³ But “[a]n [EIS] is more than a disclosure document. It shall be used by Federal officials in conjunction

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

60. 40 C.F.R. § 1508.13.

61. Tabb, *supra* note 6, at 182.

62. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 823-24 (E.D. Mich. 2008). Consider also the definition of “human environment” in 40 C.F.R. § 1508.14: Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of “effects” (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

63. Tabb, *supra* note 6, at 184 (citation omitted); *see* 40 C.F.R. § 1502.1:

The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

with other relevant material to plan actions and make decisions.”⁶⁴ After preparing a draft EIS, an agency must invite and consider comments from other agencies and the public and must respond to those comments in its final EIS.⁶⁵ Although CEQ regulations direct agencies to involve the public in the federal actions requiring an EIS, each individual agency determines its public involvement policies in those actions that only require an EA or result in a categorical exclusion.⁶⁶ As discussed more fully below, this practice is particularly troublesome from an environmental justice perspective because traditionally most actions only require an EA.⁶⁷

Finally, lead agencies file final EISs with the Environmental Protection Agency (EPA)⁶⁸ for its review, and the EPA may then refer matters to the CEQ if it “determines that the proposed action is detrimental to public health, welfare, or environmental quality.”⁶⁹ However, the EPA need not review an EA or an agency’s decision to issue a FONSI.⁷⁰ Instead, an agency’s decision to issue a FONSI and not prepare an EIS is judicially reviewed under the arbitrary and capricious standard.⁷¹ Under this standard, the court determines whether the

64. 40 C.F.R. § 1502.1.

65. *Id.* §§ 1503.1, 1503.4.

66. LUTHER, *supra* note 20, at 27; *see* 40 C.F.R. § 1506.6, in relevant part:

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

* * *

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

* * *

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

67. *See* Outka, *supra* note 14, at 606-07.

68. 40 C.F.R. § 1506.9.

69. Davis, *supra* note 49, at 37.

70. *Id.*

71. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 821 (E.D. Mich. 2008) (“Where the Court must rule based on review of administrative agency’s final decision, review is governed by the Administrative Procedure Act. The APA provides that a court should set aside an agency’s decision if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’”) (citations omitted); *see also* *Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng’rs*, 453 F. Supp. 2d 289, 299 (D. Mass 2006) (citing *The Administrative Procedure Act of 1946*, 5 U.S.C. § 706(2)(A) (2000)).

agency considered factors not intended by Congress, ignored a significant issue altogether, or provided an explanation that is either not founded in the evidence or “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁷²

C. *The Highly Controversial Regulatory Factor*

As mentioned above, the fourth factor agencies consider when determining whether a proposed action will significantly affect the quality of the human environment is “the degree to which the effects on the quality of the human environment are likely to be highly controversial.”⁷³ One of the earliest cases to examine the highly controversial factor involved the Army Corps of Engineer’s determination that an EIS was not necessary for the construction of a marina and piers on North Carolina’s outer banks.⁷⁴ In that case, the court rejected “the suggestion that ‘controversial’ must necessarily be equated with opposition.”⁷⁵ That court reasoned:

The term should properly refer to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be.⁷⁶

This reasoning has influenced the majority of courts in their interpretation of the highly controversial factor today.⁷⁷ However, consider the irony in this practice—if NEPA purports to involve the public in decisionmaking, courts and agencies should in fact give weight to substantial public opposition in determining whether to develop an EIS.⁷⁸

On the other hand, only a few courts have strayed from the traditional interpretation and substituted a more sensible approach that considers public opposition under the highly controversial factor.⁷⁹ In a case involving the exchange of federal lands for non-federal lands, the U.S. District Court for the

72. *Anglers II*, 565 F. Supp. 2d at 821 (quoting *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

73. 40 C.F.R. § 1508.27(b)(4).

74. *Rucker v. Willis*, 484 F.2d 158, 159 (4th Cir. 1973).

75. *Id.* at 162.

76. *Id.* (citing *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2nd Cir. 1972)).

77. For an analysis of courts’ justifications for the traditional interpretation, see *infra* text accompanying notes 157-203.

78. *Tabb*, *supra* note 6, at 188.

79. See *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 432 (8th Cir. 2004); *San Luis Valley Ecosystem Counsel v. U.S. Forest Serv.*, No. 04-01071, 2007 U.S. Dist. LEXIS 36242, at *32-33 (D. Colo. May 17, 2007); *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 828 (E.D. Mich. 2008).

District of Colorado determined that the agency's decision not to develop an EIS disregarded the highly controversial factor.⁸⁰ The court acknowledged that although the focus is not generally on the project's popularity, the number of public comments indicated that the effects of the land exchange were highly controversial.⁸¹ As discussed more fully below, Magistrate Judge Charles E. Binder in *Anglers* similarly reasoned that "the intensity of the public comment made at every opportunity makes clear that this project is 'likely to be highly controversial' within the meaning of the CEQ regulations."⁸² Another court contemplated, "Even if public opposition could create a controversy, . . . If a controversy existed, it was resolved."⁸³ Arguably, these opinions apply a sensible interpretation of the factor and ask a reasonable question: given all of this public opposition, how could this project not be highly controversial?⁸⁴

Professor William Murray Tabb extensively researched and analyzed this factor over a decade ago in *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*.⁸⁵ Tabb outlined courts' interpretations of the highly controversial factor through 1997⁸⁶ and proposed a "multi-factored test" to guide courts and agencies when analyzing this factor.⁸⁷ Among other things, the test focused on the origin, quantity, and timing of the opposition and how agencies had addressed these concerns.⁸⁸ Unfortunately, courts have mostly ignored Tabb's proposal and continue to narrowly interpret the highly controversial factor today.⁸⁹

II. ANGLERS OF THE AU SABLE V. U.S. FOREST SERVICE

Last summer, a group of fishermen cheered a district court's decision that

80. *San Luis Valley*, 2007 U.S. Dist. LEXIS 36242, at *32-33.

81. *Id.* at *32:

The Agency also disregarded the controversial effects of the exchange. It concluded that under NEPA, the popularity and acceptance of a proposed action is not pertinent to whether an action's effects are controversial, and thus disregarded public opposition to the exchange. It is true that the focus is upon the effects of a proposed action, rather than the action's popularity as a general matter. However, the effects of the exchange in this case are highly controversial, as evidenced by the number of public comments received by the Agency.

82. *Anglers II*, 565 F. Supp. 2d at 828.

83. *Heartwood, Inc.*, 380 F.3d at 432.

84. *See Heartwood*, 380 F.3d at 432; *Anglers II*, 565 F. Supp. 2d at 828; *San Luis Valley*, 2007 U.S. Dist. LEXIS 36242, at *32.

85. Tabb, *supra* note 6.

86. Tabb identified approximately twenty cases where courts found either sufficient or insufficient controversy under the highly controversial factor. *See id.* at 188-90.

87. *Id.* at 190-91.

88. *Id.* For Tabb's test, see *infra* text accompanying notes 205-08.

89. *See, e.g., Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 957 (9th Cir. 2008); *Anglers II*, 565 F. Supp. 2d at 827; *Nw. Bypass Group v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 2d 97, 135-36 (D.N.H. 2008).

federal agencies had acted arbitrarily and capriciously in not preparing an EIS before issuing a permit to drill for oil under one of Michigan's most highly regarded rivers.⁹⁰ These fishermen had zealously opposed this project for years.⁹¹ Nevertheless, the federal district judge applied the traditional interpretation of the highly controversial factor and concluded that the magistrate judge improperly considered their opposition.⁹² This case highlights the irony behind the traditional interpretation; it ignores the affected people in determining whether a project will significantly affect their environment.⁹³

Moreover, *Anglers* demonstrates the urgent need for courts to reconsider their traditional interpretation of the highly controversial factor. The project in *Anglers* illustrates the nation's current quest for energy-independence, as it involved a permit to drill for oil.⁹⁴ Unfortunately, drilling for oil under Huron-Manistee National Forest in Michigan would emit odors and noise, affect visual aesthetics and recreational tourism, and disrupt wildlife and old growth forest.⁹⁵ Therefore, despite its potential energy value, many people opposed this project:

Sure, this nation needs every drop of oil we can get. But we're not so hard up that we need to mess with one of the few truly wild areas we have left in Michigan. Once and for all, leave the Mason Tract and the area immediately around it alone. For anglers and others, that little slice of Michigan is sacred.⁹⁶

The foresight of this newspaper editorial is profound; indeed, it is likely that drilling projects will continue to threaten highly regarded land throughout the country as the government struggles to break its dependence on foreign oil.⁹⁷ Therefore, it is even more imperative that courts reconsider their traditional interpretation of the highly controversial factor in order to grant the public a mechanism through which it may successfully participate in the development of such projects.

90. See *Anglers II*, 565 F. Supp. 2d at 840; see also McWhirter, *supra* note 1.

91. Kart, *supra* note *.

92. *Anglers II*, 565 F. Supp. 2d at 828-31.

93. *Id.*

94. *Id.* at 817-19.

95. *Id.* at 818-20.

96. Op-Ed., *Keep Holy Waters Safe from Nearby Oil, Gas Exploration*, BAY CITY TIMES, July 25, 2008, at A8.

97. Compare this project with a recent proposal to drill for uranium in Charleston, Missouri, a small town in Southeast Missouri. A Colorado geologist has worked to gain local support by setting up an office in the town to speak to the locals about the proposed project. He has asked landowners and farmers to "sign on" to the project and allow him to lease a small portion of their land to drill. Although this project does not fall under NEPA (presumably because it is not a federal action), it is a good example of how public comment and opposition when combined with further information and participation in decisionmaking can lead to successful results. See Holly Brantley, *Land Owners Sign Off to Let Geologist Drill for Uranium*, HEARTLAND NEWS, Oct. 9, 2008, <http://www.kfvs.com/Global/story.asp?S=9153468>.

A. Background, Public Comment, and Preliminary Injunction

The specific project at issue in *Anglers* involved the U.S. Forest Service's (USFS) and U.S. Bureau of Land Management's (BLM) decision to issue an exploratory gas and oil drilling permit to Savoy Energy, L.P. ("Savoy") without preparing an EIS.⁹⁸ Savoy held three federal and three state leases for subsurface oil and gas within the Huron-Manistee National Forest ("Huron Forest") totaling approximately 640 acres.⁹⁹ Savoy applied for a permit to drill a directional gas well from surface land inside the Huron Forest into its lease holdings under an area known as the Mason Tract.¹⁰⁰ The "development involve[d] clearing, grading, and leveling a 3.5 acre well pad, preparing a production facility approximately 1.5 miles from the well, and constructing a pipeline connecting the two locations."¹⁰¹

The Mason Tract, Savoy's "drilling target," is state-owned land named after George W. Mason who deeded the 4,700 acres to Michigan in the 1950s.¹⁰² Mason gifted these acres on the condition that Michigan maintain the land in a natural, wilderness state.¹⁰³ According to the court, the Mason Tract is "one of the most revered sections of forest in all of Michigan."¹⁰⁴ The Au Sable River's South Branch, "one of the continent's most hallowed fishing sites,"¹⁰⁵ winds through the Mason Tract.¹⁰⁶ The Mason Tract was designated a "[s]emi-primitive [n]on-motorized (SPNM) area" and then an "old growth" region in 2003.¹⁰⁷ The Mason Tract's only development includes one campground, one log chapel, and a few unimproved, seasonably passable roads.¹⁰⁸ Savoy proposed to position the well pad, well head, and portion of the pipeline in the SPNM area, while maintaining the actual production facility and remainder of the pipeline outside of the SPNM area.¹⁰⁹ Although the proposed well site was roughly 1650 feet from the Mason Tract, Savoy also planned to develop roads within the tract for all-season travel.¹¹⁰

After completing an EA in August 2004, the USFS issued a FONSI in 2005;

98. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers I)*, 402 F. Supp. 2d 826, 828-29 (E.D. Mich. 2005).

99. *Anglers II*, 565 F. Supp. 2d at 817.

100. *Id.* at 817-18.

101. *Id.*

102. *Id.* at 818.

103. *Id.*

104. *Id.*

105. Keith Gave, *Angry Anglers Vow Legal Fight to Stop Drilling on Mason Tract*, BAY CITY TIMES, Feb. 7, 2005, at E1.

106. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers I)*, 402 F. Supp. 2d 826, 829 (E.D. Mich. 2005).

107. *Anglers II*, 565 F. Supp. 2d at 818.

108. *Anglers I*, 402 F. Supp. 2d at 829.

109. *Anglers II*, 565 F. Supp. 2d at 818-19.

110. *Anglers I*, 402 F. Supp. 2d at 829.

it did not prepare an EIS.¹¹¹ Shortly thereafter, a local newspaper reported that “[t]o the surprise of virtually no one, the federal government gave its blessing last week to a Northern Michigan-based energy company to begin exploratory drilling for natural gas.”¹¹² Savoy apparently received a drilling permit on August 4, 2005.¹¹³ The Anglers of the Au Sable (Anglers) and other plaintiffs filed suit on June 8, 2005, alleging that the USFS and BLM violated their duties under several federal statutes, including failing to prepare an EIS under NEPA.¹¹⁴ The Anglers rightfully and passionately opposed the project arguing “[w]e don’t fish in their oil wells, and they shouldn’t drill in our rivers.”¹¹⁵ Magistrate Judge Charles E. Binder initially received the case for general case management, but the Anglers’ motion for preliminary injunction temporarily withdrew the case back to District Judge David M. Lawson.¹¹⁶

In December 2005, the U.S. District Court for the Eastern District of Michigan granted a temporary restraining order and preliminary injunction to enjoin Savoy’s exploratory oil and gas drilling operations in the Huron-Manistee

111. *Anglers II*, 565 F. Supp. 2d at 819.

112. Gave, *supra* note 105. For more newspaper coverage of this case see *Agency Delays Decision on Mason Tract Drilling*, BAY CITY TIMES, Jan. 18, 2005, at A5; John Bebow, *Well Drilling Project Stirs Refuge Issues; Mason Tract Oil and Gas Plan Spotlights Need to Protect Wilderness Areas, Senator Says*, DETROIT NEWS, July 11, 2003, at 1C; John Bebow, *Au Sable Drilling Plan Stirs Anger; Anglers Howl as Company Moves to Drill for Oil and Natural Gas Under Mason Tract*, DETROIT NEWS, June 29, 2003, at 1A; *Opposition Strong to Drilling Near Au Sable River; Foes Fear Exploratory Well Will Harm River’s Quality*, GRAND RAPIDS PRESS, June 28, 2003, at D1.

113. *Anglers II*, 565 F. Supp. 2d at 819-20.

114. *Id.* at 815, 819-20. Tim Mason, George Mason’s grandson, was also named as a plaintiff. *Id.* at 812. Consider Tim Mason’s statement: “The Mason family has joined this fight because the Forest Service proposal goes against everything from [sic] grandfather sought to do by giving the Mason Tract to the people of Michigan.” Kart, *supra* note *.

115. *Id.* The article continued:

The plaintiffs believe plans by Savoy Energy of Traverse City to drill for oil and gas in the Huron National Forest will desecrate “one of the nation’s most important conservation gems, the Mason Tract on the South Branch of the Au Sable River in Michigan—the site on which Trout Unlimited was founded.” . . . [T]he Forest Service has rejected better, alternative sites and allowed Savoy to push ahead with its plans, endangering the river and ignoring thousands of comments from people nationwide who have called “for the protection of this pristine waterway, where thousands of Michiganders go fly-fishing each year.”

Id.; see also *Critics File Suit Over Gas Drilling; Lawsuit Claims Project Could Ruin Tranquility of Area*, GRAND RAPIDS PRESS, June 12, 2005, at B3 (“Critics say the project could ruin the tranquillity of the area, known for its pine and hardwood stands and the Mason Chapel, an open-air church on the Au Sable riverbank.”).

116. *Anglers II*, 565 F. Supp. 2d at 815; *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers I)*, 402 F. Supp. 2d 826, 828 (E.D. Mich. 2005).

National Forest.¹¹⁷ In its order, the court identified substantial evidence that undermined the USFS's decision to issue a FONSI, including the unique geographical characteristics of both the Mason Tract and South Branch of the Au Sable; the harm to aesthetic and recreational enjoyment caused by noise, odor, and visual impacts; and the adverse impacts to the local tourism economy, old-growth area, and wildlife, including threatened or endangered species.¹¹⁸ The order also cited declarations by a Professor of Forestry at the University of Michigan and a former Wildlife Chief for the Michigan Department of Natural Resources, both of whom supported the Anglers' position.¹¹⁹

Perhaps even more importantly, the preliminary injunction order considered many public comments submitted to the USFS during the EA drafting process that opposed the project because of its irreparable harm to the local environment.¹²⁰ Several groups and individuals submitted comments that mostly opposed the disruption of the old-growth area and its wildlife and consequent harm to tourism and the recreational experience.¹²¹ Those voicing their concerns about the project included: the Michigan Environmental Council; the Michigan Department of Natural Resources; the County of Crawford; several state and federal senators and representatives, including U.S. Senator Debbie Stabenow; the Michigan governor;¹²² Michigan Trout Unlimited; a biology professor; and an elderly man who has enjoyed the Mason Tract for decades.¹²³ The court also considered the general public interest finding that "there is a strong public interest in preserving national forests in their natural states and ensuring that the dictates of NEPA are complied with."¹²⁴ With the award of the preliminary injunction, the Anglers successfully put Savoy's drilling on hold.¹²⁵

117. *Anglers I*, 402 F. Supp. 2d at 828.

118. *Id.* at 832-35.

119. *Id.* at 833-36.

120. *Id.* at 837-38.

121. *Id.*

122. *Id.* Although the *Anglers I* court noted the Michigan governor's concerns in its December 2005 opinion, the following newspaper quote suggests that she may not have always publicly shared these feelings: "Now if we could just get Gov. Jennifer Granholm and others who care about this magnificent state to feel the same way, there may be a chance to get the feds who have authorized drilling for gas and oil along the hallowed Mason Tract to back off." Keith Gave, *Pristine Land Could Use Some Special Intervention*, BAY CITY TIMES, Apr. 21, 2005, at A3.

123. *Anglers I*, 402 F. Supp. 2d at 837-38.

124. *Id.* at 839 (citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002)).

125. Hugh McDiarmid, Jr., *Outdoors Gem Gets Reprieve; Judge: Firm Can't Clear Land for Drills*, DETROIT FREE PRESS, Dec. 8, 2005, at 3:

Drilling for natural gas in a forest revered by anglers and solitude seekers is temporarily on hold. . . . Conservationists hailed the ruling as a victory, although it lasts only until U.S. District Judge David Lawson makes a more permanent decision on a lawsuit seeking to block the drilling. . . . The Courts are showing what Michigan anglers have known all along: that the Au Sable River is one of the most special places in our state

B. A Win for the Anglers: The Magistrate Judge's Report Requiring an EIS

With the drilling on temporary hold, the district court turned to whether the USFS had in fact acted arbitrarily and capriciously in its decision to issue a FONSI instead of preparing an EIS.¹²⁶ The Anglers ultimately succeeded in this decision because the court found that the USFS was in fact required to prepare an EIS.¹²⁷ Although the magistrate judge offered a broader interpretation of the highly controversial factor, the district judge rejected that interpretation for the traditional approach that refuses to acknowledge public opposition.¹²⁸ This case exemplifies the irony and backwardness of this interpretation.

Magistrate Judge Binder's report offered a much broader interpretation of the highly controversial factor than the traditional interpretation applied by District Judge Lawson.¹²⁹ Overall, Magistrate Judge Binder found that the USFS acted arbitrarily and capriciously in issuing a FONSI because it violated NEPA's guidelines.¹³⁰ He strongly doubted that "a gas well drilling project that admittedly would alter scenic and primitive areas for up to 30 years, double noise levels in areas isolated from human contact, involve clearing old growth forest, and emit petroleum and engine exhaust odors would [have] no significant environmental impact."¹³¹ According to Magistrate Judge Binder, USFS paid only "lip service"¹³² to at least four significant environmental impacts: "(1) the effect on visual aesthetics; (2) emission of odor; (3) noise levels; and (4) disruption of protected wildlife and old growth forest."¹³³ Finally, he considered the public's concern and reasonably concluded that "the intensity of the public comment made at every opportunity makes clear that this project is 'likely to be highly controversial' within the meaning of CEQ regulations."¹³⁴ Given the amount of attention awarded to public comment in Judge Lawson's preliminary injunction order and the high profile nature of the case, Magistrate Judge Binder likely believed that it was only sensible to consider public opposition under the highly controversial factor.¹³⁵

Savoy objected to the Magistrate Judge Binder's report issued on June 20, 2006 that recommended that the court grant Angler's motion for summary

and shouldn't be hastily destroyed.

Id. (quotations omitted).

126. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 840 (E.D. Mich. 2008).

127. *Id.* at 830-33.

128. *Id.* at 827-28. Although Magistrate Judge Binder's report was not published, District Judge Lawson sufficiently summarized his reasoning. *See id.* at 820, 828.

129. *Id.* at 828-29.

130. *Id.* at 820.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 828.

135. *See supra* text accompanying notes 120-25.

judgment and deny Savoy's cross motion for summary judgment.¹³⁶ District Judge Lawson considered the case and issued an opinion in July 2008.¹³⁷

C. A Win for the Anglers, Sort-of: The District Judge's Decision Requiring an EIS

Although ultimately agreeing that USFS acted arbitrarily and capriciously, District Judge Lawson took issue with Magistrate Judge Binder's "highly controversial" finding.¹³⁸ District Judge Lawson recognized that the public was mostly concerned with the project's visual impact and noise.¹³⁹ For Judge Lawson, however, these concerns were not enough.¹⁴⁰ He wrote:

However, the plaintiffs demonstrate only mere public opposition; they present no evidence disputing the size, nature, or effect of the project. At no point do the plaintiffs assert that the defendants failed to analyze some likely effect of the proposed drilling, nor do they challenge the credibility of the defendant's experts, data, or methodology. Instead, the plaintiffs cite general concerns about the impact of the drilling and criticisms of the EA. The plaintiffs are not entitled to manufacture controversy in such a manner.¹⁴¹

According to Judge Lawson, "requiring an EIS based on nothing more than public controversy over the significance of the effects disclosed in the EA penalizes an agency for precisely the type of candid disclosure that NEPA seeks to promote."¹⁴² He also acknowledged that the USFS did in fact consider and respond to the public's concerns in many ways.¹⁴³ Finally, District Judge Lawson reasoned that NEPA's command is mainly procedural and because the plaintiffs produced only public opposition—not evidence of a substantial dispute or of the USFS's failure to consider public concerns—the project's environmental impact was not "likely to be highly controversial within the meaning of the CEQ regulations."¹⁴⁴

Of course, a win was a win for the Anglers—"[t]he tranquility of the Holy Waters [was] once again safe from the disruption of oil and gas exploration."¹⁴⁵ The *Record-Eagle* reported: "Opponents of a plan to drill for natural gas beneath a wilderness area known as the Mason Tract are celebrating a federal judge's decision to block mineral exploration there."¹⁴⁶ The Anglers' president stated,

136. *Anglers II*, 565 F. Supp. 2d at 815.

137. *Id.*

138. *Id.* at 828-29.

139. *Id.* at 828.

140. *Id.* at 828-29.

141. *Id.* at 828.

142. *Id.* at 829 (citation omitted).

143. *Id.*

144. *Id.* at 829.

145. Op-Ed, *supra* note 96.

146. McWhirter, *supra* note 1.

“George Mason’s gift 50 years ago is worth protecting for 50 years from now. Anything that could affect the river corridor should be highly scrutinized.”¹⁴⁷ Yet, some criticized the federal government for failing to do its job: “[Are these] the people we rely on to protect or not our environment? . . . Retrieving oil and gas is important. The aesthetics and solitude of the land are important. Divining the place in between is too important a job to be bungled.”¹⁴⁸

In reality, however, the Anglers’ zealous opposition played little role in convincing the court that at the very least the agencies should have prepared an EIS for the drilling project. In other words, if the agency had done an adequate job in preparing the EA and had complied with other procedural requirements, not even the massive amount of public opposition could persuade the court that the USFS had acted arbitrarily and capriciously in issuing a FONSI. Consider the irony: the very humans affected by a project cannot persuade an agency or a court that a proposed project will have a significant effect on the quality of their environment. Yet, presumably the affected people would know better than anyone else the effects of a proposed project on the quality of their environment, and if they do not yet know, they should be made aware. True, an adequate EA may consider and address many of the public’s concerns,¹⁴⁹ but that justification is hardly sufficient to satisfy citizens who demand at least more information or investigation into a project’s environmental effects and the right to participate in subsequent decision-making procedures. NEPA’s authors envisioned such access.¹⁵⁰ Without a doubt, the Anglers and many others would find it very disheartening to know that their opposition alone could not require more environmental studies for the drilling project. Instead, they could only hope for “botched oversight.”¹⁵¹

147. *Id.*

148. Editorial, *Botched Oversight Helps No One*, THE RECORD-EAGLE (Traverse City, Mich.), July 31, 2008, at Commentary.

149. See *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (quoted in *Mont. Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1144 (D. Mont. 2004)):

Although we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something. . . . It is evident, therefore, that a complete failure to involve or even inform the public about an agency’s preparation of an EA and a FONSI, as was the case here, violates these regulations.

150. See *supra* text accompanying note 39, in relevant part: “policy of the Federal Government, in cooperation with . . . concerned public and private organizations.” See also The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2006) (“detailed statement . . . shall be made available to . . . the public”); *id.* § 4345(2) (The CEQ shall “utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals”).

151. Editorial, *supra* note 148.

III. INCLUDING PUBLIC OPPOSITION UNDER THE HIGHLY CONTROVERSIAL FACTOR

Many justifications have been given for the traditional interpretation of the highly controversial factor.¹⁵² But they are weak when one considers the purposes and policies of NEPA.¹⁵³ The considerations that support including public opposition under the factor, conversely, effectuate NEPA's aims.¹⁵⁴ By revising the traditional interpretation to include opposition, the courts may grant citizens a mechanism for successfully participating in federal actions that they, as the affected people, believe will significantly affect them and their environment.

A. Arguments Against Public Opposition

In a case like *Anglers*, why did District Judge Lawson insist upon overturning Magistrate Judge Binder's finding that public opposition satisfied the highly controversial factor? From a layperson's perspective, it simply makes sense that the highly controversial factor would encompass such opposition, and this sense is only heightened when one considers the purposes and policies of NEPA.¹⁵⁵ Nonetheless, courts frequently cite many justifications for not considering public opposition under the highly controversial factor.¹⁵⁶ Most of these justifications are practical concerns that consider extra administrative costs in time, money, and resources.¹⁵⁷ Like most value-producing instruments, EISs are expensive and timely; typically, the thousand-page document takes years to complete and costs millions of dollars.¹⁵⁸ Given these figures alone, one can easily understand why agencies are rarely pushed to produce EISs. Nonetheless, many courts also provide more policy-based justifications for the traditional interpretation.¹⁵⁹ Yet, unlike the arguments to include opposition, none of these practical or policy considerations are wholly sufficient to justify the exclusion of public opposition

152. See *infra* text accompanying notes 157-203.

153. See *supra* text accompanying note 36 (NEPA's stated purposes) and *supra* text accompanying note 40 (declaration of national environmental police).

154. See *supra* note 153.

155. See *supra* note 153.

156. See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005); *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 828-29 (E.D. Mich. 2008).

157. Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 TEX. L. REV. 1409, 1409 n.6 (2008) (citing Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917-19 & nn.64-67).

158. *Id.*

159. See *North Carolina*, 957 F.2d at 1133-34; *Rucker*, 484 F.2d at 162; *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2nd Cir. 1972); *Nw. Bypass Group v. U.S. Army Corps of Engr's*, 552 F. Supp. 2d 97, 135-36 (D.N.H. 2008).

from the highly controversial factor.

First, many courts reason that considering public opposition under the highly controversial factor undermines the value of disclosure in an EA.¹⁶⁰ Consider again District Judge Lawson's reasoning: "requiring an EIS based on nothing more than public controversy over the significance of the effects disclosed in the EA penalizes an agency for precisely the type of candid disclosure that NEPA seeks to promote."¹⁶¹ Similarly, another court reasoned, "[s]imply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial [S]uch a standard [would] deter candid disclosure of negative information."¹⁶² However, NEPA's authors anticipated much more than mere disclosure; instead, the Act mandated public participation in federal decisionmaking.¹⁶³ Therefore, the argument that public opposition would undermine an EA's disclosure value ignores NEPA's second purpose, "to engage the public in the agency deliberative process."¹⁶⁴

Second, many courts have expressed concerns over the consequences of allowing public opposition to trigger an EIS.¹⁶⁵ *Rucker v. Willis*¹⁶⁶ offered the typical justification: "to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be."¹⁶⁷ Another court reasoned, "opposition, and not the reasoned analysis set forth in an [EA], would determine whether an environmental impact statement would have to be prepared."¹⁶⁸ Similarly, Judge Richard Posner reasoned that most EAs are just as reliable as the "much lengthier and costlier environment impact statement. . . . [P]ublic opposition . . . cannot tip the balance. That would be the environmental counterpart to the 'heckler's veto' of First Amendment law."¹⁶⁹ But despite these concerns, the authors of NEPA purported to allow the public to play some role

160. See *Anglers II*, 565 F. Supp. 2d at 828-29; *Native Ecosystems Council*, 428 F.3d at 1240.

161. *Anglers II*, 565 F. Supp. 2d at 829 (citing *Native Ecosystems Council*, 428 F.3d at 1240).

162. *Native Ecosystems Council*, 428 F.3d at 1240:

We decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome. NEPA permits a federal agency to disclose such impacts without automatically triggering the "substantial questions" threshold.

163. See NEPA statutory sections *supra* note 150 and source cited *infra* note 164.

164. Tabb, *supra* note 6, at 175 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

165. See sources cited *supra* note 159.

166. 484 F.2d 158, 158 (4th Cir. 1973).

167. *Id.* at 162 (citing *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972)).

168. *North Carolina v. FAA*, 957 F.2d 1125, 1133-34 (4th Cir. 1992).

169. *River Rd. Alliance, Inc. v. Corps of Engr's of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985) (citations omitted).

in federal decisionmaking.¹⁷⁰ Even the CEQ regulations recognize that “public scrutiny [is] essential to implementing NEPA.”¹⁷¹ Furthermore, the EIS, not the EA, is the action-forcing mechanism of NEPA.¹⁷² EAs were never intended to be as reliable as or take the place of EISs; an opposite view would only undermine the value of any EIS prepared for any project.

Another possible justification for the traditional interpretation is that litigation brought by the opposing public concerning the inadequacy of an EIS or failure to produce an EIS has historically delayed projects.¹⁷³ In fact, NEPA’s critics often argue that the Act not only encourages the opposing public to litigate projects they hope to enjoin, but also that NEPA itself “creates a complicated array of regulations and logistical delays that stall agency action.”¹⁷⁴ In actuality, however, litigation concerning NEPA has declined.¹⁷⁵ In 2004, for example, “a total of 170 NEPA-related cases were filed.”¹⁷⁶ Eleven prompted an injunction.¹⁷⁷ Nonetheless, if years of litigation often delay FONSI-deemed projects like the one in *Anglers*, perhaps it is more time efficient to satisfy public opposition by preparing an EIS. This practice would only effectuate the action-forcing mechanism of NEPA and thereby facilitate public involvement. On the other hand, this alternative closely resembles Judge Posner’s “heckler’s veto,”¹⁷⁸ and even if agencies choose to avoid litigation and prepare an EIS, the public is unlikely to be adequately served by the “overly lengthy, unreadable, and unused EISs”¹⁷⁹ that would probably result from such thinking.

The argument that public opposition is not totally discounted in the highly controversial factor also justifies the traditional interpretation; instead, the

170. See LUTHER, *supra* note 20, at 1; see also 40 C.F.R. §§ 1503, 1506.6 (2008).

171. 40 C.F.R. § 1500.1(b).

172. *Id.* § 1502.1 (“The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.”); see also The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2006) (“[All] agencies of the Federal Government shall 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”); 40 C.F.R. § 1508.11 (“Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the [NEPA].”).

173. LUTHER, *supra* note 20, at 2 (“Unlike other environment-related statutes, no individual agency has enforcement authority with regard to NEPA’s environmental review requirements. This absence of enforcement authority is sometimes cited as the reason that litigation has been chosen as an avenue by individuals and groups”).

174. *Id.*

175. *Id.* at 29.

176. *Id.* (citation omitted).

177. *Id.*

178. *River Rd. Alliance, Inc. v. Corps of Engr’s of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985) (citations omitted).

179. LUTHER, *supra* note 20, at 11.

opposition must focus on the technical aspects of the project.¹⁸⁰ Consider again Judge Lawson's reasoning in *Anglers*: "[P]laintiffs demonstrate only mere public opposition; they present no evidence disputing the size, nature, or effect of the project. . . . [P]laintiffs cite general concerns about the impact of the drilling and criticisms of the EA."¹⁸¹ On the contrary, however, the *Anglers* did in fact submit evidence disputing the effect of the project under the traditional approach.¹⁸² Second, if the *Anglers*' supposedly "mere" opposition did not meet the highly controversial factor, what level or type of controversy would?¹⁸³ At an international level, Professors John Devlin and Nonita Yap suggest that successful opposition is usually "made up of both local residents concerned about the impacts of the project on their livelihoods and intellectuals capable of contending with the technical details of the economic and environmental impacts of the project."¹⁸⁴ Again, it seems as though the *Anglers* cooperated with intellectuals (such as the Department of Environmental Quality, Michigan Environmental Council, and Michigan Department of Natural Resources).¹⁸⁵ Nevertheless, the court reasoned that these intellectuals focused mostly on the project's visual impact and noise—concerns that the court apparently finds unrelated to the project's size, nature or effect.¹⁸⁶

Similarly, some argue that NEPA already focuses too much on adverse effects, effects that are often echoed by ill-informed public opposition, rather than broader, long-term benefits.¹⁸⁷ For example, Dorothy Bisbee contends that in the context of off-shore wind farms, NEPA review will likely focus more on local adverse impacts instead of regional benefits.¹⁸⁸ She contends that "[p]opular visual aesthetic preferences are the primary obstacle to obtaining the emission reductions and other benefits wind power offers."¹⁸⁹ Bisbee's article quotes arguments much like those offered by the *Anglers*: "I'm not against wind turbines. I'm against 130 of them over 400 feet tall right smack in the middle of one of the most beautiful places in America."¹⁹⁰ Cass Sunstein offers a closely

180. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 828-29 (E.D. Mich. 2008).

181. *Id.* at 828.

182. *See id.* at 826 ("[T]he outpouring of public comments—including comments from Michigan's Governor, the County of Crawford, and the Michigan Environmental Council, among others—suggests that the project's impact on recreation and tourism could be substantial.").

183. For cases illustrating sufficient controversy, see Tabb, *supra* note 6, at 189-90.

184. John F. Devlin and Nonita T. Yap, *Contentious Politics in Environmental Assessment: Blocked Projects and Winning Coalitions*, 26 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 17, 25 (2008).

185. *See Anglers II*, 565 F. Supp. 2d at 826.

186. *Id.* at 828.

187. *See* Dorothy W. Bisbee, *NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 31 *B.C. ENVTL. AFF. L. REV.* 349, 369 (2004).

188. *Id.* at 350.

189. *Id.*

190. *Id.* at 369 (citation omitted).

related argument.¹⁹¹ He argues that because the public is often ill-informed, its involvement threatens accurate decisionmaking.¹⁹² Although recognizing the “richness” of public judgment, he warns against relying “entirely on lay judgments, which are frequently based on confusion, ignorance, and selective attention.”¹⁹³ He continues, “[w]hen those judgments are based on misunderstandings of the facts, they should play no role in policy.”¹⁹⁴ In other words, Sunstein believes that allowing a layperson’s uninformed opinion to influence the decision to prepare an EIS would serve little purpose.¹⁹⁵ Again, despite these concerns, the CEQ recognized the importance of public scrutiny and therefore mandated that agencies involve the public.¹⁹⁶

Finally, many courts have also noted that “controversy” and “opposition” are not synonymous.¹⁹⁷ The court in *Rucker* rejected “the suggestion that ‘controversial’ must necessarily be equated with opposition.”¹⁹⁸ Similarly, the court in *Northwest Bypass Group v. U.S. Army Corps of Engineers*¹⁹⁹ reasoned, “[A]s common sense dictates, the term ‘controversial’ is not synonymous with ‘opposition.’”²⁰⁰ Admittedly, the two words are not synonyms, but they are actually more similar in meaning than recognized by the courts. Compare the respective definitions of “controversy” and “oppose” found in a Merriam-Webster Dictionary: “the act of disputing or contending . . . a cause, occasion or instance of disagreement or contention: a difference marked esp. by the expression of opposing views”²⁰¹ and “to confront with hard or searching questions or objections.”²⁰² Underlying both of these definitions is the theme of contrasting, opposing views and disagreement. Although the courts generally only recognize opposing views concerning potential environmental effects,²⁰³ one could easily argue for an interpretation of “controversial” to include the public’s opposing views toward the project in general.

191. Cass R. Sunstein, *Which Risks First?*, 1997 U. CHI. LEGAL F. 101, 103-05 (1997).

192. *Id.* at 104-05.

193. *Id.* at 104.

194. *Id.*

195. For more on the development of public participation in environmental decisionmaking and its problems see Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263 (1999).

196. See 40 C.F.R. §§ 1500.1(b), 1506.6 (2008).

197. See *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (citing *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2nd Cir. 1972)); *North Carolina v. FAA*, 957 F.2d 1125, 1133-34 (4th Cir. 1992).

198. *Rucker*, 484 F.2d at 162 (citing *Hanly*, 471 F.2d at 830).

199. 552 F. Supp. 2d 97 (D.N.H. 2008).

200. *Id.* at 135 (citing *North Carolina v. FAA*, 957 F.2d at 1134).

201. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 497 (3rd ed. 1961).

202. *Id.* at 1583.

203. See *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 827 (E.D. Mich. 2008).

B. For Public Opposition

William Murray Tabb's proposal to weigh public opposition under the highly controversial factor seems even more appropriate now than a decade ago considering the recent attention to public participation in NEPA and other obstacles in NEPA-related litigation.²⁰⁴ In 1997, Tabb offered a "multi-factored approach . . . to guide federal agencies and reviewing courts to evaluate whether opposition to a major federal project is 'highly controversial' and therefore influences the determination of 'significance' within the meaning of [NEPA]."²⁰⁵ Specifically, Tabb's approach considered:

- (1) the degree of opposition, both in quantitative and qualitative terms;
- (2) whether the disputed information is a matter of legitimate scientific debate regarding the potential environmental impacts of the project;
- (3) the stage or timing in which the disputed information is raised and whether it would serve a useful purpose in light of decisions remaining;
- (4) whether the agency has a reasoned plan of mitigation to speak to the issues raised in opposition to the action; and
- (5) whether the dispute involves a matter of objective environmental effects or an issue of a subjective nature, such as aesthetics.²⁰⁶

Note that Tabb did not suggest that any opposition should automatically trigger the preparation of an EIS or propose to eliminate agencies' roles in decisionmaking.²⁰⁷ Instead, "[t]he methodology proposed reconciles the twin aims of the statute and reinforces the role of active and meaningful public participation."²⁰⁸ Now consider how the public will benefit from either Tabb's proposal or some variation of a new approach and why a new approach is more likely to succeed at this time.

First, a proposal to abandon the traditional interpretation and adopt a Tabb-like approach is more likely to succeed now because a recent publication suggests that even the CEQ is concerned with public involvement and has recognized that the forty-year-old Act must be modernized.²⁰⁹ In December 2007 the CEQ expressed its concern with ensuring public participation in the NEPA process in its publication "A Citizen's Guide to the NEPA: Having Your Voice Heard."²¹⁰

204. See Tabb, *supra* note 6, at 175; see also *infra* text accompanying notes 209-63.

205. Tabb, *supra* note 6, at 231.

206. *Id.* at 190-91.

207. *Id.* at 231. In fact, Tabb reassured that "[a]gencies still would retain considerable discretion regarding procedural implementation and substantive decisionmaking; however, that discretion would be tempered by the idea of fully considering relevant disputed information." *Id.*

208. *Id.*

209. See COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13; see also THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY, MODERNIZING NEPA IMPLEMENTATION (2003).

210. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13. This publication was likely influenced by a 1997 CEQ study of public stakeholders who felt that some EAs were developed specifically to avoid the public, that NEPA was too often a "one-way communication process," and

The guide was “developed to help citizens and organizations who are concerned about the environmental effects of federal decisionmaking to effectively participate in Federal agencies’ environmental reviews under the National Environmental Policy Act (NEPA).”²¹¹ It instructs the public on proper timing and method of involvement and even advises on what to do if involvement is not going well.²¹² But the guide also warns: “[public comment] is not a form of ‘voting’ on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward.”²¹³ Apparently, although public comment is so highly encouraged that the CEQ felt compelled to publish a handbook, the court in *Anglers II* makes clear that only public comments focused on specific, technical aspects of the project ultimately matter.²¹⁴ Moreover, the public has little incentive to provide comments when they have little effect on the actual decision-making process.

In addition to this recent publication, several other considerations support overturning the traditional interpretation and weighing public opposition under the highly controversial factor. These considerations include: the fact that very few EISs are actually prepared,²¹⁵ which suggests an overall weakening of NEPA caused by statutory misinterpretation; the numerous barriers that plaintiffs who judicially challenge agencies’ decisions must face;²¹⁶ the argument that many agencies who decide to issue FONSI have no environmental expertise;²¹⁷ and the increasingly widespread theories of environmental justice and democracy.²¹⁸ These issues, when considered together, greatly support the argument to include public opposition under the highly controversial factor. The opposing public must play a role before the agency’s decision not to prepare an EIS because the public is often left afterwards with no remedy.

Bradley Karkkainen has identified a major problem within NEPA today: “[m]ost NEPA compliance effort[s] these days [go] not into producing full-scale EISs, but into producing slimmed-down documents called environmental assessments (EAs), designed to produce just enough information to justify a ‘Finding of No Significant Impact’ (FONSI) to get the agency off the hook.”²¹⁹ The CEQ has calculated the total number of draft and final EISs prepared from

that comments were sought only after the decision-making process had effectively concluded. LUTHER, *supra* note 20, at 30-31.

211. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13, at 1 (citing National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2006)).

212. *Id.* at 21-30.

213. *Id.* at 27.

214. *Anglers of the Au Sable v. U.S. Forest Serv. (Anglers II)*, 565 F. Supp. 2d 812, 828 (E.D. Mich. 2008).

215. Karkkainen, *supra* note 12, at 347-48.

216. *See infra* text accompanying notes 225-39.

217. Davis, *supra* note 49, at 35.

218. *See infra* text accompanying notes 246-63.

219. Karkkaninen, *supra* note 12, at 347.

1973-2007.²²⁰ Federal agencies prepared 2,036 EISs in 1973, as compared to 557 EISs in 2007.²²¹ Consider another comparison: 50,000 EAs leading to FONSI versus roughly 500 EISs are produced each year.²²² Thus, it seems that EISs, the “operative, action-forcing mechanism of NEPA,” are infrequently produced.²²³ These statistics likely result from the sources of criticism noted earlier by Matthew Lindstrom and Zachary Smith, specifically that both the executive and judicial branches have undermined NEPA’s effectiveness by applying “a very narrow, crabbed interpretation in implementing” the Act and failing to recognize “the comprehensive core and long-term view embedded within NEPA.”²²⁴ Therefore, if the courts and agencies were to begin to interpret the highly controversial factor to include public opposition, it is likely that agencies would produce more EISs and thereby advance the purposes of NEPA.

Next, the opposing public who must resort to judicial review of an agency’s decision not to prepare an EIS faces several barriers. Unlike other environmental statutes, NEPA does not provide for “citizens’ suits,” which confer standing for injured citizens who can demonstrate that an agency violated NEPA.²²⁵ Consequently, citizens must prove standing through the Administrative Procedure Act (APA).²²⁶ In general, standing requires proof of three elements: injury in fact that is concrete, particularized, and imminent; fairly traceable causation; and redressability.²²⁷ However, Adrienne Smith has recently noted the split between the courts over conferring standing in broad, policy-based NEPA suits.²²⁸ Finding fault with both sides’ approaches, Smith contends that standing in the NEPA context should extend to the full Constitutional limits: “[t]he better standing

220. COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL IMPACT STATEMENTS FILED 1973 THROUGH 2007 (on file with author).

221. *Id.*

222. Karkkaninen, *supra* note 12, at 347-48 (citing COUNCIL ON ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1994-1995)). In addition, Karkkaninen explains that because draft EISs precede final EISs, “this figure really represents approximately 250 federal actions per year that trigger the EIS production process—a vanishingly small number given the scale and scope of federal operations.” *Id.* at 348.

223. LINDSTROM & SMITH, *supra* note 12, at 63.

224. *Id.* at 10.

225. *Id.* at 103 (“Legal standing is the broad threshold requirement that plaintiffs must satisfy in order to present their case in court.”).

226. *Id.* at 105. See The Administrative Procedure Act, 5 U.S.C. § 702 (2000), in relevant part: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

227. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This Note does not provide a historical development or analysis of standing in environmental litigation. For more on standing under NEPA see LINDSTROM & SMITH, *supra* note 12, at 104 n.7; Davis, *supra* note 49, at 44-47; and Smith, *supra* note 24.

228. Smith, *supra* note 24, at 637-38 (“Specifically, the courts disagree as to the [sic] how specific the plaintiff’s evidence must be to prove the plaintiff is at risk of suffering future environmental harm.”).

approach would allow plaintiffs to sue under the theory that an agency harms individuals and organizations when it deprives them of information that NEPA requires the agency to disseminate. . . . [C]ourts should evaluate standing in light of NEPA's core informational objectives."²²⁹ The argument to include public opposition under the highly controversial factor is closely related. Because "informational injury" standing is not widely recognized by the courts, the opposing public who is denied both subsequent information and participation by an agency's decision not to prepare an EIS faces a higher standing burden if it chooses to pursue litigation.²³⁰ Lack of standing could help explain why there has been less NEPA litigation recently.²³¹

The fact that citizens must sue under the APA is also significant in determining the court's standard for review.²³² Although somewhat ambiguous, the APA generally provides that courts review agencies' actions or inactions under some sort of arbitrary and capricious standard.²³³ To be upheld, the APA "requires that the federal agency's final decision not be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.'"²³⁴ Like the standing split mentioned above, however, different courts apply either more demanding or more deferential versions of the arbitrary and capricious standard.²³⁵ The more demanding "hard look" approach offers a two-fold analysis: first, "whether the agency took a 'hard look' at the possible effects of the proposed action. . . . Second, . . . whether the agency's decision was arbitrary and capricious."²³⁶ On the other hand, the more literal approach is very deferential to agencies' decisions.²³⁷ Regardless of the approach, Korey Nelson recognizes that "[t]he purpose of the EIS goes unfulfilled if agencies do not 'carefully consider' the impacts of their action."²³⁸ The courts therefore must strike the proper balance between analyzing the appropriateness of agencies'

229. *Id.* at 638, 653; *accord* Davis, *supra* note 49, at 46.

230. Smith, *supra* note 24, at 638-39.

231. *See* LUTHER, *supra* note 20, at 29 (noting two possible reasons for decline in NEPA litigation, "improved agency compliance" and fewer "major federal actions" under NEPA). In addition to these reasons, some decline in NEPA litigation may stem from the court's refusal to permit individuals to sue for informational injury and NEPA plaintiff's difficulty meeting Lujan standing requirements. *See* Smith, *supra* note 24, at 652-55.

232. *See* The Administrative Procedure Act, 5 U.S.C. § 706 (2000). For more on judicial review of NEPA actions, see Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There Are Too Many Trees*, 17 TUL. ENVTL. L.J. 177 (2003).

233. Nelson, *supra* note 232, at 181-83.

234. LINDSTROM & SMITH, *supra* note 12, at 114.

235. Nelson, *supra* note 232, at 198-99.

236. *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Vill. of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991)).

237. Nelson, *supra* note 232, at 187-90.

238. *Id.* at 198 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

actions while remaining deferential. As a result, the public who opposes a project and decides to challenge the issuance of a FONSI in court must overcome imposing barriers—merely getting into court is difficult enough, but actually getting an agency's decision overturned under the arbitrary and capricious standard depends on the court's level of deference to the agencies.²³⁹

The courts' tendency to defer to agencies' findings raises yet another consideration relating specifically to an argument supporting the traditional interpretation.²⁴⁰ Admittedly, the public, who is not informed or who may be misinformed on environmental matters, may do little to contribute to accurate decisionmaking. Yet, as Professor Wendy Davis points out, often the agencies in charge of deciding whether or not to prepare an EIS also lack environmental knowledge.²⁴¹ She recognizes, "[m]any of these FONSI determinations are made by lead agencies without environmental expertise"²⁴² Davis also asserts, "Federal agencies, which lack environmental expertise, and whose mission is not environmental protection, should not have the power to determine whether their proposed projects will harm the environment."²⁴³ Davis proposes to require EPA approval for each FONSI determination.²⁴⁴ She argues three points: courts should not be required to order agencies to prepare EISs because it wastes resources; public suits are inefficient and often unsuccessful at challenging FONSI determinations; and most interestingly, "the results of NEPA court challenges are currently politically motivated."²⁴⁵ However, including public opposition under the highly controversial factor could help to resolve Davis's concerns. There would likely be less FONSI-related suits because of increased EISs, less waste of judicial resources, and even more public opposition to politically-motivated outcomes.

Finally, the increasing prominence of environmental justice and democracy theories supports considering public opposition under the highly controversial factor.²⁴⁶ Most federal actions result in EAs, not EISs, as noted above.²⁴⁷ This fact is troublesome because "[a]lthough NEPA regulations call on agencies to involve the public in preparing EAs, public participation is only required by NEPA *after* the EA is completed, through the notice and comment provisions for

239. See Smith, *supra* note 24, at 652 (noting that under the additional Lujan approach, NEPA plaintiffs struggle to tie standing to the risk of environmental injury because they are not suing to enforce substantive NEPA requirements; indeed, NEPA contains no substantive requirements); see also Nelson, *supra* note 232, at 198-99.

240. See *supra* text accompanying notes 187-96.

241. Davis, *supra* note 49, at 47.

242. *Id.* at 48.

243. *Id.* at 35.

244. *Id.* at 72.

245. *Id.* at 43.

246. Environmental justice theory acknowledges that "exposure to environmental hazards is related to race and income levels." Outka, *supra* note 14, at 602.

247. See *supra* text accompanying notes 219-23.

an EIS.”²⁴⁸ As a result, if the highly controversial factor ignores public opposition and no EIS is prepared, then the opposing public loses its opportunities to access more information or participate in any further decisionmaking.²⁴⁹

The preparation of EISs advances environmental justice by facilitating fairness in the decision-making process and highlighting discriminatory results.²⁵⁰ Professor Alice Kaswan asserts that NEPA, specifically through its EIS requirement, provides “opportunities for increased information and participation that . . . could facilitate a community’s ability to understand and critique an agency’s decisionmaking process.”²⁵¹ In particular, the EIS may reveal information concerning the project’s inappropriate location or underlying unfairness and thereby provide the community with reason to question the agency’s motives behind its decision.²⁵² Kaswan articulates related environmental justice concerns, “[t]he information developed throughout the environmental review process may show that the purported rationale is simply a pretext masking a discriminatory decision.”²⁵³ As a result, the public may use participation in the EIS process to raise broader political concerns and bring attention to injustices.²⁵⁴ A decision to issue a FONSI, however, limits the public’s access to information and participation, and therefore concerns of broader political injustice must be raised through litigation. Factoring public opposition into the EIS determination will likely produce two positive outcomes. First, the likelihood of increased numbers of EISs will result in more information being disseminated to the public and additional public participation. Second, at the very least, the public will gain some satisfaction in knowing that its opposition played a role in determining whether the project would significantly affect the human environment.

Moreover, both the agencies and the public must initiate changes in order to

248. Outka, *supra* note 14, at 608. Some courts however have responded to this disparity by offering rules regulating the level of public participation required in the EA process. Consider this adopted rule: “An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.” *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engr’s*, 524 F.3d 938, 953 (9th Cir. 2008).

249. “From an environmental justice perspective, this is troubling, because if the agency issues a FONSI without public involvement in its EA process, no meaningful opportunity remains.” Outka, *supra* note 14, at 608.

250. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221, 233, 289-97 (1997).

251. *Id.* at 289-90.

252. *Id.* at 291-94 (“[A] community may be able to use an EIS to show that the selection of the proposed site does not make sense, whatever the purported rationale of the decisionmaker.”).

253. *Id.* at 293.

254. *See id.* (quoting Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 87 (1996)).

participate most effectively in EIS determination or preparation.²⁵⁵ Professor John S. Applegate recognizes that too often notice-and-comment procedures, like those employed in preparing EISs, result in “decide, announce, and defend. That is, the agency makes its decision internally, announces it to the public only nominally as a proposal, and then defends its proposal against criticism rather than seriously reexamining it in light of comments.”²⁵⁶ Applegate, however, proposes changes to enhance public participation.²⁵⁷ First, he suggests that procedures should strive to include those people who are limited in their ability to participate, like minorities.²⁵⁸ Next, the procedures must not only provide information, but also teach the uninformed or ill-informed public.²⁵⁹ He warns, “The proverbial playing field will never be truly level between persons with many and those with few resources, but the latter can learn enough to participate meaningfully.”²⁶⁰ Third, the procedures should be transparent so that the public can understand its role in both the participation and decision-making processes.²⁶¹ Finally, the participating public should influence the outcome.²⁶² In sum, every aspect of the public impacted by the agency action should have a role; have awareness of its role and influence; possess information and tools to make use of the information; and influence the outcome of the decision-making process.²⁶³

CONCLUSION

Too often federal agencies issue FONSI and do not develop EISs in light of substantial public opposition. This result is facilitated by the traditional interpretation of the highly controversial factor. Through traditional interpretation of this factor, courts have negated the major goal of NEPA by depriving the public of both further information about proposed actions’ environmental effects and participation in the decision-making procedures of those actions.

The irony of the factor’s traditional interpretation was recently highlighted in a case involving fisherman and drilling for oil under a revered Michigan river. Despite their zealous opposition, the fisherman had little influence on the court’s ultimate decision that the project would have a significant impact on the quality of the human environment. In other words, the affected people, who would

255. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 952-53 (1998).

256. *Id.* at 908.

257. *Id.* at 952-53.

258. *Id.* at 952.

259. *Id.*

260. *Id.*

261. *Id.* at 953.

262. *Id.*

263. *Id.* at 952-53. On the proper timing of participation, Applegate advises, “Participation should begin early in the decisionmaking process, when outcomes are most flexible, and it should permit actual dialogue between the decisionmaker and interested parties, and among interested parties.” *Id.*

presumably know better than anyone else the environmental effects or who at least deserve to know those effects, had little input whether a project would significantly impact their environment. The traditional interpretation therefore results in illogical, ineffective outcomes that do little to advance the purposes of NEPA. As a result, the courts should reconsider this failing interpretation and adopt a broader view that encompasses public opposition.

Over a decade ago, William Murray Tabb offered a five-factor test for incorporating public opposition into the highly controversial factor, but both agencies and courts have basically ignored his proposal. In light of more recent developments concerning public participation in NEPA and environmental justice issues, perhaps now the courts will heed Tabb's advice and revise their interpretation of the factor. Again, Tabb did not advance and this Note does not propose that any opposition should trigger an EIS, and neither suggests that public opposition should ultimately determine the fate of a project. Nonetheless, the amount of public opposition and concerns raised should at the very least have some role in determining whether a project significantly affects the quality of the human environment.

In the wake of substantial opposition to a proposed project, the public deserves even more information and access to decision-making procedures—an end that is best achieved in NEPA through the preparation of an EIS. Moreover, that the public is not informed or may be misinformed on environmental matters is all the more reason to provide information. Thomas Jefferson spoke of this idea most eloquently:

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.²⁶⁴

If an EA is nonetheless prepared and found adequate by the court, the opposing public is left helpless. Certainly, in that situation, the Anglers would have faced the choice of continuing to fish in a once-revered, now oil-stained river or finding someplace equally magnificent to fish—provided any such sites still existed.

264. Jefferson on Politics and Government: The Safest Depository, <http://etext.virginia.edu/jefferson/quotations/jeff0350.htm> (last visited Mar. 1, 2009).

