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Seeking an Informed Decision: Early Site Permits and Energy Alternatives in Environmental Law and Policy Center v. United States Nuclear Regulatory Commission

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I. Introduction

The United States faces the combined consequences of energy dependence, global warming, and an ever-increasing need for energy to stimulate and maintain economic growth. In light of these problems, nuclear energy has once again emerged as a viable option to supply the nation's insatiable energy needs. But many still resist the expansion of nuclear energy, and both sides of the debate over the efficacy of nuclear power present bleak scenarios in support of their positions. Proponents of nuclear power point to our increasing need for energy, the negative environmental effects of other forms of fuel, and the political reverberations of energy dependence to support expanding the use of nuclear energy. Critics of nuclear power point to accidents such as Chernobyl, the expense of building and later decommissioning reactors, the environmental fallout of nuclear waste, and the threat of nuclear proliferation to highlight the dangers of turning to nuclear energy.

1. See Denis E. Beller, Atomic Time Machines: Back to the Nuclear Future, 24 J. LAND RESOURCES & ENVTL. L. 41, 41-42 (2004) (describing need for cleaner forms of energy and sustainable development); see also Rebecca Smith, Electricity Demand is Far Outpacing New-Supply Sources, WALL ST. J., Oct. 17, 2007, at A17 (noting demand for electricity in United States is increasing twice as fast as new supplies are being produced).

2. See Beller, supra note 1, at 41-42 (noting need for abundant, clean, and affordable sources of energy, nuclear power being sole source that can meet demand).

3. See Kurt Gottfried, Climate Change and Nuclear Power, 73 SOC. RES. 1017, 1017 (2006) (noting nuclear power's “serious negatives”). But see Beller, supra note 1, at 42 (suggesting nuclear power can safely meet increasing needs and is safe and clean).

4. See James Buchan, Oil: We're all Addicted, NEW STATESMAN, July 17, 2006, at 32-33 (describing effects of oil scarcity and global warming effects); see also Fred Bosselman, The Ecological Advantages Of Nuclear Power, 15 N.Y.U. ENVTL. L.J. 1, 1 (2007) (arguing the environmental impact of nuclear energy will be neutral or positive).

5. See Taylor Burke, Nuclear Energy And Proliferation: Problems, Observations, And Proposals, 12 B.U. J. SCI. & TECH. L. 1, 3 (2006) (noting United States' nuclear technology promotion needs to address proliferation risk); see also Howard C. Shaffer, The Downside Of Nuclear Power-By An Advocate, 7 VT. J. ENVTL. L. 119, 124 (2006) (arguing nuclear energy is unsafe, uneconomical, and unnecessary); see also Brad
Thus, the United States is left with a difficult substantive decision. We must determine whether nuclear power is the best means of supplying energy in a manner that is safe, cost effective, and environmentally stable; but this is not the only decision that must be made. We must also determine how we are to make this decision; that is, we must establish the process by which policymakers reach decisions about supplying energy.\(^6\) An effective process will ensure that the decision was correct by scrutinizing private interests, treating political actors equally, and ensuring equal rights of participation.\(^7\)

The process by which the Nuclear Regulatory Commission (NRC) grants licenses for the construction of nuclear reactors is in flux.\(^8\) Despite consistent opposition to nuclear power, supporters of nuclear energy have made significant progress over the last two decades toward increasing the nuclear energy capacity of the

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\(^6\) See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1514 (1992) (describing civic republican theory of constitutional democracy). The civic republican theory of constitutional democracy argues "the government's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good." *Id.*. Under this theory, we should establish procedures that will lead to effective deliberation. *Id.* Professor Seidenfeld argues civic republicanism "provides an essential justification for the modern bureaucratic state." *Id.* at 1515.

\(^7\) See Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1541 (1988) (describing republicanism). Whether right or wrong as a theory, civic republicanism is a useful prism through which to look at the nuclear licensing process. *See id.* Professor Sunstein identifies four central principles of civic republicanism: (1) deliberation in politics; (2) equality of political actors; (3) universalism; and (4) citizenship. *Id.* Deliberation ensures alternative perspectives are considered, ensuring "outcomes will be supported by reference to a consensus ... among political equals." *Id.* at 1549. Political equality ensures all groups, not just the rich and powerful, have "access to the political process." *Id.* at 1552. Universalism entails a process of mediation "designed to produce substantively correct outcomes, understood as such though the ultimate criterion of agreement among political equals." *Id.* at 1554. Finally, the ideal of citizenship calls for "citizen control of national institutions." *Id.* at 1555-556.

\(^8\) For a further discussion of the changes in the nuclear reactor licensing process, see *infra* notes 9-16 and accompanying text.
United States.9 One of the successes achieved by nuclear power supporters, for example, is the amelioration of the effects of regulatory obstacles.10 The NRC, beginning in 1989, substantially revised its licensing requirements in order to streamline the licensing process.11 Part of this “standardization” process implemented the “Early Site Permit” (ESP), which allows applicants “to have the ‘safety, environmental protection, and emergency preparedness’ aspects of prospective sites for new plants reviewed independent of a specific nuclear plant design.”12 In addition to progress with respect to nuclear regulation, the Energy Policy Act of 2005 further bolstered nuclear energy by providing significant incentives to those seeking to invest in nuclear energy.13 The result of the streamlined licensing process and the Energy Policy Act is an in-


10. Neal H. Lewis, Interpreting the Oracle: Licensing Modifications, Economics, Safety, Politics, and the Future of Nuclear Power in the United States, 16 ALB. L.J. SCI. & TECH. 27, 31 (2006) (describing three mechanisms that streamline licensing process). The streamlining changes are the standard design certification, early site permits, and combined licensing. Id. Standard design certification allows companies to choose from “off the shelf” reactor designs. Id. at 32. This streamlines the process by allowing the NRC to approve reactor designs independent of the specific sites, meaning the NRC can approve designs without interference by local interest groups wielding objections based on local concerns. Id. at 33. The Early Site Permit allows those seeking licenses to apply for and “bank” licenses for sites before a reactor design is chosen. Id. The Early Site Permit streamlines the process by limiting local opposition to concerns about the site itself as opposed to concerns about the reactor design and site all at once. See Lewis, supra, at 35-36. Combined licensing allows an applicant to obtain a license that permits construction and operation. Id. at 59. Combined licensing streamlines the licensing process because the NRC no longer requires separate licenses for construction and operation. Id.

11. See Lewis, supra note 10, at 35 (describing streamlining process).


crease in the number of license applications; the NRC expects at least twenty-one license applications for thirty-two reactors between 2007 and 2009.14

Yet, this rapid increase in support of nuclear power, along with streamlined licensing procedures, has the potential to conflict with the National Environmental Policy Act (NEPA).15 For instance, NEPA's requirement of an Environmental Impact Statement (EIS) conflicts with the energy sector's desire to increase the nuclear capacity of the United States in a manner fast enough to meet future energy needs and ameliorate the effects of global warming.16

This conflict is apparent in Environmental Law and Policy Center v. United States Nuclear Regulatory Commission (ELPC).17 In ELPC, the United States Court of Appeals for the Seventh Circuit rejected a challenge to Exelon Generation Company's (Exelon) ESP for a facility in Clinton, Illinois.18 In rejecting the environmental groups' challenge, the Seventh Circuit defined the ESP seeker's obligations with respect to NEPA.19 First, the court held that the NRC regulations did not obligate Exelon to consider "energy efficiency" alternatives in its EIS because Exelon is a "baseload generator."20 Second, the ELPC court held the NRC regulations allow a party seeking an ESP to defer a "need for power" analysis until "a later combined licensing proceeding."21

This Note will evaluate the Seventh Circuit's decision not to require Exelon to discuss energy efficiency alternatives in its EIS. This Note will also argue that the ELPC court's decision brings the ESP process into conflict with NEPA because it thwarts the purpose of the EIS, which is to inform not only the agency, but also the

Id. The incentives are federal loan guarantees, a production tax credit, and standby support. Id.


15. For a further discussion of the streamlined licensing procedures' conflict with NEPA, see infra notes 150-85 and accompanying text.

16. See id. (discussing streamlined licensing procedures).

17. 470 F.3d 676 (7th Cir. 2006).

18. See id. at 685 (rejecting environmental groups' challenge).

19. Id. at 683-84 (defining ESP license seeker's obligations).

20. Id. at 684 (holding discussion of energy efficiency alternatives is not required). A baseload generator generates new energy at high capacity to sell on the wholesale market instead of a particular area. See id. at 679 (describing function of baseload generator).

21. Envtl. Law and Policy Ctr. v. U.S. Nuclear Regulatory Comm'n (ELPC), 470 F.3d at 684 (allowing deferral of power analysis because relevant issues will be considered at later stages).
public and the government of reasonable alternatives to the proposed action.\textsuperscript{22} This note is impartial to the efficacy of nuclear power in the United States; instead, it argues that if a decision is to be made, it should be a product of effective deliberation.\textsuperscript{23} Part II describes the facts of \textit{ELPC}.\textsuperscript{24} Part III provides legal background on the ESP process, NEPA requirements, and segmentation.\textsuperscript{25} Part IV is an discussion of the \textit{ELPC} court’s reasoning.\textsuperscript{26} Part V critically analyzes the \textit{ELPC} decision and argues that the decision brings the ESP process into conflict with NEPA.\textsuperscript{27} Finally, Part VI examines the impact the \textit{ELPC} decision will have on energy efficiency and the deliberative process by which the United States makes decisions about nuclear energy.\textsuperscript{28}

II. Facts

In \textit{ELPC}, Exelon applied for an ESP in order to build at least one nuclear reactor in Clinton, Illinois.\textsuperscript{29} Exelon plans to use the reactors at the Clinton site to produce energy to sell on the wholesale market, as opposed to a particular area.\textsuperscript{30} As part of the ESP application process, NRC regulations require applicants to submit an environmental report that discusses alternatives to the proposed action.\textsuperscript{31} In its EIS, Exelon evaluated several alternatives to building the nuclear reactors, including wind and solar power.\textsuperscript{32} Exelon concluded in its report, however, that these alternatives were inferior to the nuclear reactors that Exelon intended to build.\textsuperscript{33} Exelon

\textsuperscript{22} For a further discussion of how the \textit{ELPC} decision conflicts with NEPA, see notes 150-85 and accompanying text.
\textsuperscript{23} For a further discussion of the \textit{ELPC} decision’s conflict with NEPA, see \textit{infra} notes 150-85 and accompanying text.
\textsuperscript{24} For a further discussion of \textit{ELPC}, see \textit{infra} notes 29-44 and accompanying text.
\textsuperscript{25} For a further discussion of the legal background information, see \textit{infra} notes 45-129 and accompanying text.
\textsuperscript{26} For a further discussion of the \textit{ELPC} court’s reasoning, see \textit{infra} notes 130-49 and accompanying text.
\textsuperscript{27} For a further discussion of the \textit{ELPC} court’s reasoning, see \textit{infra} notes 150-85 and accompanying text.
\textsuperscript{28} For a further discussion of the possible impact of \textit{ELPC}, see \textit{infra} notes 186-94 and accompanying text.
\textsuperscript{29} See \textit{ELPC}, 470 F.3d at 679 (giving background of case).
\textsuperscript{30} See id. (discussing Exelon’s intended use of reactor).
\textsuperscript{31} See id. (addressing environmental report).
\textsuperscript{32} See id. (describing Exelon’s discussion of alternatives).
\textsuperscript{33} See id. (explaining factors considered in Exelon’s evaluation of alternative energy sources).
pointed to several disadvantages of the alternative energy sources such as pollution and lack of generating capacity.\textsuperscript{34}

Several environmental groups filed a petition to intervene (contention) challenging Exelon’s application for an ESP.\textsuperscript{35} The environmental groups argued that Exelon failed to consider energy efficiency and combinations of wind or solar power with traditional fossil fuels.\textsuperscript{36} The environmental groups also claimed Exelon presented flawed information with respect to wind and solar power.\textsuperscript{37}

The NRC’s Atomic Safety Licensing Board (Board) rejected the environmental groups’ claim that Exelon was required to recognize energy efficiency alternatives in its environmental report.\textsuperscript{38} Nevertheless, the Board recognized the environmental groups’ contention that Exelon had failed to consider adequately wind and solar power combined with fossil fuel plants.\textsuperscript{39} Exelon responded by preparing a revised evaluation, which concluded that the combination of solar and wind power with fossil fuel plants was inferior to nuclear energy because of harmful environmental effects.\textsuperscript{40}

Following Exelon’s revised evaluation, the NRC issued a draft EIS which “reached conclusions similar to those reached by Exelon.”\textsuperscript{41} Exelon then submitted a motion for summary disposition of the environmental groups’ contention arguing that no genuine disputes of material fact remained.\textsuperscript{42} The Board granted Exelon’s motion and terminated the contested portion of the proceeding.\textsuperscript{43}

\textsuperscript{34} See ELPC, 470 F.3d at 679-80 (illustrating Exelon’s evaluation of alternative energy sources). With respect to wind and solar power, Exelon argued that power generation was intermittent. \textit{Id.} at 680; see also Div. of New Reactor Licensing, N.R.C., NUREG-1815, VOL. 1, ENVIRONMENTAL IMPACT STATEMENT FOR AN EARLY SITE PERMIT (ESP) AT THE EXELON ESP SITE 8-17 (2006) [hereinafter EIS] (providing Exelon’s complete evaluation of alternative energy sources). Exelon found fuel cells were not economically or technologically competitive with sources such as nuclear power. See EIS, supra, at 8-21. Additionally, conventional sources such as coal and gas would produce “substantial” environmental effects. See id. at 8-6.

\textsuperscript{35} See ELPC, 470 F.3d at 679-80 (explaining opportunity for parties affected by NRC licensing proceeding to file request for hearing and petition to intervene).

\textsuperscript{36} See id. (outlining substance of environmental groups’ contention).

\textsuperscript{37} See id. (describing environmental groups’ criticism of information Exelon used in evaluating alternative energy sources).

\textsuperscript{38} See id. (describing Board’s rejection of environmental groups’ contention).

\textsuperscript{39} See id. (stating need for revised environmental statement).

\textsuperscript{40} See ELPC, 470 F.3d at 679-80 (explaining Exelon’s revised statement).

\textsuperscript{41} \textit{Id.} (outlining NRC’s draft EIS).

\textsuperscript{42} See id. (describing Exelon’s motion for summary disposition).

\textsuperscript{43} See id. (describing Board’s grant of Exelon’s motion).
The NRC then affirmed the Board’s ruling, and the environmental groups appealed.44

III. BACKGROUND

Applications to construct nuclear facilities must satisfy the requirements of the Atomic Energy Act (AEA) and NEPA.45 Section 101 of the AEA forbids any person to “manufacture, produce, transfer, acquire, possess, [or] use” a nuclear reactor without a license issued by the NRC.46 Applicants can obtain a license under section 185 of the AEA, which provides that applicants “shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit.”47

In 1989, the NRC’s desire to standardize nuclear facilities and the licensing of those facilities culminated in several significant changes to the licensing process.48 One of the NRC’s changes created the availability of ESPs.49 The NRC created ESPs to “serve as vehicles for resolving most site issues before large commitments of resources are made.”50 Under the ESP process, an applicant must submit detailed information about the proposed site, including an EIS.51 The NRC requires the EIS in its regulation to implement NEPA’s standards.52

44. See id. (discussing facts of case).
45. For a further discussion of the requirements of the AEA and NEPA, see infra notes 46-129 and accompanying text.
46. 42 U.S.C. § 2131 (2006) (explaining requirement of license). Section 2131 uses the term “production facility,” which the Act defines as “(1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.” 42 U.S.C. § 2014(v) (2006).
47. 42 U.S.C. § 2235 (2006) (defining conditions under which license is to be granted).
49. See id. at 15,378 (describing ESP).
50. Id. (describing purpose of ESP).
NEPA’s policy is “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” NEPA institutes this “broad national commitment” in part by requiring an EIS for all “major Federal actions significantly affecting the quality of the human environment.”

The EIS furthers this policy by serving two important “action forcing” purposes: (1) the agency will have information about environmental impacts; and (2) the information will be available to the public. It is significant, however, that the EIS “does not mandate particular results, but simply prescribes the necessary process.” In essence, NEPA does not prohibit an agency from making a decision that has negative environmental implications; it merely requires that if an agency makes such a decision, it be on an informed basis.

The EIS must include the impact of the proposed action, adverse environmental effects, alternatives to the proposed action, the relationship between short and long-term uses, and any irreversible and irretrievable commitments of resources. The report should provide enough information, both favorable and adverse, to facilitate the Commission’s independent analysis. In addition, the report must provide details on the environmental effects of construction and evaluate alternative sites.

The requirement to consider alternatives to the proposed action has generated a significant amount of litigation, particularly with respect to whether the reports submitted are sufficient. In Natural Resources Defense Council Inc. v. Morton (Morton), the

55. 42 U.S.C.A. § 4332(C) (2006) (describing circumstances in which an EIS is required and information that must be provided).
56. See Robertson, 490 U.S. at 349 (describing EIS’s “action forcing” principles).
57. Id. at 350 (distinguishing results from process in EIS).
58. Id. at 351 (discussing NEPA). The court noted that “NEPA merely prohibits uninform ed – rather than unwise – agency action.” Id.
60. 10 C.F.R. § 51.45(c) (describing amount of information required by EIS).
62. For a further discussion of litigation arising out of the sufficiency of EIS, see infra notes 63-87 and accompanying text.
63. 458 F.2d 827 (D.C. Cir. 1972).
United States Court of Appeals for the District of Columbia Circuit applied a "rule of reason" to determine the alternatives an agency must consider in its EIS. The EIS in Morton provided environmental information regarding the Department of Interior’s leasing of parts of the outer continental shelf off the coast of Louisiana for oil and gas exploration. Several environmental groups challenged the EIS claiming it did not contain a sufficient discussion of alternatives to leasing parts of the continental shelf such as the elimination of oil import quotas. Agreeing with the environmental groups, the District Court granted an injunction prohibiting the leases until the EIS complied with NEPA.

The government argued on appeal that the only alternatives the agency should have to discuss are the alternatives the agency can implement. The Court of Appeals disagreed, however, and held that the discussion of alternatives was not limited to "measures the agency or official can adopt" because the lease of the outer continental shelf was part of a broader presidential plan.

The Court of Appeals in Morton began its analysis with an explanation of the role played by the discussion of alternatives required by the EIS. First, the court explained, the EIS provides information to the President and Congress, and second, the EIS helps to enlighten the public. The discussion of alternatives, therefore, would be limited to "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned," and does not need to be a "crystal ball inquiry." Furthermore, an alternative is not outside the bounds of discussion merely because it requires legislative implementation.

The Supreme Court defined an applicant’s responsibilities with respect to the range of alternatives that must be included in an EIS in Vermont Yankee Nuclear Power v. Natural Resources Defense Coun-

64. Id. at 834 (explaining rule of reason).
65. Id. at 830-31 (describing creation of EIS).
66. Id. at 831 (describing environmental groups’ challenge).
67. Id. (describing district court’s injunction).
68. Morton, 458 F.2d at 834 (describing government’s arguments and which alternatives should be discussed).
69. Id. (describing which alternatives should be discussed).
70. Id. at 835 (discussing role of EIS).
71. Id. (discussing role of EIS to inform the President and Congress as well as enlighten public).
72. Morton, 458 F.2d at 836 (discussing which alternatives require discussion).
73. Id. at 837 (discussing which alternatives require discussion). The court brought attention to the agency’s limited resources to meet the nation’s needs. See id.
74. Id. (discussing which alternatives require discussion).
In *Vermont Yankee*, Consumers Power Company applied for a construction permit to build two nuclear reactors. Two groups intervened and filed numerous contentions, seventeen of which raised energy conservation issues. The Licensing Board rejected these contentions because it was "beyond their province" to determine "whether the customary uses being made of electricity in our society are 'proper' or 'improper.'" The Licensing Board also dismissed the intervening groups' claim that the utility was increasing energy use through advertisement and marketing due to a lack of evidence.

The intervening groups appealed, and the Commission, in dismissing their claims, applied a "threshold test," under which the Agency did not have to recognize energy conservation alternatives unless the alternatives "were reasonably available," would "curtail demand" to the extent that the proposed facility would no longer be needed, and "were susceptible to a reasonable degree of proof."

While the Court of Appeals rejected the threshold test because it violated NEPA, the Supreme Court disagreed and upheld the test. In upholding the test, the Supreme Court noted the term "alternatives" as used in NEPA "is not self-defining," and "the concept of alternatives must be bound by some notion of feasibility." The Supreme Court also reasoned that "alternatives" as used in NEPA does not require "every alternative device and thought conceivable by the mind of man." Consequently, the Supreme Court upheld the test because it found energy conservation to be an "evolving concept," as it only recently became an issue after the 1973 oil crisis. But the Court did not disclose the possibility of evaluating conservation alternatives; instead, the Court held as agencies better understand the concept, they will be required to

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75. 435 U.S. 519, 530 (1978) (discussing responsibilities in EIS).
76. Id. at 530-31 (describing application for permit).
77. Id. at 532 (describing intervention by environmental groups).
78. Id. (discussing disposition of licensing board).
79. Id. (listing reason for licensing board's dismissal).
81. Id. (describing threshold test).
82. Id. at 535 (discussing disposition of Court of Appeals).
83. Id. at 550 (holding threshold test was not improper).
84. Id. at 551 (defining meaning of word "alternatives").
86. Id. at 552 (explaining concept of efficiency alternatives).
"explore more or fewer alternatives as they become better known and understood."^87

Courts also struggle with the relationship between an agency's stated purpose and the range of alternatives an agency must discuss.^88 For instance, in Simmons v. United States Army Corps of Engineers,^89 the United States Court of Appeals for the Seventh Circuit faced the question of the sufficiency of an EIS.^90 In Simmons, the town of Marion, Illinois sought to build a dam that would create a reservoir to supply Marion and another town, Lake of Egypt, with desperately needed water.^91 Because the area in which Marion planned to build the dam was federal property, Marion sought a permit from the U.S. Army Corps of Engineers (Corps).^92 NEPA required the Corps to produce an EIS, which would include alternatives to the dam.^93 Plaintiffs, who challenged the EIS, claimed the Corps failed to sufficiently explore alternatives, and "rigged the environmental impact statement on the question of purpose" by defining the purpose as creating one source of water for both towns instead of the more general goal of simply supplying water.^94 By defining the project in such a narrow way, plaintiffs argued, the Corps ruled out alternatives to a "single source" supply such as tapping into existing pipelines.^95

The Corps responded by asserting, among other things, that the single source solution was obvious and thus an analysis of alternatives was not required.^96 The Seventh Circuit rejected the Corps' reasoning, holding that "[b]y focusing on the single source idea, the Corps never looked at an entire category of reasonable alternatives and thereby ruined its [EIS]."^97 In rejecting the Corps' argument, the court noted that defining the scope of reasonable alternatives is crucially important and "forms the heart of the

87. Id. at 552-53 (discussing evolution of efficiency alternative).
88. For a further discussion of the relationship between an agency or entity's stated purpose and the alternatives required in the EIS, see infra notes 89-101 and accompanying text.
89. 120 F.3d 664 (7th Cir. 1997) (describing court's conflict between purpose and alternatives).
90. Id. at 666 (recognizing court is confronted with situation in which agency's stated purpose restricts range of alternatives that must be discussed).
91. Id. at 667 (describing inception of project).
92. Id. (stating facts of case).
93. Id. (describing Corps' EIS).
94. See Simmons, 120 F.3d at 669 (reiterating plaintiff's contentions).
95. See id. (describing plaintiff's claim).
96. Id. (describing Corps's argument).
97. Id. at 670 (holding the Corps had excluded reasonable alternatives).
Additionally, the court brought attention to the importance of defining the project's purpose in evaluating alternatives. When determining reasonable alternatives, "the first thing an agency must define is the project's purpose. . . . [t]he broader the purpose, the wider the range of alternatives; and vice versa." The court went on to say that "[i]f the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act."

An additional issue that arises in cases involving an EIS is the problem of segmentation. Segmentation most often refers to the process wherein an agency proposes two actions and submits an EIS for each action one at a time. Segmentation can also occur in situations where, as in ELPC, a proposed action is divided into stages over a long period. Segmentation presents a problem because by the time the agency is prepared to evaluate a later stage, it may already be so committed to a proposed action that there is no feasible way to stop it.

In County of Suffolk v. Secretary of the Interior the United States Court of Appeals for the Second Circuit faced the question of whether the Secretary of Interior engaged in segmentation to such an extent that he violated NEPA. The case involved efforts by the Secretary of Interior to accelerate the leasing of the federally owned outer continental shelf for oil and gas exploration. The Bureau of Land Management of Interior (BLM) selected 154 tracts off the coast of New Jersey for proposed leases. The National Resources Defense Council and several other groups challenged

98. Id. at 666 (emphasizing importance of defining scope of alternatives).
99. See Simmons, 120 F.3d at 666 (emphasizing importance of defining project's purpose).
100. Id. (describing effect scope of agency or private party's purpose may have on discussion NEPA requires).
102. For a further discussion of segmentation, see infra notes 103-29 and accompanying text.
104. See id. (describing varieties of segmentation).
106. 562 F.2d 1368 (2d Cir. 1977).
107. Id. at 1372 (stating issue of case).
108. Id. at 1372-373 (stating facts of case).
109. Id. at 1373 (describing process by which the outer continental shelf was leased).
the proposed leases in district court on the basis that the Secretary had engaged in segmentation. The district court found "the EIS should have projected routes that pipelines would be 'likely' to take. . . . even though no oil had as yet been discovered" in the area being considered for the lease.

The Secretary of Interior, along with several oil companies, argued that the route projections required by the District Court would be of no use because the pipelines would not be built for three years and no oil had yet been discovered. The Secretary of the Interior further argued that the project should be broken down into three stages with a separate EIS for each stage. The Second Circuit agreed with the Secretary of Interior, and established two factors for determining whether including potential pipeline routes in an EIS was proper. First, the agency must consider whether obtaining further information would be "meaningfully possible," and second, the importance of having the information at an earlier stage when deciding whether to proceed with the project.

As to the first factor, the court distinguished two situations. The first situation is one "[w]here the major federal action under consideration, once authorized, cannot be modified or changed. . . . (e. g., the construction of a bridge of a specified type between two precise points)." In this situation, "it may be essential to obtain such information as is available, speculative or not." The court contrasted the situation where no modifications are possible with one where "a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards. . . . and the Government reserves the power to make such a modification or change after the information is available."

110. Id. (describing challenge to agency action).
111. See County of Suffolk, 562 F.2d at 1376 (describing holding of district court).
112. See id. (describing argument made by Secretary of Interior).
113. See id. at 1377 (describing argument made by Secretary of Interior).
114. See id. at 1382 (stating holding of case).
115. See id. at 1378 (describing factors involved in determining whether subject of pipeline routes was proper in EIS).
116. See County of Suffolk, 562 F.2d at 1378 (establishing two factors used in determining whether discussion of pipeline route projections was proper).
117. See id. (establishing two factors used in determining whether discussion of pipeline route projections was proper).
118. Id. (explaining two possible situations involving first factor).
119. Id. (explaining first situation wherein decisions affecting federal action occur at once).
120. Id. (explaining first situation).
Applying these situations to the case before it, the Second Circuit held that projecting hypothetical pipeline routes would be a "meaningless exercise" that "would not yield information of practical use to the Secretary,"121 and noted several factors that led to its decision.122 First, no oil companies had discovered resources in a large area, and no ocean bottom survey was available.123 Second, in order to develop pipeline plans, the oil companies first needed to wait for the states to draft plans required by the Coastal Zone Management Act.124 Finally, there was no way for the Secretary of Interior to know whether any companies would make successful bids.125 Additionally, the Second Circuit noted that "there comes a point when the chain of 'ifs' gets too long and too tenuous to be of any practical use."126

Moreover, the Second Circuit also found that the Secretary of Interior could modify the pipelines in the future, and thus projections of pipeline routes were not necessary to make the environmental assessment.127 The court rejected the argument that the Secretary was "boxed in" and had "irrevocably committed himself."128 The court noted the Secretary of Interior had a great deal of power at his disposal to protect the environment.129

IV. NARRATIVE ANALYSIS

In ELPC, the United States Court of Appeals for the Seventh Circuit considered three issues.130 The first issue was whether the NRC's order was appealable.131 The second issue was whether the Licensing Board properly dismissed the environmental groups' contention that Exelon failed to consider energy efficiency alterna-

121. County of Suffolk, 562 F.2d at 1378 (discussing holding of case).
122. See id. (elaborating on factors that led to decision).
123. See id. (discussing impact of lack of oil discovery and ocean bottom survey).
124. See id. at 1379 (discussing factors leading to court's decision).
125. See id. (elaborating on factors that led to decision).
126. County of Suffolk, 562 F.2d at 1379 (demarcating line between alternatives that must be discussed and alternatives that are speculative).
127. See id. at 1380 (stating holding of case).
128. Id. at 1381 (explaining rejection of environmental groups' argument).
129. See id. at 1381-382 (detailing Secretary's powers with respect to pipelines).
130. See Envtl. Law and Policy Ctr. v. United States (ELPC), 470 F.3d 676, 680-81 (7th Cir. 2006) (stating issues in case).
131. See id. at 680-81 (discussing issue of whether NRC decision could be appealed).
Finally, the court addressed the issue of whether summary disposition of the environmental groups’ contention was proper.\(^\text{133}\) The Seventh Circuit first found that the NRC’s decision to dismiss the environmental groups’ claims from its proceedings constituted a final and appealable order.\(^\text{134}\) The court held that the NRC’s order was final and appealable because the order terminated the environmental groups’ involvement in the case, which determined the environmental groups’ rights and caused legal consequences to flow from the decision.\(^\text{135}\)

The court then found that the NRC properly dismissed the environmental groups’ contention that NEPA required Exelon and the NRC to consider energy efficiency as an alternative.\(^\text{136}\) The environmental groups’ challenge of the Board’s decision not to consider energy alternatives consisted of two arguments.\(^\text{137}\) First, the environmental groups argued that the Board excluded consideration of energy alternatives by adopting Exelon’s goal of generating baseload energy.\(^\text{138}\) Second, the environmental groups claimed that “the Board should have considered energy efficiency alternatives in a ‘need for power’ analysis,” which the Board refused to conduct.\(^\text{139}\)

In response, the court first established the requirements of Section 101 of NEPA and the standard of review under the Administrative Procedure Act (APA).\(^\text{140}\) The court then rejected the first aspect of the environmental groups’ challenge and held “the Board’s adoption of baseload energy generation as the purpose behind the ESP was not arbitrary.”\(^\text{141}\) The court also held that the purpose was broad enough to allow the NRC to consider “a host” of alternatives.\(^\text{142}\) In addition, Exelon, as a provider of energy, could

\(^{132}\) See id. at 681 (discussing issue of whether NRC properly dismissed environmental groups’ contention that Exelon’s failed to discuss energy efficiency alternatives).

\(^{133}\) See id. (discussing issue of whether NRC’s summary disposition of environmental groups contention was proper).

\(^{134}\) See id. (stating holding with respect to first issue).

\(^{135}\) See ELPC, 470 F.3d at 681 (stating holding with respect to first issue).

\(^{136}\) See id. at 684 (stating holding with respect to second issue).

\(^{137}\) See id. at 682 (describing environmental groups’ challenge).

\(^{138}\) See id. (describing environmental groups’ argument).

\(^{139}\) Id. (describing environmental groups’ argument regarding board’s decision to decline consideration of efficient energy alternatives).

\(^{140}\) See ELPC, 470 F.3d at 682 (describing nuclear licensing requirements).

\(^{141}\) See id. at 684 (rejecting environmental groups’ argument and noting that purpose of program was sufficiently broad to consider multiple energy alternatives).

\(^{142}\) See id. (rejecting environmental groups’ argument).
not manage a conservation scheme, which the Board referred to as “demand side management.”

The court rejected the second aspect of the environmental groups’ challenge because it agreed with the NRC and construed an inquiry into energy alternatives as a “need for power” analysis. The court concluded that the NRC can defer the need for power analysis until the full licensing proceeding because an ESP does not authorize construction. These regulations, according to the court, are consistent with NEPA because “all relevant issues will eventually be considered.” In addition, the court did not find the information to be essential at this early stage, and because Exelon could build the reactor as distant as forty years in the future, the information might not be easy to obtain, and the need for power was variable. Moreover, the NRC has the discretion to implement such rules under the APA. Finally, the court found the environmental groups’ third argument could not prevail because the Board satisfied NEPA’s procedural requirements.

V. CRITICAL ANALYSIS

The court in ELPC erred in not requiring Exelon to provide a discussion of energy efficiency alternatives in its EIS. The court erred because its holding is contrary to the purpose of the EIS: to effectuate NEPA’s “broad national commitment” by ensuring the agency, the public, and the government make informed decisions regarding choices that may significantly affect the environment.

143. See id. (rejecting environmental groups’ argument because court did not believe Exelon was in position to implement energy efficiency alternatives).

144. See id. (rejecting environmental groups’ argument because energy company’s discouragement of energy use is counterintuitive).

145. See ELPC, 470 F.3d at 684 (citing Administrative Review of Applications; Hearings, 10 C.F.R. § 52.21 (2007)) (explaining NRC’s obligations). It is significant that the NRC is currently considering a proposed rule that would allow limited construction activities before the NRC issues a construction permit. Licenses, Certifications, and Approvals for Nuclear Power Plants; Supplemental Proposed Rule 71 Fed. Reg. 61,330, 61,330 (Oct. 17, 2006) (to be codified at 10 C.F.R. pts. 2, 50, 51, 52).

146. ELPC, 470 F.3d at 684 (explaining consistency with NEPA).

147. See id. (citing County of Suffolk v. Sec’y of the Interior, 562 F.2d 1368, 1378 (2d Cir. 1977)) (finding variability of power needs and uncertainty of future power construction did not substantiate obtaining “need for power” analysis information).


149. See id. (discussing Board satisfaction of NRC requirements).

Rather than acknowledge this broad purpose, however, the court’s reasoning is symptomatic of an excessively narrow view of the EIS’s purpose: that it exists solely to inform the agency or private party in question. Concomitant with this narrow view is the position that if the information will not benefit the agency or the private party in question, or if the agency or private party cannot readily and pragmatically use the information, then the information is not required. This narrow view is contrary to the purpose of the EIS.

In *ELPC*, the court reasoned that Exelon was not required to explore energy efficiency alternatives for three reasons: first, it was beyond the scope of Exelon’s stated purpose; second, Exelon was not in a position to implement energy efficiency alternatives; and third, Exelon could defer “a need for power” analysis until the full licensing proceeding. The problem, however, is that these reasons go to points foreign to the purpose of the EIS. The reasons given relate to scope, feasibility, and procedure, but none adequately explains why the public and the executive and legislative branches should not be informed of such an alternative.

The *ELPC* court’s first reason for not requiring information about energy efficiency alternatives was that Exelon’s stated purpose was “broad enough to permit consideration of a host of energy generating alternatives.” The court cited *Simmons* in arguing that the agency could adopt a private party’s purpose if it is broad enough to allow consideration of all reasonable alternatives. But here, the *ELPC* court’s disregard for the language in *Vermont Yankee* relating to energy efficiency alternatives is crucial.

151. See *ELPC*, 470 F.3d at 684 (stating holding of case).
152. See id. (arguing that Exelon was not in position to implement energy efficiency alternatives because this was demand side management).
153. See *Robertson*, 490 U.S. at 349 (discussing informational role of EIS of publishing findings in order to reassure public environmental concerns were being considered).
154. See *ELPC*, 470 F.3d at 684 (discussing court’s determination that EIS can be deferred in long-term, multiple stage projects because accurate and useful information is difficult to gather at early stage).
155. See id. (rejecting environmental groups’ arguments with three pronged analysis).
156. See id. (explaining basis of decision that Exelon was not required to explore energy efficiency alternatives).
157. Id. (deferring to Exelon’s analysis of whether company considered sufficient alternative energy options).
158. See id. at 683 (stating proposition that agencies can adopt private party’s purpose in certain circumstances) (citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d at 667).
Vermont Yankee dealt specifically with the issue of energy efficiency alternatives. The Supreme Court in Vermont Yankee recognized that a discussion of energy efficiency alternatives would become increasingly necessary as the technology of energy efficiency evolved. The Supreme Court's reason for not requiring a discussion of energy alternatives in the impact statement in that particular case was the novelty of the energy efficiency concept in the late 1970s. The Supreme Court recognized, however, that agencies would need to "explore more or fewer alternatives as they become better known and understood."

The ELPC court, however, did not confront this language in the Vermont Yankee opinion. Vermont Yankee's recognition that energy efficiency would need to be explored as it became better understood brought efficiency into the purview of Exelon's EIS, regardless of Exelon's stated purpose. Not only is the purpose constrained to the extent that Exelon is not discussing reasonable alternatives, but it is constrained by the same private party whose interests are at stake. By merely defining its purpose in such a way that a discussion of energy efficiency alternatives is not required, the Court of Appeals allowed Exelon to bypass entirely a reasonable alternative to the construction of another nuclear reactor.

The ELPC court's second reason for not requiring Exelon to discuss energy efficiency alternatives in its EIS was that because Exelon was not in a position to implement energy efficiency measures, it did not need to discuss them in its EIS. While it is true Exelon had "neither the authority nor the incentive to implement energy efficiency measures," Morton made clear that the discussion of additional measures was not limited to those the agency could itself im-

160. See id. (indicating importance of developing alternative methods of energy conservation).
161. See id. (noting increase in awareness of energy conservation alternatives after 1973 oil shortages in United States)
162. Id. at 552-53 (emphasizing evolving nature of energy efficiency alternatives).
163. See id. (indicating that exploration of alternatives would have to grow alongside understanding of alternatives).
164. See MANDELKER, supra note 105, at 9-80 (noting ELPC does not hold that private party's purposes are determinative of scope when conducting alternatives analysis).
165. See Envtl. Law and Policy Ctr. v. United States (ELPC), 470 F.3d 676, 684 (7th Cir. 2006) (rejecting environmental groups' arguments).
The purpose of the EIS is not just to provide information to Exelon or the NRC; rather, it is to inform the agency, the public, and the government. By informing the government and the public, additional measures that are outside of Exelon’s control could be taken. For instance, while it may be true that Exelon cannot implement such efficiency measures, public outcry or legislative action could.

Moreover, by not requiring Exelon to discuss energy efficiency alternatives because Exelon was not in a position to implement such alternatives, the ELPC court contradicted the Supreme Court’s discussion in *Robertson v. Methow Valley Citizens Council (Robertson)* concerning the role the EIS plays in putting NEPA’s policies into effect. *Robertson* established the principle that an agency must have enough detailed information about environmental impacts, and that this information should be available to the public. But the court’s decision in *ELPC* thwarted the EIS’s goal to effectuate NEPA’s policy by failing to inform the agency and the public.

First, without information relating to energy efficiency alternatives, the NRC does not have “carefully considered detailed information concerning significant environmental impacts.” If the NRC is not fully informed, then it is not in a good position to make

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166. See Natural Res. Def. Council Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972) (disagreeing with Government’s position that only alternatives required for discussion under NEPA are those which can be adopted and implemented by agency issuing statement). There is no reason to conclude from the reasoning in *Morton*, that the EIS also provides guidance to government decision makers, does not also apply to private parties as well. See id. at 835.

167. See id. at 835 (noting broad purpose of impact statement is to provide guidance to ultimate decision makers in addition to exposing thought process of agency). In *Morton*, the agency action in question was directed in part by those ultimate decision makers. See id. Nonetheless, the language in *Morton* is broad enough to encompass agency action that originates in a private party. See id. at 837 (stating simply because agency cannot implement alternative without legislative action does not exclude alternative from discussion).

168. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (defining informational role of EIS as ensuring agency considers significant environmental impacts and public is aware of agency’s consideration).

169. See id. (explaining publication of EIS provides springboard for public comment and discussing possibility of legislative action).


171. See id. (discussing EIS’s role of disseminating information to agency and larger audience).

172. Id. (describing informational role EIS plays in decision-making process).

173. Id. (explaining EIS serves NEPA’s action-forcing purpose by forcing agency to consider environmental impacts and by providing larger audience with information to also play role in decision-making process).

174. See *Robertson*, 490 U.S. at 349 (discussing agency’s need for information to sufficiently consider environmental impacts).
decisions that will significantly affect the environment. Second, by not requiring information concerning energy efficiency alternatives, the parameters of other possibilities are not "made available to the larger audience." Because energy efficiency alternatives were not included in Exelon's EIS, a potential "springboard for public comment" is thus not available.

The ELPC court's third reason for not requiring Exelon to discuss energy efficiency alternatives in its EIS is that, according to the court, the agency could defer the "need for power" analysis until the full licensing proceeding. While segmentation is not per se improper, it does pose a threat to the rationale underlying the EIS. An important possibility could be overlooked "until the die is cast," potentially resulting in the agency being committed to a certain action before all of the relevant information is available.

Even if the ELPC court's decision is correct, however, the need for segmentation was not as strong as it was in County of Suffolk. In County of Suffolk, the court reasoned that the projection of pipeline routes would be entirely arbitrary. Here, however, analyzing a need for power is different because analyzing future power needs is not a completely arbitrary exercise. For instance, the Energy Information Administration released a report in 2007 projecting energy needs up to the year 2030. The fact that such projections are frequently made distinguishes the situation in ELPC from the projection of pipeline routes in County of Suffolk. While the ELPC
court’s decision with respect to segmentation may be correct, the case for segmentation is weaker here than in County of Suffolk, the case on which the ELPC court relied. In addition, even if the ELPC court was correct on the point of segmentation taken in isolation, the ELPC court’s holding, taken as a whole, amounts to a sharp blow to the informational role played by the EIS.

VI. Impact

The ELPC decision will have both short and long-term impacts. In the short term, the ELPC decision is not likely to have a serious impact on the Clinton, Illinois site and energy efficiency. The most deleterious short-term effect of the decision is that the NRC, the public, and the legislative and executive branches have missed an opportunity to be informed of an increasingly relevant alternative to nuclear energy. But this result is mitigated by the fact that even if Exelon had included energy efficiency alternatives in its EIS, Exelon would not have been obligated to choose efficiency over new reactors. The only detriment energy efficiency will suffer is that it has lost the forum of nuclear licensing proceedings, though the value of that forum is unclear.

The long-term impact of the decision, however, may be a setback to the deliberative process by which we reach decisions about the expansion of nuclear power in the United States. From the perspective of republicanism, this setback to the deliberative process may have a negative effect on the legitimacy of this country’s move toward nuclear power. Requiring a discussion of energy efficiency would show the public that all parties had legitimate access to the political process and that the outcome was a product of consensus and not the efforts of powerful interest groups. These interests are particularly crucial with respect to the expansion of nuclear power in the United States because it is not just the interest

185. See Envtl. Law and Policy Ctr. v. United States (ELPC), 470 F.3d 676, 684 (7th Cir. 2006) (citing County of Suffolk, 562 F.2d 1368 (2d Cir. 1977)) (stating that agencies may be permitted to defer some issues in EIS when information is not “meaningfully possible” to obtain).

186. See Robert Manor, Exelon Gets Reactor Site OK No Commitment on Adding Clinton Unit Despite Federal Ruling, Chi. Trib., Mar. 9, 2007, at 1 (discussing Exelon’s plans with respect to Clinton nuclear power site).


188. See id. at 350 (distinguishing results from process in EIS).

189. See Sunstein, supra note 7, at 1541 (describing republicanism).

190. See id. (describing republicanism).

191. See id. (discussing central principles of republicanism).
of the government, but also private corporations as well that are at stake.\footnote{92}

Effective deliberation was by no means entirely precluded, however, solely because Exelon was not required to discuss energy efficiency.\footnote{93} But if the NRC required Exelon to provide an analysis of energy efficiency alternatives it would have enhanced deliberation, which in turn would promote increased participation and even legitimacy.\footnote{94} The current expansion of nuclear power in the United States may come to be regarded as a success, but if later we consider it a mistake, future generations will hopefully be able to take solace in the fact that the decisions made now, though wrong, were made legitimately through a robust process of deliberation.

\textit{Vincent Manapat}

\footnote{92. \textit{See id.} (discussing role of private preferences as relevant inputs in politics). That Exelon is a private interest alone does not necessarily make its interests invalid or suspect. \textit{Id.} Deliberation merely ensures political outcomes are the product of consensus and not the will of politically powerful private groups. \textit{Id.}}

\footnote{93. \textit{See Envtl. Law and Policy Ctr. v. United States (ELPC), 470 F.3d 676, 678-79 (7th Cir. 2006)} (describing elaborate process required to obtain license for nuclear reactor).}

\footnote{94. \textit{See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)} (discussing informational role of EIS). Because the EIS provides information to different groups, it ensures greater participation and thereby enhances deliberation. \textit{Id.}}