Volume 28 | Issue 2 Article 2

8-1-2017

Order Restored? Federal Agencies "Accountable" for NEPA, ESA Violations but Project to Proceed: Examining Pub. Emps. For Envtl. Responsibility v. Hopper

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2017]

ORDER RESTORED? FEDERAL AGENCIES "ACCOUNTABLE" FOR NEPA, ESA VIOLATIONS BUT PROJECT TO PROCEED: EXAMINING *PUB. EMPS. FOR ENVTL. RESPONSIBILITY V. HOPPER*

I. Introduction

The time for bipartisan and strong government support for environmental crusades is diminishing.[1] The National Environmental Policy Act (NEPA) is at the forefront of environmental causes that receive reduced support, and it continues to face a constant stream of restrictions and limitations.[2] NEPA began with the lofty goal of eliminating harm to the environment.[3] It did not take long, however, for the limitations on NEPA's far-reaching effects to begin.[4] In *Kleppe v. Sierra Club*,[5] the United States Supreme Court (Supreme Court) found that a complete NEPA review was only necessary after "an actual proposal for . . . development[ ]" had occurred.[6] Following this decision, the Department of Housing and Urban Development brought the substantive power of NEPA into question.[7] Subsequently, the Supreme Court determined that NEPA's role was to make an agency consider the possible environmental impact of a given proposal.[8] The Supreme Court, however, quickly clarified whether NEPA had substantive or procedural power in *Robertson v.*

1. *See* Nate Hausman, *Monsanto Co. v. Geertson Seed Farms: Breathing a Sigh of Equitable Relief*, 25 Tul. Envtl. L.J. 155, 156 (2011) (explaining how courts reversed support for NEPA). Beyond the role that the courts have played in shaping NEPA, many members of Congress have also lessened their support towards environmental causes since the peak of support by the Nixon administration. *See* Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. Envtl. L.J. 50, 52 (2003) (detailing Congress' diminished NEPA support).

2. *See* Hausman, *supra* note 1, at 156 (describing challenges NEPA has faced).

3. *See id.* (citing National Environmental Policy Act of 1969, 42 U.S.C.A. § § 4321-70 (West (2012)) (explaining NEPA's self-proclaimed goals and purpose).

4. *See id.* (citing Kleppe v. Sierra Club, 427 U.S. 390, 414-15 (1976)) (describing case in which United States Supreme Court limited NEPA).

5. 427 U.S. 390 (1976).

6. *See* Hausman, *supra* note 1, at 156 (footnote omitted) (discussing when NEPA analyses must occur).

7. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 223 (1980) (explaining what court must determine for NEPA).

8. *See* Hausman, *supra* note 1, at 156 (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)) (highlighting how Court declared NEPA procedural).

Methow Valley Citizens Council,[9] and determined that NEPA did not have substantive power, thus reducing it to a solely procedural statute.[10]

While only procedural, NEPA still had the power to halt a project with the same effectiveness as many substantive environmental acts, such as the Endangered Species Act (ESA).[11] Plaintiffs could obtain some form of injunctive relief after an alleged violation, which is a way both NEPA and ESA halted projects.[12] Statutes, such as NEPA and the ESA, often resulted in the possible remedies made available by statutes, even after initial restrictions, and thus, both were effective.[13] Further, no shortage of environmental groups existed in the eco-defense landscape.[14] These environmental groups often sued federal agencies when the government agencies used methods that arguably violated NEPA.[15] In recent years, however, many circuit courts, including the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), provided other courts greater latitude in determining the appropriate remedy for a NEPA violation.[16] In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission* (*United States Nuclear Regulatory Commission*),[17] the United States District Court for the District of Columbia (D.C. District) created the "countervailing considerations" test to balance environmental interests against so-called "public interest."[18] The most recent case on this issue, *Public Employees for Environmental Responsibility v. Hopper* (*Hopper*),[19] exemplifies the trend of many courts to limit the remedies available when NEPA is violated in the name of public interests.[20] This trend serves as an-

9. 490 U.S. 332 (1989).

10. *See id.* at 350 (detailing case that found NEPA was procedural).

11. *See* Hausman, *supra* note 1, at 158 (showing Ninth Circuit upheld permanent injunction).

12. *See* Sarah J. Morath, *A Mild Winter: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155, 156 (2013) (explaining remedies environmental group plaintiffs seek).

13. *See* Hausman, *supra* note 1, at 158 (showing effectiveness of NEPA).

14. Morath, *supra* note 12, at 156 (describing environmental group landscape).

15. *See id.* (explaining how plaintiffs promote NEPA compliance).

16. *See* Nat. Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n., 606 F.2d 1261, 1273 (D.D.C. 1979) (detailing court change in NEPA views).

17. *Id.* at 1272 (introducing countervailing considerations test).

18. *See id.* (internal quotation marks omitted) (quoting Alaska v. Andrus, 580 F.2d 465, 485 (1978)) (explaining court's use of countervailing considerations test).

19. 827 F.3d 1077 (D.C. Cir. 2016).

20. *See id.* (explaining court's decision).

other reminder that NEPA may no longer be the same in terms of effectiveness.[21]

This Casenote (Note) examines the D.C. Circuit's opinion in *Hopper*.[22] The *Hopper* court held that a variety of federal agencies violated the ESA and NEPA by granting leases for the Cape Wind Project (Cape Wind); Cape Wind was projected to build wind turbines in the ocean off of the coast.[23] The court ultimately found that Cape Wind could proceed after minor adjustments.[24] Part I discusses the trend of declining NEPA effectiveness, which can, in part, explain the ineffectiveness of NEPA in the *Hopper* case.[25] Part II provides an overview of the relevant facts of *Hopper* and its predecessor, *Pub. Emps. for Envtl. Responsibility v. Beaudreau* (*Beaudreau*).[26] Part III explains the origins and requirements of the relevant acts and their historical applicability to federal agencies.[27] Part IV reviews the D.C. Circuit's legal analysis in *Hopper* and explains the differences in reasoning from the D.C. District's decision in *Beaudreau*.[28] Part V takes a critical look at the court's reasoning and conclusions.[29] This discussion focuses on the D.C. Circuit's determination that, despite a violation of NEPA, the relevant agency need not halt construction under the "countervailing considerations" test.[30] Rather, the agency need only submit a geological survey before project construction continues.[31] Lastly, Part VI explores the impact that limiting the remedies under NEPA will

21. *See id.* (foreshadowing subsequent impacts NEPA limitations create).

22. *See id.* (detailing court's opinion in *Hopper* case).

23. *See* Pub. Emps. for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 85 (D.D.C. 2014) (explaining factual background of case).

24. *See id.* (explaining remedy court gives).

25. *See* Hausman, *supra* note 1, at 155-58 (explaining NEPA's dwindling effectiveness). For background information on the ineffectiveness of NEPA, see *supra* notes 1-2 and accompanying text.

26. *See Hopper*, 827 F.3d at 1080-82 (explaining relevant facts of *Hopper*); *see also Beaudreau*, 25 F. Supp. 3d at 85-86. For a summary of relevant facts to the case, see *infra* notes 34-74 and accompanying text.

27. *See Beaudreau*, 25 F. Supp. 3d at 81-85 (explaining environmental acts' background). For additional background on many of the important environmental acts discussed in this Note, see *infra* notes 75-132 and accompanying text.

28. *See Hopper*, 827 F.3d at 1084-91 (detailing *Hopper*'s narrative analysis). For a more detailed narrative analysis of *Hopper*, see *infra* notes 133-190 and accompanying text.

29. *See id.* (explaining court's reasoning and conclusion). For a critical analysis of *Hopper*, see *infra* notes 191-237 and accompanying text.

30. *See id.* (showing court's use of "countervailing considerations" test).

31. *See id.* (setting forth court's determination). For a critical analysis of *Hopper*, see *infra* notes 191-237 and accompanying text.

have in the future.[32] This section considers NEPA's apparent ineffectiveness in the face of other environmental statutes, such as the ESA.[33]

II. FACTS

The D.C. Circuit's decision in *Hopper* epitomizes the diminishing role of NEPA at the hands of the courts.[34] This story begins in 1999, when the Massachusetts state legislature established Section 11F under Chapter 25A of the general laws of the state, and listed the renewable energy requirements applicable to every retail supplier of electricity in the state.[35] Under Section 11F, the first requirement detailed specific guidelines for the amount of energy to be generated by renewable energy by December 31, 2003.[36] These requirements resulted in the creation of the Cape Wind in 2000, for the purpose of providing offshore wind energy.[37] Specifically, the project planned to place wind turbines or mills on "monopile foundations[,]" whereby the foundations would then be fused with the ocean seabed in the waters off the coast of Cape Cod.[38]

Cape Wind was "one of the largest offshore wind projects in the world."[39] Its goal was to install, operate, and maintain "130 offshore wind turbine generators" in the Nantucket Sound off the coast of Massachusetts.[40] The purpose of Cape Wind was simple: to provide wind energy to the majority of the Cape Cod area.[41] The administrators for Cape Wind began the required regulatory pro-

32. *See* Hausman, *supra* note 1, at 157-61 (foreshadowing NEPA's continuing ineffectiveness). For a discussion of the future impacts of *Hopper*, see *infra* notes 238-256 and accompanying text.

33. *See id.* (giving reasons why NEPA is no longer effective). For a discussion of the future impacts of *Hopper*, see *infra* notes 238-256 and accompanying text.

34. *See id.* at 157-58 (describing NEPA's changing role).

35. *See* MASS. GEN. LAWS ANN. ch. 25A § 11F(a) (West (2012)) (explaining renewable energy requirements that Massachusetts legislature mandate).

36. *See id.* at § 11F(a)(1) (explaining responsibility of retail electricity suppliers).

37. *See* Pub. Emp. For Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 85 (D.D.C. 2014) (explaining Cape Wind factual background).

38. *See Cape Wind Project Overview*, CAPE WIND, https://www.capewind.org/what/overview (last visited Dec. 30, 2016) (describing Cape Wind setup, purpose, and goals).

39. *See Beaudreau*, 25 F. Supp. 3d at 85 (internal quotation marks omitted) (quoting Bureau of Ocean Energy Management Doc. CW201584) (explaining Cape Wind factual background).

40. *See id.* (internal quotation marks omitted) (quoting Outer Continental Shelf, Headquarters, Cape Wind Offshore Wind Development 2007, 71 Fed. Reg. 30693-01 (May 30, 2006)) (foreshadowing Cape Wind impact).

41. *See id.* (describing Cape Wind purpose).

cess by filing a permit application with the Army Corps of Engineers in late 2001.[42] In late 2005, however, the Bureau of Ocean Energy Management (BOEM) became the agency responsible for (1) granting leases for "projects on the Outer Continental Shelf[,]" involving renewable energy, and (2) controlling the remainder of the approval process.[43]

BOEM took action to evaluate Cape Wind, and consulted with several different agencies to fulfill its obligations under the ESA, NEPA, the Coast Guard and Maritime Transportation Act, and many other controlling environmental laws.[44] BOEM conferred with Fish and Wildlife Services (FWS) and began a formal consultation in compliance with the ESA.[45] FWS had a duty to consider Cape Wind and any adverse effects that the project potentially posed to adjacent fish or wildlife.[46] Specifically, one relevant concern that arose with wind turbines was that birds could be killed in the rotators that turned to create wind energy.[47] FWS subsequently issued a biological opinion and an incidental take statement listing migratory birds as wildlife under the ESA.[48] An incidental take statement uses further analysis than a biological opinion and specifies the impact of a proposed project.[49] An incidental take statement also lists the reasonable measures agencies should take towards minimizing any negative occurrences, and sets forth future terms, conditions, and procedures that agencies must follow.[50] The incidental take statement was applicable to "the roseate tern and

42. *See id.* (showing Army Corps of Engineers' former role).

43. *See id.* at 89 (internal quotation marks omitted) (quoting Outer Continental Shelf, Headquarters, Cape Wind Offshore Wind Development 2007, 71 Fed. Reg. 30693-01 (May 30, 2006)) (noting BOEM replaced Army Corps of Engineers). This change occurred as result of the Energy Policy Act of 2005. *Id.* For a further discussion of the Energy Policy Act of 2005, see Outer Continental Shelf, Headquarters, Cape Wind Offshore Wind Development 2007, 71 Fed. Reg. 30693-01 (May 30, 2006).

44. *See Beaudreau*, 25 F. Supp. 3d at 86 (detailing steps BOEM took to comply with laws). Aside from the ESA, NEPA, and the Coast Guard and Maritime Transportation Act, the D.C. District considered many other environmental laws the Plaintiffs claimed had been violated. *Id.* These laws included the Outer Continental Shelf Lands Act, the Migratory Bird Treaty Act, and the National Historic Preservation Act. *Id.* The court found that BOEM did not violate any of these additional environmental laws. *Id.*

45. *See id.* (showing how BOEM fulfilled ESA duty).

46. *See id.* (explaining FWS's ESA obligations).

47. *See id.* (describing wind turbine common problems).

48. *See id.* (explaining steps FWS took to comply with ESA).

49. *See* 50 C.F.R. § 402.14(i) (West (2016)) (defining incidental take statement).

50. *See id.* (explaining when to issue incidental take statement).

piping plover[.]"[51] FWS concluded that if BOEM granted Cape Wind regulatory approval, then these birds likely would not be in danger of extinction.[52] FWS noted, however, that "the [wind] turbines would nonetheless kill [between] [eighty and one hundred] [ ] roseate terns and ten [ ] piping plovers[;]" it included, therefore, the incidental take statement with the biological opinion.[53]

During the period when the Army Corps of Engineers was responsible for regulating Cape Wind, it went through the process of drafting an Environmental Impact Statement (EIS) to meet NEPA guidelines.[54] The Army Corps of Engineers also held a notice-and-comment period, in which the public was free to read the EIS and voice complaints.[55] When BOEM took over Cape Wind agency regulation, the agency redrafted an EIS for Cape Wind and held another public comment period.[56] BOEM considered comments from both the original EIS that the Army Corps of Engineers drafted and the comments from the modified EIS.[57] Subsequent to the comment period, BOEM declared the EIS final and made it publically available at the beginning of 2009.[58] BOEM also consulted with the Coast Guard to satisfy obligations under the Coast Guard and Maritime Transportation Act.[59] The Coast Guard issued

51. *See Beaudreau*, 25 F. Supp. 3d at 86 (internal quotation marks omitted) (quoting United States Fish and Wildlife Service Doc. FWS3) (explaining process FWS took to issue incidental take statement).

52. *See* Pub. Emps. for Envtl. Responsibility v. Hopper, 827 F.3d 1077, 1088 (D.C. Cir. 2016) (explaining FWS final conclusion).

53. *See id.* (footnote omitted) (stating FWS actions). The incidental take advised BOEM to adopt "feathering" mitigation method "to [ ] turn off [ ] windmills during poor visibility periods to 'reduce the risk of collision' by birds flying through the wind farm[.]" *Id.* (footnote omitted) (quoting United States Fish and Wildlife Service's incidental take statement). BOEM challenged this mitigation advice as too detrimental, and in its final recommendation, FWS did not suggest the feathering mitigation. *Id.* at 1089.

54. *See id.* at 1082 (explaining process Army Corps of Engineers took to draft EIS).

55. *See id.* (explaining more about public comment period).

56. *See id.* (explaining process BOEM took to redraft EIS).

57. *See Beaudreau*, 25 F. Supp. 3d at 90 (showing BOEM actions in regard to NEPA).

58. *See id.* (detailing BOEM steps under NEPA laws).

59. *See Hopper*, 827 F.3d at 1085 (showing how BOEM contacted Coast Guard). The Coast Guard and Maritime Transportation Act grants the Commander of the Coast Guard certain powers and obligations. *See* 14 U.S.C.A. § 1 (Westlaw though Pub. L. No. 109-241, Title 1, § 101(3) (July 11, 2006) (explaining actual Act). The Commander's authority includes the power to issue a "lease, easement, or right-of-way" for certain renewable energy sources off the Outer Continental Shelf. *Id.* at § 414(a). Further, Section 414 of the Coast Guard and Maritime Transportation Act of 2006 requires that the Commander identify "reasonable . . . conditions . . . necessary to provide for navigational safety[,]" when issuing a "lease, easement, or right-of-way[.]" *Id.*

certain terms for the Cape Wind lease in a recommendation that it gave to BOEM, which BOEM subsequently incorporated into its recommendations to Cape Wind.[60] Finally, BOEM completed a "Record of Decision[,]" which declared the allowance of a commercial lease to Cape Wind to construct and operate the proposal, but noted that a required "Construction and Operations Plan[ ]" had to be submitted first.[61] At the end of 2010, Cape Wind submitted the "Constructions and Operations Plan[ ]" to BOEM, who approved the plan in April of 2011 after it determined the final EIS adequately met all NEPA requirements.[62]

Several environmental agencies and individuals were concerned about the Nantucket Sound and brought suits against a collection of government agencies, including BOEM, the Coast Guard, and FWS.[63] The D.C. District consolidated these suits into one litigation matter.[64] The court heard arguments for alleged violations of six statutes: NEPA, the Shelf Lands Act, the National Historic Prevention Act, the Migratory Bird Treaty Act, ESA, and the Coast Guard and Maritime Transportation Act.[65] The D.C. District granted summary judgment in favor of the Defendant for all of the alleged violations, except the ESA.[66] The D.C. District found that FWS had a duty to make an independent consideration, regarding mitigating measures for Cape Wind, and ordered FWS to do so.[67] It remained in dispute whether FWS's independent considerations had to include Plaintiffs' data, and thus, Plaintiffs asked the D.C. District to interpret its own remand for this question.[68] The D.C. District (1) found no ESA violation, (2) determined that FWS did not have to consider Plaintiffs data in its independent consideration, and (3) granted summary judgment in favor of the Defen-

60. *See Hopper*, 827 F.3d at 1086 (highlighting how Coast Guard gave terms to BOEM).

61. *See Beaudreau*, 25 F. Supp. 3d at 90-91 (detailing obligation BOEM imposed).

62. *See id.* (explaining BOEM's final approval of Cape Wind).

63. *See id.* at 93 (outlining litigation environmental groups brought).

64. *See id.* (providing arguments court heard).

65. *See id.* (explaining Plaintiffs' claim). The D.C. District also heard challenges under the Clean Water Act and the Rivers and Harbors Act. *Id.* For more information on Cape Wind, see *Cape Wind Wins Major Legal Victories*, CAPE WIND (Mar. 14, 2014, 3:35 PM), http://www.capewind.org/node/1709 (showing history of litigation).

66. *See Beaudreau*, 25 F. Supp. 3d at 130 (explaining conclusion court reached).

67. *See id.* at 110 (explaining FWS duties FWS under ESA).

68. *See Hopper*, 827 F.3d at 1090 (detailing how court interpreted own remand concerning ESA question).

dant.[69] On appeal, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reviewed and affirmed the D.C. District's decision, granting summary judgment in favor of the Coast Guard in regard to the Coast Guard and Maritime Transportation Act violations.[70] The D.C. Circuit reviewed and reversed the D.C. District's decision that granted summary judgment in favor of BOEM for NEPA violations.[71] Finally, the D.C. Circuit reviewed and reversed the D.C. District's decision that granted summary judgment in favor of FWS for the ESA violations.[72] Although the D.C. Circuit found that BOEM violated NEPA because it failed to complete an adequate EIS, the D.C. Circuit neither issued an injunction, nor required BOEM to issue a new impact statement.[73] Instead, the D.C. Circuit simply required that the EIS had to rely on a geological survey before construction for Cape Wind could begin.[74]

III. BACKGROUND

A. The Beginning of NEPA

In 1969, Congress officially recognized that certain changes to the environment were the result of human activity.[75] To combat these changes, Congress enacted NEPA for the purpose of holding local, state, and federal governments, including agencies, responsible for issuing environmentally-friendly policies.[76] Specifically, these policies "relat[ed] to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development."[77]

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69. *See id.* (explaining district court's conclusion).

70. *See id.* at 1087 (noting D.C. Circuit's affirmation of lower court decision).

71. *See id.* at 1083 (detailing court's reversal).

72. *See id.* at 1090 (explaining court's decision concerning ESA violation).

73. *See Hopper*, 827 F.3d at 1084-90 (noting how court reversed lower court decision).

74. *See id.* at 1084 (highlighting court's limited remedy).

75. *See* 42 U.S.C.A. § 4321 (Westlaw through Pub. L. No. 91-190, § 2 (Jan. 1, 1970)) (outlining NEPA's origins). Following this official recognition, the federal government enacted several environmental acts to prevent damage to the environment throughout the rest of the twentieth century. *See Laws and Executive Orders*, EPA, https://www.epa.gov/laws-regulations/laws-and-executive-orders (last updated Sept. 8, 2016) (showing other acts). These acts include the Clean Air Act of 1970, the Clean Water Act of 1972, and the Environmental Response, Compensation, and Liability Act of 1980. *Id.*

76. *See* 42 U.S.C.A. § 4332 (Westlaw through Pub. L. No. 91-190, Title I, § 102 (Jan. 1, 1970)) (explaining government agencies to which NEPA applies).

77. *See id.* at § 4371(b)(1) (stating NEPA policy purpose).

NEPA is applicable to federal agencies and requires the preparation of an EIS for major projects "significantly affecting the quality of the human environment[.]"[78] Agencies, however, are not always required to complete an EIS, even in the case of major projects.[79] If an agency can show that there will be minimal environmental effects resulting from a project, then NEPA laws may allow the agency to complete a more brief Environmental Assessment (EA) in order to obtain permission for the project.[80]

According to the D.C. Circuit in *Sierra Club v. United States Army Corps of Engineers* (*Sierra Club*),[81] an agency must also examine the environmental consequences of any project prior to giving approval.[82] The purpose of assessments, such as an EIS and an EA, is to give each environment-changing proposition due deliberation.[83] These assessments also give the public advanced notice of any potential changes the administrator of a given project requests.[84] While NEPA does not prescribe a given outcome, there is a standard in place that requires agencies to take a "hard look" at proposals.[85] The "hard look" test demands that an agency considers any harmful environmental consequences of the project in order to avoid uninformed agency action.[86] Under NEPA, ultimately, an agency must take steps to ensure the appropriate "process[ ]" oc-

78. *See id.* at § 4332(C) (detailing NEPA requirements for agencies). An environmental impact statement is prepared under NEPA if proposal to an agency is considered major and "significantly affecting the quality of the human environment[.]" *Id.*; *see also National Environmental Policy Act Review Process*, EPA, https://www.epa.gov/nepa/national-environmental-policy-act-review-process#EIS (last updated Jan. 24, 2017) (explaining environmental impact statement process).

79. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 16 (2008) (explaining difference between EISs and EAs). An Environmental Assessment (EA) is used to decide "whether or not a federal action has the potential to cause significant effects." *See National Environmental Policy Act Review Process*, EPA, https://www.epa.gov/nepa/national-environmental-policy-act-review-process#EIS (last updated Jan. 24, 2017) (explaining more about environmental assessments). In addition, an EA briefly includes (1) why the proposal is being requested, (2) alternative options to be considered, (3) any consequences to the environment for either the alternative option or the proposal, and (4) related agencies or people that need to be involved. *Id.*

80. *See Winter*, 555 U.S. at 16 (explaining when federal agency can use EA).

81. 803 F.3d 31 (D.C. Cir. 2015).

82. *See id.* at 36 (citing Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756-57 (2004)) (detailing requirements in cases of private actions).

83. *See id.* (explaining purpose of NEPA's mandate).

84. *See id.* (discussing public comment period).

85. *See id.* at 37 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989)) (explaining "hard look" requirement).

86. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (detailing what "hard look" requirement entails).

curs to make any environmental risks known to the agency and the public.[87]

B. Typical Treatment of NEPA Violations

Since the inception of NEPA, despite its noble purpose, the Supreme Court constantly limited NEPA's ultimate impact on the environment.[88] Courts have widely accepted that a violation of NEPA "is subject to [treatment under] equity principles."[89] Courts could, therefore, grant the grieved party some form of injunctive relief, such as stopping an already-existing project.[90] When BOEM violated NEPA, however, courts did not automatically grant an injunction that completely stopped a project.[91] Courts also did not automatically require that the agency complete a new regulatory approval process.[92] Instead, courts "balance[ed] [ ] hardships[ ]" and acknowledged "countervailing interests[.]"[93] In fact, in many cases, a NEPA violation did not result in a project stoppage if the economic burden of suddenly halting an already-existing project outweighed the economic benefits of stopping the project.[94]

A reviewing court ultimately used its discretion to decide whether to grant an injunction or to impose a more limited punishment, such as requiring minor modifications to an EIS or EA.[95] To decide, the reviewing court looked to "a 'particularized analysis' of the violations that have occurred[ ] [and] [ ] the possibilities for relief, and of any countervailing considerations of public interest."[96] The D.C. Circuit described this process as an "analysis of

87. *See* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (citation omitted) (explaining overall NEPA process).

88. *See* Hausman, *supra* note 1, at 157-58 (describing NEPA's changing role). For a discussion of relevant background on the purpose of NEPA, see *supra* note 78 and accompanying text.

89. *See* Pit River Tribe v. United States Forest Serv., 615 F.3d 1069, 1080-81 (9th Cir. 2010) (explaining equity principle's NEPA applicability).

90. *See id.* (describing how injunctions are used).

91. *See id.* at 1081 (explaining injunction process).

92. *See id.* (explaining different NEPA relief options).

93. *See id.* (explaining applicable test for reliefs).

94. *See* Nat. Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n, 606 F.2d 1261, 1272 (D.C. Cir. 1979) (detailing court's decision).

95. *See id.* (explaining court's discretion in NEPA relief). The *United States Nuclear Regulatory Commission* court gave an example of a modification needed before any injunction against construction of tanks is granted. *Id.* at 1273. The court required the "completion of an EIS devoted to the safety and design alternatives raised by NRDC." *Id.*

96. *See id.* at 1272 (quoting Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 513 (D.C. Cir. 1974)) (citing Alaska v. Andrus, 580 F.2d 465, 485 (D.C. Cir. 1978)) (showing court balancing factors).

injury to either or both parties, the public interest, and the balancing of interests[.]"[97] A court, however, ultimately had the option to simply notify an agency of its obligations under NEPA, as courts have determined that this, alone, is sufficient to ensure obedience.[98]

C. Origins of the ESA

Like NEPA, Congress adopted the ESA during a period when environmental causes began to have a more prevalent role in the laws of the United States.[99] The ESA was enacted in 1973 for the purpose of "provid[ing] a program for the conservation of such endangered species and threatened species[.]"[100] The ESA is applicable to government agencies, and it provides the duties of an agency.[101] The ESA is also used to determine if a proposed agency action "may affect listed species or critical habitat."[102] If an agency determines that its actions may produce such an effect, then that agency must schedule a formal consultation with FWS.[103]

FWS has the duty of giving the agency a written report, known as a biological opinion, that "explain[s] how the proposed action will affect [wildlife.]"[104] If FWS subsequently finds the wildlife or

97. *See* Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 509 (D.C. Cir. 1974) (quoting Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 832 (D.C. Cir. 1972)) (explaining about NEPA relief factors).

98. *See id.* at 512 (reinforcing court's discretion in punishment).

99. *See* George L. Blum, Annotation, *Construction and Application of Citizen Suit Requirements and Notice Provisions of Sec. 11 of the Endangered Species Act of 1973*, 16 U.S.C.A. §§ 1540(g)(1), 1540(g)(2), 94 A.L.R. Fed. 2d 169 (2015) (describing ESA origins and purpose).

100. *See* 16 U.S.C.A. § 1531(b) (West (2012)) (explaining ESA induction and purpose).

101. *See* 50 C.F.R. § 402.14(a) (West (2016)) (giving basic ESA background).

102. *See id.* (detailing agency duties under ESA).

103. *See id.* (explaining FWS role under ESA).

104. *See* Bennett v. Spear, 520 U.S. 154, 158 (1997) (explaining FWS's responsibility under ESA). A biological opinion includes the following:

> (1) A summary of the information on which the opinion is based; (2) A detailed discussion of the effects of the action on listed species or critical habitat; and (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a 'jeopardy biological opinion'); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a 'no jeopardy' biological opinion). A 'jeopardy' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

50 C.F.R. 402.14(h) (West {2016}).

wildlife habitat will be adversely affected, then FWS must recommend "reasonable and prudent alternatives" through an incidental take statement to minimize any such consequences.[105] FWS must base a biological opinion and any accompanying incidental take statement upon "the best scientific and commercial data available[.]"[106] The ESA ultimately dictates how the FWS interacts with relevant agencies.[107]

D. Typical Treatment of ESA Violations

At its inception, the ESA had the goal of "halt[ing] and revers[ing] the trend toward species extinction, whatever the cost."[108] The Supreme Court brought this idea to fruition when it ruled that it had to permanently stop a federal dam project, developed by Tennessee Valley Authority, in order to save the habitat of the snail darter.[109] The Court made this ruling despite that the dam was virtually constructed and had millions of dollars invested in it.[110] Over time, it became arguably more difficult to obtain such promising results because of the new preliminary injunction standard, the *Winter's* test.[111] The Supreme Court created the *Winter's* test in *Winter v. Natural Resources Defense Council, Inc.* (*Winter*).[112] In *Winter*, the plaintiffs requested an injunction from the Court to stop the Navy's use of "'mid-frequency active' (MFA) sonar[ ]" for training exer-

105. *See Bennett*, 520 U.S. at 158 (explaining FWS's responsibility). Under the ESA, after FWS issues a biological opinion that concludes there is possibility of jeopardy or adverse effects to habitat, it must issue an incidental take statement. *Id.*

106. *See* 50 C.F.R. 402.14(g)(8) (West (2016)) (explaining data standard FWS used).

107. *See* 16 U.S.C.A. § 1536 (West (2012)) (explaining ESA scope); *see also* AT&T Wireless Servs. Inc. v. F.C.C., 365 F.3d 1095, 1099 (D.C. Cir. 2004) (explaining FWS' ESA duty). In the court's analysis *in AT&T Wireless Services, Inc. v. F.C.C.*, the D.C. Circuit examines the technical issue of how a court can rule on its previous interpretations on remand concerning this ESA issue. *AT&T Wireless Servs. Inc.*, 365 F.3d at 1099.

108. *See* J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 488 (2012) (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)) (explaining ESA background).

109. *See id.* (giving background to seminal United States Supreme Court case, *Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978)*). For a further explanation of the Supreme Court's decision, *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (demonstrating Supreme Court support of ESA).

110. *See Ruhl*, *supra* note 108, at 489 (explaining decision's huge economic cost).

111. *See* Morath, *supra* note 12, at 155 (explaining ESA challenges from *Winter*).

112. 555 U.S. 7 (2008).

cises because the activity allegedly violated the ESA and NEPA.[113] The *Winter's* test requires:

> [That] [a] plaintiff [who is] seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest.[114]

Despite the modern use of the *Winter's* test, some studies show that the ESA's effectiveness in obtaining injunctions has not changed since the introduction of the *Winter's* test.[115] Proponents of these studies suggest that this effect can be attributed, in part, to the substantive nature of the ESA.[116] The ESA differs from NEPA because NEPA is only a procedural framework that does not require "a particular substantive result for environmental protection."[117]

E. Origins of the Coast Guard and Maritime Transportation Act

Among the many purposes of the Coast Guard and Maritime Transportation Act, safety and environmental protection of the maritime are two objectives that are directly related to the environment.[118] In furtherance of these goals, Congress has given the Coast Guard the authority to "grant a lease, easement, or right-of-way on the outer Continental Shelf for [certain] activities[.]"[119] For these activities, the Coast Guard must establish certain regulations

113. *See id.* at 13 (explaining creation of *Winter's* test).

114. *See* Morath, *supra* note 12, at 157 (quoting *Winter*, 555 U.S. at 19) (explaining *Winter's* factors).

115. *See id.* at 160 (detailing quantitative data). This data illustrates that, so far, the *Winter*'s test has minimally impacted injunctions overall. *Id.* For a further discussion of the *Winter* case, see *supra* note 79 and accompanying text.

116. *See* Melaney Payne, *Critically Acclaimed But Not Critically Followed – The Inapplicability Of The National Environmental Policy Act To Federal Agency Actions: Douglas County v. Babbitt*, 7 VILL. ENVTL. L.J. 339, 347 (1996) (explaining ESA's substantive nature).

117. *See* Payne, *supra* note 116, at 347 (explaining differences between NEPA and ESA); *see also* Aliza M. Cohen, Note, *NEPA in The Hot Seat: A Proposal For An Office Of Environmental Analysis*, 44 U. MICH. J.L. REFORM 169, 202 (2010) (providing background information NEPA and ESA).

118. *See* 14 U.S.C.A. § 1 (Westlaw though Pub. L. No. 109-241, Title 1, § 101 (July 11, 2006)) (explaining Coast Guard's purpose).

119. *See* 43 U.S.C.A. § 1337(p)(1) (West (2012)) (describing Congress's delegation of power). Some of the activities that are within the scope of the Coast Guard's power include "support [of] exploration, development, production, or storage of oil or natural gas[.]" *Id.*

based on what the agency finds necessary to ensure navigational safety for every "lease, easement, or right-of-way considered by the Secretary [of the Interior]."[120] When working with other agencies, the Coast Guard must provide these agencies with recommendations.[121] In turn, these agencies must "incorporate the Coast Guard's [recommendations] [ ] into any leases" that they create to further the goal of maritime safety.[122]

On certain occasions, various environmental groups questioned the manner in which the Coast Guard handled its delegated authority to grant a "lease, easement, or right-of-way[.]"[123] In assessing the actions of the Coast Guard, courts have often adhered to deference under the Administrative Procedure Act (APA).[124] The APA serves to bring "uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."[125] More fundamentally, the APA aims "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[126] In accordance with the APA, when a court is reviewing an agency's interpretation of its own statute, it is given substantial

120. *See* 14 U.S.C.A. § 663 (Westlaw though Pub. L. No. 109-241, Title VI, § 414 (July 11, 2006)) (explaining Coast Guard's responsibilities under § 414 of Act).

121. Pub. Emps. for Envtl. Responsibility v. Hopper, 827 F.3d 1077, 1086 (D.C. Cir 2016) (providing role of Coast Guard).

122. *See id.* (explaining Coast Guard regulation process). Section 4(e) of the Federal Power Act is another act that has similar provisions to those included in the Coast Guard and Maritime Transportation Act. *See* 16 U.S.C.A. § 797(e) (West (2012)) (explaining Federal Power Act). The Act is discussed extensively in the *Escondido* case. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 777 (1984) (explaining Coast Guard authority court interpreted). Under the Federal Power Act, any license granted "must be reasonably related to the objective of the regulating agency." *Id.*

123. *See* Pub. Emps. for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 85-95 (D.D.C. 2014) (citing 43 U.S.C. 1337(p)) (evaluating Coast Guard duty); *see also* Collins v. Nat'l Transp. Safety, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (analyzing deference under Administrative Procedure Act).

124. *See Collins*, 351 F.3d at 1253 (discussing Coast Guard expertise).

125. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950) (giving goals of Act).

126. *See id.* (detailing purpose of Act). The APA also governs the standard of review for determining whether a government agency complied with a federal or state law; this standard is "arbitrary, capricious, [and] an abuse of discretion[.]" *See* 5 U.S.C.A. § 706(2)(a) (West (2012)) (explaining APA standard).

weight.[127] Courts allow this deference to the agency because of its expertise in certain areas.[128]

The D.C. District found that at least a threshold level of deference must be granted to the Coast Guard in areas concerning the administration of licenses for projects.[129] The D.C. District reasoned that these areas were appropriate due to the Coast Guard's expertise in maritime safety.[130] The D.C. District court noted that the level of deference may appear to be similar to that in *Skidmore*, but it is not clearly defined by the court.[131] The court noted, however, that an agency does not need a position that "is more convincing than its adversaries'[.]"[132]

IV. NARRATIVE ANALYSIS

In *Hopper*, the D.C. Circuit reversed two out of the three D.C. District's findings and affirmed the D.C. District's third finding, despite D.C. Circuit's affirmation based on different legal reasoning than that of the D.C. District.[133] The D.C. Circuit affirmed that neither the Coast Guard nor BOEM violated the Coast Guard and Maritime Transportation Act.[134] The D.C. Circuit then reversed the D.C. District's decision, that FWS had not violated the ESA and

127. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (explaining deference process).

128. *See id.* (explaining reasoning for deference). *Chevron* deference is a test courts use to determine what level of deference to give an agency action. *Id.* at 842. The court must first ask "whether Congress has directly spoken to the precise question at issue." *Id.* If the issue is ambiguous, then Congress looks to see if the agency interpretation is "a permissible construction of the statute." *Id.* at 843. The court does not formulate or impose its own interpretation of the statue upon the agency. *Id.* at 843; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (explaining lower threshold level of deference). Under *Skidmore* deference, while an agency decision is not binding on a court, a court will consider the experience and judgment of the agency with weight equal to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140 (detailing *Skidmore* deference).

129. *See Collins*, 351 F.3d at 1254 (discussing deference standard court selected).

130. *See id.* (explaining Coast Guard's experience).

131. *See id.* (giving *Skidmore*-like deference).

132. *See id.* (detailing court decision). The court did not provide complete clarity on what deference courts should give, but noted that it should be similar to *Skidmore*. *Id.* The court explained that the deference given should be less than *Chevron* deference, but "more than acknowledgement that the agency's position is more convincing than its adversaries'[.]" *Id.*

133. *See* Pub. Emps. for Envtl. Responsibility v. Hopper, 827 F.3d 1077, 1082-91 (D.C. Cir. 2016) (analyzing and deciding each issue).

134. *See id.* at 1087 (giving court's affirming ruling).

its decision that BOEM had not violated NEPA.[135] Although the D.C. Circuit found that BOEM violated NEPA, the court did not require BOEM to issue a new EIS or EA.[136] The court concluded that all the project's regulatory approvals would remain in effect and the project could continue with no hindrance.[137] The court found that BOEM did not need to issue a new EIS or EA provided that it first incorporate "adequate geological surveys" into the already-existing EIS.[138]

A. Giving Deference: An Analysis of the Coast Guard Leases

The plaintiff environmental groups asked the court to decide whether the terms of the Cape Wind leases were reasonable in relation to the objective of Section 414.[139] Section 414 of the Coast Guard and Maritime Transportation Act aims "to provide for navigational safety[.]"[140] The Plaintiffs noted that the Defendant did not propose reasonable alternatives in the terms of the lease the Coast Guard approved.[141] As a result, the Plaintiffs also alleged that the lease failed to consider present conditions surrounding the project.[142] In *Beaudreau*, the D.C. District looked to Section 4(e) of the Federal Power Act (FPA), which the court discussed in *Escondido Mut. Water v. La Jolla* (*Escondido*).[143] The *Escondido* court interpreted the FPA to require the terms of any licenses granted be "reasonably related to [the Secretary's] goal[.][144] The *Escondido* court also noted that the standard of review should be equivalent to "arbitrary and capricious[.]"[145] The D.C. District found that the *Escondido* court's reasoning should also apply to Section 414 of the Coast Guard and Maritime Transportation Act, "[g]iven the similarity be-

135. *See id.* at 1083, 1091 (explaining court's reversing rulings).

136. *See id.* at 1085 (explaining court's minimal punishment).

137. *See id.* at 1084 (detailing court's limited requirements).

138. *See Hopper*, 827 F.3d at 1084 (explaining court's NEPA violation remedy).

139. *See id.* at 1086 (citation omitted) (discussing issue court of appeals faced).

140. *See id.* (explaining Section 414).

141. *See id.* at 1087 (citation omitted) (explaining Plaintiffs' legal arguments).

142. *See id.* (giving Plaintiffs' legal assertion support).

143. *See Hopper*, 827 F.3d at 1086 (explaining district court's analysis). For a further discussion of the *Escondido* case, see *supra* note 122 and accompanying text.

144. *See* Pub. Emps. for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 96-97 (D.D.C. 2014) (discussing FPA in *Escondido*).

145. *See id.* at 97 (detailing *Escondido* standard of review). The Federal Power Act (FPA) gives the Secretary of Interior the responsibility of issuing licenses for hydroelectric facilities, among other purposes. *See generally id.* Section 4(e) of the FPA mandates that the Coast Guard issues must be reasonably related to "adequate protection and utilization of" property under the Act. *See* 16 U.S.C.A. § 797(e) (West (2012)) (explaining Coast Guard duties under FPA).

tween the statutory schemes" shared by the acts.[146] Using the *Escondido* standard, the D.C. District in *Beaudreau* ultimately found that there was sufficient evidence to support the Coast Guard's assertion.[147] The Coast Guard argued that the alleged "forward-looking terms" were reasonably related to its objective to "provide for navigational safety[.]"[148] While the D.C. Circuit agreed with the district court's ultimate conclusion in *Hopper*, the D.C. Circuit reached its ruling "for somewhat different reasons."[149] The court ultimately adopted a deference standard rather than the "arbitrary and capricious" standard.[150]

The D.C. Circuit in *Hopper* used a different standard than that used by the D.C. District to evaluate whether there was a reasonable relationship between the terms of the license granted and the "navigational safety" objective.[151] Instead of the "arbitrary and capricious" standard the D.C. District adopted, the D.C. Circuit simply reasoned that the agency was entitled to some level of deference, similar to a *Skidmore* standard.[152] To support this decision, the court looked to *Collins v. Nat'l Transp. Safety*,[153] which determined that the Coast Guard had certain expertise under the Coast Guard and Martine Transportation Act.[154] In addition, as support, the D.C. Circuit interpreted Section 414 of the Coast Guard and Maritime Transportation Act as allowing for some "informational gaps

146. *Beaudreau*, 25 F. Supp. 3d at 97 (explaining district court's analysis).

147. *See Hopper*, 827 F.3d at 1086 (providing district court's final conclusion).

148. *See id.* (explaining district court's analysis).

149. *See id.* (presenting D.C. Circuit's conclusion).

150. *See id.* (distinguishing D.C. Circuit's ruling from lower court); *see also Beaudreau*, 25 F. Supp. 3d at 97 (citation omitted) (explaining "arbitrary and capricious" standard).

151. *See id.* at 1086-87 (quoting 14 U.S.C.A. § 663 (Westlaw though Pub. L. No. 109-241, Title IV, § 414 (July 11, 2006)) (footnote omitted) (describing deference standard).

152. *See Hopper*, 827 F.3d at 1086-87 (describing deference standard); *see also Beaudreau*, 25 F. Supp. 3d at 97 (citation omitted) (using "arbitrary and capricious" standard); *see generally* Collins v. Nat'l Transp. Safety, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (presenting *Skidmore* deference). *Collins v. Nat'l Transp. Safety* established the Coast Guard's expertise in maritime safety; the case stated that there are several levels of deference, but that ultimately it was not necessary to go through each level because the lowest level of deference still supports the notion that the Coast Guard has certain expertise in maritime safety. *Id.* For a further discussion of the levels of deference that can be given to agencies and how each is determined, see *supra* notes 127-128 and accompanying text.

153. 351 F.3d 1246 (D.C. Cir. 2003).

154. *See id.* at 1253-54 (describing deference standard). For a further discussion of *Collins*, see *supra* note 129 and accompanying text.

that can be filled in later[ ]" for terms of a granted lease.[155] Although the court's reasoning differed from the D.C. District, the D.C. Circuit ultimately found that the Coast Guard did not violate Section 414 of the Coast Guard and Maritime Transportation Act.[156]

B. ESA Violated: "Incidental Take" Arbitrary and Capricious

The second issue the D.C. Circuit addressed in *Hopper* was whether FWS's incidental take statement, which it included in its biological opinion to BOEM, was "arbitrary and capricious[,]" and thus, in violation of the ESA.[157] The Plaintiffs in *Hopper* argued that FWS's incidental take statement violated the ESA because it failed to include a feathering mitigation measure.[158] Plaintiffs also argued that the incidental take statement failed to use "the 'best scientific and commercial data available[ ]'" because it did not consider the information that they submitted.[159] More specifically, the Plaintiffs alleged that FWS had an obligation under the ESA to mitigate bird deaths by implementing feathering.[160] The feathering mitigation the Plaintiffs proposed limits the time of day that the wind turbines spin during certain times of the year.[161] By limiting the wind turbines spinning when bird migration is at its highest, many bird deaths can be prevented.[162] The Plaintiffs also argued that FWS should have included the 2014 data because FWS considered the 2008 opinion of its own internal in-house economist in 2014.[163] In *Beaudreau*, the D.C. District originally found that FWS

155. *See Hopper*, 827 F.3d at 1087 (explaining court's Section 414 analysis). Specifically, the court looked to the part of Section 414, which "requires the Coast Guard to issue its terms at least '60 days before' the Bureau [BOEM] publishes its draft environmental impact statement." *Id.* (citation omitted). The court reasoned that, if the Coast Guard must publish terms of a draft EIS so far in advance of BOEM's draft publication, there must be some room for terms to be developed in more detail later. *Id.*

156. *See id.* (describing court's final conclusion).

157. *See id.* at 1088 (describing issue court analyzed).

158. *See id.* (describing Plaintiffs' claim).

159. *See id.* (quoting 50 C.F.R. § 402.14(g)(8) (West {2016}) (describing Plaintiffs' submission). For a further discussion of the feathering mitigation, see *infra* note 196 and accompanying text.

160. *Hopper*, 827 F.3d at 1089 (citing *Beaudreau*, 25 F. Supp. 3d at 107) (describing Plaintiffs' allegation). For a further discussion of the feathering mitigation, see *infra* note 196 and accompanying text.

161. *See id.* at 1088 (introducing feathering mitigation).

162. *See id.* (explaining feathering mitigation). For a further discussion of the feathering mitigation, see *infra* note 196 and accompanying text.

163. *See id.* at 1089 (describing Plaintiffs' argument regarding FWS's obligation).

was required "to 'make an independent determination' [of] whether" BOEM should include the feathering mitigation to avoid killing the migratory birds.[164] On remand, however, the D.C. District found that under "an independent determination[,]" FWS did not need to consider the data the Plaintiffs submitted in 2014.[165]

In *Hopper*, the D.C. Circuit reversed and found that FWS's final incidental take statement was "arbitrary and capricious," and thus, an ESA violation.[166] The court reasoned that regardless of the year from which FWS's in-house economist applied, the determination was made in 2014.[167] The court, thus, concluded that FWS's decision to forgo feathering mitigation contained "additional analysis" on feathering.[168] Since FWS made a new determination in 2014, the court found that FWS reopened the record, and, subsequently, it mandated that the FWS also consider the plaintiffs' data.[169] The court ultimately vacated the incidental take statement FWS created.[170]

C. NEPA Violated: But Construction to Continue After Geological Survey Component Considered

Finally, the D.C. Circuit turned to the issue of whether the EIS that BOEM issued contained "inadequate 'geophysical and geotechnical' surveys[,]" and thus, violated NEPA.[171] The Plaintiffs argued that the EIS violated NEPA because it failed to produce "sufficient site-specific data on seafloor and subsurface hazards[.]"[172] To support their allegation that the EIS did not contain the necessary site-specific data, the Plaintiffs presented several concerning emails sent to the manager of Cape Wind from BOEM's geolo-

164. *See id.* (quoting *Beaudreau*, 25 F. Supp. 3d at 130) (explaining district court's March 14, 2014 remand).

165. *See Hopper*, 827 F.3d at 1089, 90 (quoting Joint Appendix at 777-78) (describing district court's decision). The district court based this decision in part on FWS's argument that the in-house economist only considered information available "at the time the statement was issued in 2008." *Id.* at 1089 (quoting PEER Br. at 17-18). The court supported its remand order decision by looking to *AT&T Wireless Servs., Inc.*, which provided that "the court is generally the authoritative interpreter of its own remand[.]" *Id.* (citing AT&T Wireless Servs., Inc. v. F.C.C., 365 F.3d 1095, 1099 (D.C. Cir. 2004)).

166. *See id.* (describing court's conclusion about ESA violation).

167. *See id.* (describing court's analysis).

168. *See id.* (quoting Defendants Br. at 63) (detailing court conclusion about re-opened record).

169. *See id.* (expressing court's reasoning).

170. *See Hopper*, 827 F.3d at 1090 (explaining court's final decision).

171. *Id.* at 1081 (quoting Alliance Br. at 21) (introducing NEPA violation issue).

172. *Id.* (quoting Alliance Br. at 26-27) (describing Plaintiffs' claims).

gist.[173] One email concluded that the project "ha[d] not acquired sufficient geophysical data and information to adequately delineate in detail geologic hazards and conditions in the vicinity ([one thousand mile] radius) of even one proposed turbine location[.]"[174]

Arguing before the D.C. District, the plaintiffs in *Beaudreau* alleged that the insufficient geophysical or geotechnical surveys violated the Shelf Lands Act.[175] At this point, the plaintiffs did not allege that BOEM violated NEPA because of the insufficient surveys, although they alleged that BOEM violated NEPA for other reasons.[176] The D.C. District rejected the plaintiffs' claims under both NEPA and the Shelf Lands Act.[177] The plaintiffs repackaged the insufficient survey claims and argued that the surveys violated NEPA, rather than the Shelf Lands Act, before the D.C. Circuit.[178]

On review in *Hopper*, the D.C. Circuit found that the surveys were "arbitrary and capricious[,]" and thus, violated NEPA.[179] To reach this conclusion, the court looked to see if BOEM "[took] a 'hard look' at the geological and geophysical environment" of the Cape Wind project area.[180] Under the "hard look" test, BOEM had to both consider any harmful environmental consequences of a project, and take the necessary steps to make environmental risks known to the agency and the public.[181] The D.C. Circuit found that while BOEM may have completed additional surveys as required, it was apparent that BOEM did not rely on any such surveys in its final EIS.[182]

The D.C. Circuit further reasoned that BOEM failed the "hard look" test because BOEM did not consider the surveys and looked exclusively to data "so roundly criticized by its 'own experts[.]'"[183] Although the D.C. Circuit found that BOEM violated NEPA, the

173. *Id.* at 1082 (providing general facts about EIS).

174. *See id.* at 1083 (illustrating why EIS is insufficient).

175. *See* Pub. Emps. for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 121 (D.D.C. 2014) (explaining plaintiffs' Shelf Lands Act argument in *Beaudreau*).

176. *See id.* at 122 (explaining plaintiffs' NEPA argument).

177. *See id.* at 121-23 (expressing district court's conclusion).

178. *See Hopper*, 827 F.3d at 1083 (giving Plaintiffs' NEPA claim).

179. *Id.* at 1082-83 (footnote omitted) (explaining D.C. Circuit's conclusion).

180. *See id.* at 1083 (quoting Defendants Br. at 40) (providing test to evaluate issue). For a further discussion of the "hard look" test, see *supra* note 60 and accompanying text.

181. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (detailing what "hard look" requirement entails); *see also* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 96 (1983) (explaining NEPA requirements).

182. *Hopper*, 827 F.3d at 1083 (examining court's analysis).

183. *Id.* (citation omitted) (explaining court's conclusion).

court also determined that the project could continue.[184] The court also found that BOEM did not need to re-approve the "regulatory approval[s]" that Cape Wind attained.[185] The D.C. Circuit based this determination on *United States Nuclear Regulatory Commission* and its "countervailing considerations" test.[186] Under this test, a court must weigh the NEPA violation and the equitable relief a court can provide against the economic expense or public interest.[187] The D.C. Circuit applied the "countervailing considerations" test and found the economic expense and public interest outweighed equitable NEPA relief.[188] Specifically, the court found that the Massachusetts law regarding renewable energy requirements and the decade-long project delay outweighed the need for a new EIS and regulatory approvals process.[189] As such, the court in *Hopper* required that BOEM only incorporate a geological survey into the EIS before Cape Wind's wind turbine construction began.[190]

V. CRITICAL ANALYSIS

The D.C. Circuit in *Hopper* found that both BOEM's and FWS's actions violated NEPA and the ESA.[191] The court, however, neither vacated the regulatory approval process nor the lease already granted to Cape Wind.[192] The court concluded that the project could proceed after BOEM incorporated a geological survey into the EIS.[193] The D.C. Circuit's conclusion that NEPA violations occurred is an accurate interpretation of the current precedent surrounding NEPA.[194] The D.C. Circuit's conclusion regarding the appropriate remedy for the NEPA violation, however, can best be

184. *Id.* at 1083-84 (giving court's remedy).

185. *Id.* (providing BOEM does not need re-approvals).

186. *Id.* at 1084 (introducing "countervailing considerations" test); *see also* Nat. Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n, 606 F.2d 1261, 1272 (D.C. Cir. 1984) (giving origins of "countervailing considerations" test).

187. *Hopper*, 827 F.3d at 1084 (citing United States Nuclear Regulatory Comm'n, 606 F.2d at 1272) (summarizing how courts apply "countervailing considerations" test). For a further discussion of the "countervailing considerations" test, see *supra* note 18 and accompanying text.

188. *Id.* (giving results of test).

189. *See id.* (citing MASS. GEN. LAWS ANN. ch. 25A § 11F(a) (West (2012)) (explaining court's analysis).

190. *See id.* at 1084 (providing court's conclusion and remedy).

191. *See id.* at 1083-85, 1089-90 (restating court's conclusion).

192. *Hopper*, 827 F.3d at 1084 (explaining court's decision).

193. *See id.* (describing limited consequence for NEPA violation).

194. *See id.* at 1081-84 (explaining step-by-step requirements of each statute).

described as predictable.[195] Although the project will likely move forward, there is still a chance the project will adopt some form of mitigation to avoid unnecessary bird deaths, such as feathering.[196] The potential adoption of this kind of mitigation is due to FWS's ESA violation and the D.C. Circuit's ruling that required a new incidental take statement.[197] The overall outcome in *Hopper* illustrates NEPA's further deterioration and places NEPA's effectiveness in question.[198] NEPA's effectiveness becomes especially uncertain in comparison to the ESA's effectiveness because the ESA may yield a positive impact if feathering is adopted.[199]

A. NEPA Remedies Under a "Hard Look" Analysis

When the D.C. Circuit analyzed BOEM's actions as related to NEPA, it correctly identified the "hard look" test as the proper method to determine whether BOEM's actions complied with NEPA.[200] The D.C. Circuit also correctly asserted that the "hard look" test, established in *Sierra Club* "applie[d] to the authorization [ ] of private action[ ]" permits.[201] Under NEPA, an agency must have used published environmental impact statements to alert the public about agency actions that may have an impact on the environment.[202] The statement also must have described potential direct and indirect effects.[203] The D.C. Circuit in *Hopper* found that BOEM's 2009 statement "[did] not adequately assess the seafloor and subsurface hazards of the Sound."[204] The D.C. Circuit supported its conclusion with the series of internal emails the Plaintiffs presented regarding the internal geologists' concerns about Cape Wind.[205] The emails raised many red flags; one email stated that

195. *See* Hausman, *supra* note 1, at 184-88 (describing difficulties that NEPA has faced).

196. *Hopper*, 827 F.3d at 1089-90 (explaining possibility of feathering mitigation).

197. *See id.* (explaining FWS requirements).

198. Hausman, *supra* note 1, at 184-88 (questioning effectiveness of NEPA).

199. *See* Morath, *supra* note 12, at 162-68 (describing ESA environmental law violations).

200. *See Hopper*, 827 F.3d at 1083 (explaining "hard look" test).

201. *See id.* (citing Sierra Club v. United States Army Corps of Eng'rs, 803 F.3d 31, 37 (D.C. Cir. 2015)) (illustrating how "hard look" test applies to agencies).

202. *See Sierra Club*, 803 F.3d at 37 (citing 42 U.S.C.A. § 4332(C) (West {2012}) (explaining requirements for each agency).

203. *See id.* (citing 42 U.S.C.A. § 4332(C) ((West {2012}) (explaining basic agency requirements under NEPA). For a further discussion about EIS and related rules for agencies, see *supra* notes 79-80 and accompanying text.

204. *See Hopper*, 827 F.3d at 1082 (footnote omitted) (explaining court's legal reasoning and conclusion).

205. *See id.* (detailing proof Plaintiffs provided to support argument).

the "surveys [did not] seem to conform (even loosely) to the 'Guidance Notes on Site Investigations for Offshore Renewable Energy Projects[.]'"[206] The court concluded that BOEM violated NEPA since BOEM neither took a "hard look" nor contemplated all major environmental impacts in the EIS.[207]

After the D.C. Circuit in *Hopper* found that BOEM violated NEPA, the court considered the results emanating from this violation.[208] The D.C. Circuit correctly applied the "countervailing considerations" standard to determine whether a preliminary injunction should be granted.[209] This balancing test weighs relief options against public interests in project continuation, including social or economic factors.[210] The D.C. Circuit established this test in *United States Nuclear Regulatory Commission*, which granted courts wide discretion in determining the outcome of the "countervailing considerations" test.[211] When the D.C. Circuit applied the test, it specifically acknowledged that "it would be imprudent to allow Cape Wind to begin construction before it can 'ensure the seafloor [is] able to support' its facilities."[212] The court also acknowledged that the administrators of Cape Wind had essentially "no prior experience [in] developing[ ] [or] operating offshore wind farms[ ]" on the seafloor; the court, however, ultimately provided limited remedies to the Plaintiffs.[213] Because of the decade of litigation and regulatory process, the D.C. Circuit asserted the economic cost of the project was already burdensome.[214]

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206. *Id.* (quoting Defendants Br. at 41) (giving specific examples of how BOEM violated NEPA).

207. *See id.* at 1083 (citing Defendants Br. at 40; *Sierra Club*, 803 F.3d at 37) (providing facts and explaining court's legal conclusions).

208. *See id.* at 1084 (explaining court's conclusion and remedy).

209. *See Hopper*, 827 F.3d at 1084 (citing Nat. Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n., 606 F.2d 1261, 1272 (D.C. Cir. 1979)) (discussing when "countervailing considerations" test is applicable).

210. Nat. Res. Def. Council, Inc. v. United States Regulatory Comm'n., 606 F.2d 1261, 1272 (D.D.C. 1979) (explaining "countervailing considerations" test).

211. *See id.* (examining factors of test); *see also* Pit River Tribe v. United States Forest Serv., 615 F.3d 1069, 1081 (9th Cir. 2010); Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 509 (D.C. Cir. 1974) (providing origins and factors for "countervailing considerations" test).

212. *See Hopper*, 827 F.3d at 1084 (citation omitted) (giving court's concerns).

213. *See id.* (citation omitted) (exploring safety of installing and operating wind farm). For a further discussion on why the court is essentially allowing BOEM to do little to nothing and permitting the project to proceed, see *infra* note 216 and accompanying text.

214. *See id.* (providing duration of litigation).

The court offered a "compromise" that required BOEM to incorporate a geological survey in the EIS before construction.[215] Despite this requirement, the D.C. Circuit explained that BOEM's 2012 Cape Wind Survey could be used at the discretion of BOEM if the "survey[ ] adequately address[ed] the geological concerns discussed above[.]"[216] Although BOEM completed the 2012 survey after the survey at issue in *Hopper*, the 2012 survey was completed prior to the *Hopper* litigation.[217] Ultimately, this conclusion is within the scope of the "countervailing considerations" test because the test affords discretion to a court.[218] The outcome is also well within the recent pattern of NEPA enforcement.[219] The point of interest, however, is the irony in enforcing NEPA by condemning the agency for lack of detail and still allowing project to proceed with little to no consequences.[220]

B. Analyzing ESA Violation: FWS Arbitrary and Capricious

When the D.C. Circuit analyzed whether FWS violated the ESA by producing an "arbitrary and capricious" incidental take statement, the court correctly identified that the statement must be based upon "the 'best scientific and commercial data available[.]'"[221] This language is found directly in Sections 1536(a)(2) and (c)(1) of Title 16 of the United States Code (Section 1536), and the language is a statutory requirement for the incidental take statement.[222] The D.C. Circuit also correctly identified that courts should review cases using the "arbitrary and capricious" standard to

215. *See id.* (detailing how court reached compromise).

216. *See id.* at 1084 n.5 (explaining court's endnote about geophysical survey). This endnote comment by the D.C. Circuit is a potential area for concern because of the discretion it gave BOEM. *Id.* The endnote allowed BOEM to use a survey from 2012 in the EIS if BOEM felt it met all NEPA requirements. *Id.* This is concerning given that BOEM's judgment on what to include in an EIS to comply with NEPA is the entire reason NEPA was violated to start with. *Id.* at 1084. Additionally, even if BOEM's judgment is not sound, the process to challenge it could take years of litigation. *Id.* at 1081.

217. *See Hopper*, 827 F.3d at 1084 n.5 (explaining EIS timeline).

218. *Nat. Res. Def. Counsel, Inc.*, 606 F.2d at 1272 (examining factors which allow for judicial discretion).

219. *See* Hausman, *supra* note 1, at 184-88 (describing NEPA's pattern of enforcement).

220. *See Hopper*, 827 F.3d at 1084 (giving NEPA remedy); *see also Nat. Res. Def. Council, Inc.*, 606 F.2d at 1272 (explaining NEPA's past interpretations).

221. *See id.* at 1088 (reiterating D.C. Circuit's analysis); 16 U.S.C.A. § 1536(a)(2), (c)(1) (West {2012}) (explaining statutory requirements of agencies); *see also* 50 C.F.R. § 402.14(g)(8) (West {2016}) (providing specific requirements).

222. *See* 16 U.S.C.A. § 1536(a)(2), (c)(1) (West 2012) (explaining origins of "best scientific and commercial data available" standard).

determine whether the incidental take statement violated Section 1536.[223] The D.C. Circuit in *Hopper* accepted Plaintiffs' argument that the incidental take statement FWS issued did not meet "the 'best scientific and commercial data available'" standard.[224] Plaintiffs specifically argued that the standard was not met because the incidental take statement omitted the data on feathering mitigation Plaintiffs submitted.[225]

The D.C. District in *Beaudreau* originally determined that Cape Wind was not under an obligation to consider the scientific data submitted by plaintiffs.[226] The D.C. District interpreted its own remand language to reach this conclusion, and it found that FWS did not violate the ESA.[227] The D.C. Circuit, however, was able to reach its conclusion without addressing how a court can interpret its own remand, which left the issue unresolved.[228] The D.C. Circuit determined that FWS opened the record in considering its in-house economist 2008 opinion during 2014, and thus, it found that FWS must also consider the Plaintiffs' 2014 submissions.[229]

Although the ESA violations notably do not have the powerful results they once did, the *Hopper* decision and violation penalty demonstrate an ESA-friendly interpretation.[230] The D.C. Circuit vacated the incidental take statement that FWS produced as a result of FWS's ESA violation.[231] The court required FWS to complete a new incidental take statement that considers Plaintiffs' submissions.[232] Plaintiffs' submissions contained both "scientific and economic data" to support their assertion that if Cape Wind adopted the feathering mitigation tactic, it would only have a minor economic cost.[233]

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223. *See Hopper*, 827 F.3d at 1088 (detailing arbitrary and capricious standard).

224. *See id.* (citing 16 U.S.C.A. § 1536(a)(2), (c)(1) (West {2012}); 50 C.F.R. § 402.14(g)(8) (West {2012}) (explaining court's conclusion).

225. *See id.* (giving FWS obligations under standard).

226. *See id.* at 1089 (citation omitted) (explaining March 14, 2014 remand).

227. *See id.* at 1090 (citation omitted) (examining feathering mitigation and scientific data).

228. *See Hopper*, 827 F.3d at 1090 (discussing unresolved issue left open).

229. *See id.* (citing Defendants Br. at 63) (detailing how court avoided answering remand question).

230. *See* Ruhl, *supra* note 108, at 488-91 (explaining ESA's power fluctuations).

231. *See Hopper*, 827 F.3d at 1090 (providing court's ESA violation remedy).

232. *See id.* (explaining court's ESA violation ruling).

233. *See id.* at 1089 (quoting PEER Br. at 17-18) (detailing Plaintiffs' assertions).

The submissions also illustrated that several other government agencies have had "to 'make comparable operational adjustments to minimize [harm to] protected species.' "[234] With this evidence, it is quite possible that the new incidental take statement may contain a required mitigation measure.[235] If the project ever becomes operational, a required measure would force Cape Wind to adopt the mitigation.[236] Although the project is still likely to continue after BOEM completes the minor court-required NEPA remedies, there is still a chance that the ESA repercussions will make a positive environmental change.[237]

VI. IMPACT

Although the decision in *Hopper* is not surprising or law-shaping, *Hopper*'s significance can be found in the message it sends to many federal agencies.[238] The ruling in *Hopper* follows the trend of many courts that limit the remedies of NEPA violations when there are "public interest" factors opposing strong NEPA remedies.[239] As a result of the latest NEPA limitations, NEPA's effectiveness and its goal become questionable to agencies that consider all environmental impacts of projects.[240]

A. Limited NEPA, Limited Agency Deterrence

A potential issue *Hopper* creates is that NEPA will become less effective because it will not provide the same deterrent effect against NEPA violations as that of other environmental statutes, such as the ESA.[241] In *Hopper*, the D.C. Circuit considered an ESA issue and ruled that FWS violated the ESA because it failed to consider Plaintiffs' submissions.[242] These submissions detailed certain

234. *See id.* (quoting PEER Br. at 17-18) (summarizing data Plaintiffs' gave on mitigation).

235. *See id.* at 1090 (foreshadowing future mitigation possible).

236. *See Hopper*, 827 F.3d at 1090 (explaining future FWS ESA obligations).

237. *See id.* (discussing court's decision).

238. *See* Hausman, *supra* note 1, at 185 (illustrating NEPA's limited agency deterrence effect).

239. *See* Nat. Res. Def. Council, Inc. v. United States Regulatory Comm'n., 606 F.2d 1261, 1272 (D.D.C. 1979) (discussing widespread adoption of "countervailing considerations"-like test).

240. *See* Hausman, *supra* note 1, at 185 (citing Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 999 (1993); Jonathan Weems, *A Proposal for Federal Genetic Privacy Act*, 24 J. LEGAL MED. 109, 125 (2003)) (discussing NEPA's reduced effectiveness).

241. *See id.* at 186 (outlining future problems concerning agency conduct).

242. *See Hopper*, 827 F.3d at 1090 (explaining how *Hopper* court ruled).

mitigation methods, and the court ordered that FWS complete a new incidental take statement that properly considered the methods suggested by the Plaintiffs.[243] An ESA violation resulted in Cape Wind possibly adopting a future mitigation method.[244] This ultimately furthers the ESA's goal of protecting endangered species from harm.[245] In contrast, a NEPA violation resulted in Cape Wind moving forward once BOEM incorporated a geological survey into the EIS.[246] Ultimately, agencies may lose incentives to follow NEPA procedures if remedies for violations are limited.[247] This limitation makes it more difficult for NEPA to accomplish one of its major goals, namely, "[ ] deter[ing] damage to the environment[.]"[248]

B. Courts Assume Only One Violation Per Agency

Another concern about NEPA effectiveness arises when a court presumes an agency will both use appropriate behavior and follow a judicial ruling after a violation.[249] In its introduction, NEPA states that one of its primary goals is for an agency to perform an independent analysis of environmental consequences.[250] In *Hopper*, the court found that BOEM violated NEPA, but, rather than require a new EIS be completed by BOEM, the court only mandated BOEM issue a revised EIS that incorporated a geological survey.[251] The court gave BOEM the discretion to use an already completed geological survey from 2012 in the revised EIS if BOEM felt it was adequate.[252] BOEM completed the 2012 survey after the original survey in question, but well before the case.[253]

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243. *See id.* (explaining FWS's consequences for ESA violation).

244. *See id.* (providing court's ruling).

245. *See id.* (describing ESA's goal). For a more detailed explanation of the goals of the ESA, see *supra* notes 100-102 and accompanying text.

246. *See id.* at 1083-84 (comparing court's ESA and NEPA violation remedies).

247. *See* Hausman, *supra* note 1, at 186 (detailing future of NEPA).

248. *See* Payne, *supra* note 116, at n.2 (citing 42 U.S.C.A. § 4332 (West {2012}) (illustrating problems NEPA faces). NEPA's weakening deterrent effect is also demonstrated by Cape Wind in this case; Cape Wind's website boasts of continued victories with a section dedicated to "major legal victories[.]" *See Cape Wind Wins Major Legal Victories*, CAPE WIND (Mar. 14, 2014, 3:35 PM), http://www.capewind.org/node/1709 (discussing Cape Wind's major legal success).

249. *See* Cohen, *supra* note 117, at 202 (explaining problems with giving agencies discretion).

250. *See id.* (citing Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000)) (detailing NEPA's goal of promoting independent environmental analysis); *see also* 42 U.S.C.A. § 4332(D)(iii) (West {2012}) (providing exact statute goals).

251. *See Hopper*, 827 F.3d at 1084 (demonstrating court give remedy).

252. *See id.* at n.5 (detailing court's footnote).

253. *See id.* at 1084 (discussing NEPA conflict court's footnote created).

When a court provides an agency the discretion to decide what is appropriate under NEPA, the independent analysis objective of NEPA is jeopardized even after violations have occurred.[254] Thus, increased judicial oversight, rather than additional agency discretion, appears to increase NEPA effectiveness.[255] With the current judicial trend that limits NEPA violation remedies, ultimately, any NEPA effectiveness will likely come from an agency's desire to avoid costly litigation of prominent environmental issues, rather than from its desire to follow NEPA.[256]

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254. *See* Cohen, *supra* note 117, at 202 (explaining conflict agency discretion created).

255. *See id.* at 203 (giving suggestion of reduced agency discretion). Although courts could increase NEPA's effectiveness by limiting how much agency discretion is given, this should be done in accordance with APA requirements. *See* Administrative Procedure Act, 5 U.S.C.A. § 551 (West {2012}) (explaining discretion that courts should give agencies). The APA requires that courts give a certain amount of discretion to agencies due to agencies inherent expertise. *Id.* For a further explanation of the APA see *supra* note 126 and accompanying text.

256. *See* Payne, *supra* note 116, at 372 (citing Silvia M. Riechel, Note, *Government Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 119-20 (1994); Philip Michael Ferester, Article, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptions from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 227 (1992)) (discussing litigation's deterrent effect).

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