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A Slick Situation: The First Circuit Creates a Buzz and Turns to NEPA to Strengthen Federal Oil Spill Regulation in United States v. Coalition for Buzzards Bay

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A SLICK SITUATION: THE FIRST CIRCUIT CREATES A BUZZ AND TURNS TO NEPA TO STRENGTHEN FEDERAL OIL SPILL REGULATION IN UNITED STATES V. COALITION FOR BUZZARDS BAY

I. INTRODUCTION

"America's economic health and prosperity are inexorably linked to the productive and sustainable use of our environment. That is why NEPA remains a vital tool for my Administration as we work to protect our Nation's environment . . . ."¹

President Barack Obama recently called attention to the continuing significance of the National Environmental Policy Act (NEPA), which was signed into law over forty years ago and instilled an elevated commitment to environmental awareness in the United States government.² NEPA employs a basic policy to ensure the government gives suitable consideration to the environment and invokes public participation before undertaking any major federal action.³ Since its inception in 1969, NEPA has notably improved certain areas of federal environmental policy and remains a valuable tool in addressing present-day environmental issues.⁴

The danger of oil spills is one such environmental issue, as they pose a constant threat to the marine resources and coastal waters of


³. See generally National Environmental Policy Act § 4331 (mandating cooperation of federal government, states, agencies, and public to implement federal policies with desirable levels of environmental quality and preservation).

the United States. Due to the dominance of oil as an energy source in the United States, the nation’s waterways have been and will continue to be utilized to constantly move and transport oil around the country. The widespread and consistent transportation of oil, however, creates an inevitable risk of oil spills. Accordingly, an estimated 1.3 million gallons of oil spill into United States’ waters each year. While persistent efforts to enact more stringent regulations led to an overall decline in oil spills, the risk of spills remains. Federal and state governments, therefore, continue to adopt preparedness and prevention measures to decrease the potential environmental harms resulting from oil spills.


6. See, e.g., Ramseur, supra note 5, at 1 (discussing widespread use of oil in United States); National Academy of Sciences et al., Oil in the Sea III: Inputs, Fates, and Effects 1 (2003) [hereinafter Oil in the Sea] (discussing “pervasive” role oil plays in modern society). Because oil continues to be a dominant source of energy in the United States, “[v]ast quantities of oil continuously enter the country via vessel or pipeline and are then transported to destinations throughout the country.” Ramseur, supra note 5, at 1.

7. See Ramseur, supra note 5, at 1 (observing oil spills are inevitable due to widespread use and transport of oil).


9. See Ramseur, supra note 5, at 28 (discussing existing concern for lack of oil spill response action despite overall decrease in number and volume of oil spills in recent years); see also Response to Oil Spills, U.S. Env’tl. Protection Agency (Jan. 27, 2011), http://www.epa.gov/emergencies/content/learning/response.htm (noting almost 14,000 oil spills in United States coastal waters reported each year despite prevention efforts). Experts predict oil will remain a primary source of energy in the United States, and the United States will continue importing a substantial amount of oil by means of coastal waterways. Ramseur, supra note 5, at 24. Because a majority of U.S. oil imports arrive by vessel via the Gulf Coast and east coast, the possibility of oil spills will continue in the coming years. Id. at 27.

10. Ramseur, supra note 5, at 10 (noting oil spill governance in United States is combination of federal, state, and international authorities). This overlapping framework gives several federal agencies the authority to implement oil spill regulations. Id.
The impact of oil spills can be devastating.\textsuperscript{11} Even a minor spill can disrupt marine ecosystems, cause significant harm to individual organisms, and affect entire marine species and habitats.\textsuperscript{12} Oil spills also implicate steep economic recovery costs, impress permanent damage upon natural resources, and hinder local infrastructure and services.\textsuperscript{13} Various sources have been held responsible for the damaging effects of oil spills, including vessels, facilities, and pipelines.\textsuperscript{14} Governments recognized the significance of oil transportation, and imposed stricter requirements upon oil-transporting vessel operations in an attempt to reduce the impact of possible future spills.\textsuperscript{15}

Historically, large-scale oil spill disasters prompted both federal and state governments to take regulatory action against oil-transporting vessels to decrease the risk of future spills.\textsuperscript{16} Congress passed one of the most prominent regulatory maritime laws, the Oil

\begin{itemize}
  \item \textsuperscript{11} See \textit{Oil in the Sea}, supra note 6, at 1 (explaining widespread transport of oil translates to high risk of spills causing massive and widespread environmental damage). Even minor spills can cause significant toxic damage. \textit{Id.}
  
  \item \textsuperscript{12} See \textit{id.} at 120 (noting harmful effects of oil on marine environments have been "unambiguously established"); see also Ramseur, \textit{supra} note 5, at 6-7 (discussing both short- and long-term damage to specific marine species caused by oil spills). Short-term impacts present immediate danger to marine organisms and habitats, and long-term impacts can significantly affect the survival and reproductive success of marine species. \textit{Id.}
  
  \item \textsuperscript{13} Ramseur, \textit{supra} note 5, at 8-10 (summarizing consequences of spills to include considerable cleanup and recovery costs, damage and rehabilitation of natural resources, and disruption of business activity and local reputation near spill).
  
  \item \textsuperscript{14} See \textit{id.} at 3-6 (explaining potential sources of oil spill incidents). While the sources of oil spills affecting U.S. waters are extensive, this Note focuses solely on oil spills caused by oil-transporting vessels and the preventative measures taken by the states and United States Coast Guard to regulate such vessels. \textit{Id.}
  
  \item \textsuperscript{15} See \textit{id.} at 19 (discussing federally-mandated responsibilities of oil-transporting vessels to prevent future oil spills); see also \textit{Massachusetts Oil Spill Prevention and Response Efforts, Massachusetts Dep't of Envtl. Protection}, http://www.mass.gov/dep/cleanup/ospre.htm (last visited Mar. 6, 2012) [hereinafter \textit{Mass. Spill Efforts}] (asserting increased state efforts to regulate oil spill prevention in response to 2010 Deepwater Horizon oil disaster in Gulf of Mexico). This Note does not discuss the Deepwater Horizon oil spill because the Deepwater Horizon disaster involved offshore drilling rigs and this Note focuses solely on oil-transporting vessel regulation. \textit{See Mass. Spill Efforts, supra.} It is important to note, however, the Deepwater Horizon spill in the Gulf significantly magnified both federal and state efforts to properly address oil spill regulation in the United States. \textit{Id.} The Massachusetts Department of Environmental Protection stated, "Despite the remote possibility of oil from the Gulf reaching our coast [Massachusetts] is continuing efforts begun in the aftermath of the 2003 Buzzards Bay oil spill to strengthen [its] ability to prevent and respond to oil spills in the coastal waters of the Commonwealth." \textit{Id.}
  
  \item \textsuperscript{16} See Swanson, \textit{supra} note 5, at 379 (noting major oil spills can implicate both federal and state laws).
\end{itemize}
Pollution Act of 1990 (OPA),\textsuperscript{17} in response to the Exxon Valdez disaster off the coast of Alaska.\textsuperscript{18} Even prior to the OPA, clear differences existed between federal and state approaches to the prevention of oil spills, resulting in widespread litigation concerning whether federal maritime law could preempt state regulations.\textsuperscript{19} Despite the limitations imposed on state authorities by federal law, there remains a fine line between federal and state governance of oil-transporting vessel regulation that continues to be tested.\textsuperscript{20}

Congress expanded its authority to regulate tank vessels and protect marine resources by enacting the Ports and Waterways Safety Act of 1972 (PWSA).\textsuperscript{21} The PWSA allocated federal regula-


\textsuperscript{18} See, e.g., Ramseur, supra note 5, at 12-16 (discussing OPA’s purpose to create unified oil pollution law in response to widespread dispute and confusion surrounding current federal and state oil spill regulations); Swanson, supra note 5, at 379-80 (observing Exxon Valdez oil spill to be worst in U.S. history at time and creation of OPA in response to subsequent problems produced by spill); William Yardley, Recovery Still Incomplete After Valdez Spill, N.Y. TIMES, May 5, 2010, available at http://www.nytimes.com/2010/05/06/us/06alaska.html?ref=exxonvaldezoil spill1989 (discussing Exxon Valdez disaster that spilled 11 million gallons of oil into Alaskan waters, stained 1,500 miles of coastline, killed hundreds of thousands of marine animals, and devastated local communities when it hit undersea reef). For a further discussion of OPA, see infra notes 95-98 and accompanying text. The Exxon Valdez spill highlighted the inadequacy of existing maritime law, and Congress enacted the OPA to consolidate existing federal oil spill laws under one program. Ramseur, supra note 5, at 12.

\textsuperscript{19} See, e.g., Ramseur, supra note 5, at 11 (noting central issue surrounding oil spill regulation is state preemption and “whether a federal oil spill law should limit a state’s ability to impose stricter requirements”); Swanson, supra note 5, at 379-80 (noting differing legal systems governing oil spill regulation caused tension between federal government and states); see also United States v. Locke, 529 U.S. 89, 94 (2000) (clarifying federal and state governments’ roles in oil spill prevention and reaffirming weight given to prior federal judicial decisions); Ray v. Atl. Richfield Co., 435 U.S. 151, 157-58 (1978) (differentiating between federal and state authority regarding oil spill regulation and noting predominance of federal law in this area of law).

\textsuperscript{20} See Locke, 529 U.S. at 117 (emphasizing political responsibility of federal government in this area); see also Ray, 435 U.S. at 158 (noting federal laws will void state laws to the extent the two conflict, even if Congress did not expressly or implicitly foreclose state legislation in particular area); Ramseur, supra note 5, at 24-25 (noting confusion between federal and state oil spill regulations remains despite attempts to clarify). “[I]t is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States . . . will participate in the process.” Locke, 529 U.S. at 117.

\textsuperscript{21} Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221 et seq., 46 U.S.C. § 3701 et seq. (2006) (noting complete set of PWSA provisions); Ports and Waterways Safety Act § 1221(a)-(d) (stating policy for protection of marine environment through regulation of vessel traffic and navigation); Ports and Waterways Safety Act § 3703 (requiring Coast Guard to issue rules regulating vessels for increased protection of United States’ waters); see also Brooks, supra note 5, at 231 (asserting
tory power to the United States Coast Guard and authorized the Coast Guard to issue regulations providing the maximum protection of vessel navigation and the marine environment.22 Also in the early 1970s emerged a nationally recognized movement to restore, maintain, and preserve the environment, at which time the federal government began to take unprecedented action to address these issues.23 The enactment of NEPA demonstrated this commitment.24 NEPA is predominantly a procedural law, and it requires federal agencies to give adequate consideration to the environment before undertaking any major agency action.25 The Coast Guard is the federal agency commanded with protecting the nation’s waterways, and accordingly must abide by NEPA when promulgating rules and regulations.26

The United States Court of Appeals for the First Circuit recently addressed the enduring conflict between federal and state oil spill regulations.27 In doing so, the court reiterated the significance

creation of PWSA was in response to major oil spill from American tanker off English coast in 1967). For a further discussion of the PWSA, see infra notes 84-87 and accompanying text. The Coast Guard rules must address the “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels.” Ports and Waterways Safety Act § 3703(a).

22. See Ports and Waterways Safety Act § 1223 (establishing vessel operating requirements); § 3703(a) (indicating issuance of vessel operating requirements pursuant to federal authority); see also Locke, 529 U.S. at 101 (describing Coast Guard responsibility under PWSA).

23. See Brooks, supra note 5, at 231 (discussing era of advancement in environmental law in United States).


27. See United States v. Coal. for Buzzards Bay, 644 F.3d 26, 28-29 (1st Cir. 2011) (addressing conflict between federal and state oil spill regulation in Buzzards Bay, Massachusetts).
of agency compliance with NEPA. In United States v. Coalition for Buzzards Bay (Buzzards Bay), the First Circuit concluded the United States Coast Guard failed to comply with the requisite NEPA procedures when it promulgated regulations governing navigation of oil-transporting vessels in Buzzards Bay, Massachusetts. The First Circuit's decision marked the most recent holding in a prolonged and controversial battle between the conflicting approaches of federal and state laws regulating maritime traffic to protect against oil spills in Buzzards Bay. In its decision, the court declined to address the issue of federal preemption, and instead focused on the Coast Guard's failure to comply with NEPA. As a result, the Commonwealth of Massachusetts prevailed as the court reinstated the state provisions governing vessels navigating throughout Buzzards Bay instead of the less stringent, and typically controlling, federal oil spill regulations.

This Note examines the First Circuit's rationale in Buzzards Bay and analyzes the potential impact of its holding. The court's conclusion in Buzzards Bay challenges the predominance of federal influence on oil spill regulation and also illustrates NEPA's power to contribute to substantial environmental developments. Part II provides a detailed summary of the facts of Buzzards Bay. Part III

28. Id. at 28 (recognizing federal authority of Coast Guard to issue rules regarding tank vessel regulation, and Coast Guard's subsequent failure to comply with NEPA).
29. 644 F.3d 26 (1st Cir. 2011).
30. Id. at 38-39 (holding Coast Guard did not satisfy NEPA obligations through failure to properly assess environmental impacts of proposed regulations). The Coast Guard's error "was one of function, not merely of form." Id. at 30. The First Circuit remanded the regulations at issue to the Coast Guard for compliance with NEPA procedures. Id. at 39.
31. See id. at 28-29 (noting controversial nature of court's decision given tension between federal and state governments). The court noted that Buzzards Bay is not only a "spectacularly beautiful natural resource but also a major channel of maritime commerce." Id. at 28.
32. See id. at 28 (stating court need not discuss preemption issue because Coast Guard violated NEPA).
33. Buzzards Bay, 644 F.3d at 39 (vacating injunction of MOSPA provisions due to Coast Guard's non-compliance with NEPA); see also Tug of War, Cape Cod Times, June 1, 2010, available at 2010 WLNR 11202911 [hereinafter Tug of War] (finding federal regulations governing coastal waters less stringent than state laws).
34. For a narrative analysis of Buzzards Bay, see infra notes 132-177 and accompanying text. For a discussion of the impact of the First Circuit's holding, see infra notes 207-224 and accompanying text.
35. For a narrative analysis of Buzzards Bay, see infra notes 132-177 and accompanying text. For a critical analysis of the holding in this case, see infra notes 178-206 and accompanying text.
36. For a discussion of the relevant facts of Buzzards Bay, see infra notes 41-79 and accompanying text.
then describes the development of oil spill regulation in the United States, the ongoing conflict between federal and state governance of oil spill prevention, and NEPA’s role in controversial issues of environmental concern.\(^\text{37}\) Next, Part IV examines the rationale the First Circuit employed to reach its holding.\(^\text{38}\) Thereafter, Part V evaluates the court’s rationale in light of the preemption question surrounding oil spill regulation and the utilization of NEPA in reaching its conclusion.\(^\text{39}\) Finally, Part VI considers the impact Buzzards Bay will have on the future governance of federal and state oil spill regulation.\(^\text{40}\)

II. FACTS

In Buzzards Bay, the United States Court of Appeals for the First Circuit determined whether the Coast Guard complied with obligatory NEPA procedures in promulgating rules for the regulation of oil-transporting vessels in Buzzards Bay, Massachusetts.\(^\text{41}\) Buzzards Bay “is not only a spectacularly beautiful natural resource but also a major channel of maritime commerce in southeastern Massachusetts.”\(^\text{42}\) Each year, an estimated two billion gallons of oil, gasoline, and other hydrocarbons are transported through Buzzards Bay.\(^\text{43}\) Since an extensive oil spill devastated the bay in 2003, federal and state authorities have struggled to agree on the appropriate level of regulatory measures to prevent future oil spills.\(^\text{44}\) Following years

\(^{37}\) For a discussion of background material pertaining to the oil spill regulation, NEPA, and relevant court decisions, see infra notes 80-131 and accompanying text.

\(^{38}\) For a narrative analysis of the court’s opinion in Buzzards Bay, see infra notes 132-177 and accompanying text.

\(^{39}\) For a critical analysis of the First Circuit’s holding in Buzzards Bay, see infra notes 178-206 and accompanying text.

\(^{40}\) For a discussion of the impact of the First Circuit’s holding, see infra notes 207-224 and accompanying text.

\(^{41}\) United States v. Coal. for Buzzards Bay, 644 F.3d 26, 28 (1st Cir. 2011) (addressing relevant issues of case).

\(^{42}\) Id. (noting Buzzards Bay is both commercially and environmentally significant); see also Dr. Joe Costa, Twenty Years of Science and Management in Buzzards Bay, BUZZARDS BAY NAT’L ESTUARY PROGRAM (2005), http://www.buzzardsbay.org/bbnep-anniversary.htm (discussing Congress’s declaration of Buzzards Bay as “Estuary of National Significance” and part of EPA’s National Estuary Program (NEP) under Clean Water Act). The NEP was established to protect and restore the water quality and ecological integrity of estuaries of national significance. Id.


\(^{44}\) Buzzards Bay, 644 F.3d at 28 (discussing conflict between federal and state laws regulating maritime traffic on Buzzards Bay following 2003 oil spill). A Bouchard Barge 120 released approximately 98,000 gallons of oil into Buzzards
of litigation, the First Circuit recently held the Coast Guard failed to comply with its obligations under NEPA. As a result, the court reinstated Massachusetts' state laws governing the regulation of Buzzards Bay.

In the aftermath of the Buzzards Bay oil spill, the Massachusetts state legislature enacted the Massachusetts Oil Spill Prevention Act (MOSPA) in 2004. The federal government instantly tagged MOSPA as a threat, claiming certain provisions would interfere with its power to regulate commercial shipping in Buzzards Bay. The federal government thus argued the PWSA preempted MOSPA, certain sections of the United States Code, and requisite Coast Guard regulations.

The United States District Court for the District of Massachusetts initially granted an injunction against the challenged MOSPA provisions and held that the federal PWSA preempted state laws governing oil vessel reporting obligations. When Massachusetts subsequently appealed, the First Circuit vacated the injunction and reinstated MOSPA. [Massachusetts v. MOSPA (MOSPA) 2004].

Bay after striking an outcropping of rocks, which "soiled approximately ninety miles of Buzzards Bay beaches and coastline, killed hundreds of birds and marine life, contaminated thousands of acres of shellfish beds, and seriously harmed the overall marine environment of the bay." United States v. Massachusetts (Massachusetts I), 440 F. Supp. 2d 24, 27 (Mass. Dist. Ct. 2006), vacated, 493 F.3d 1 (1st Cir. 2007).

45. See Buzzards Bay, 644 F.3d at 28-29 (holding Coast Guard's failure to comply with NEPA procedural obligations when instituting regulations relating to vessel navigation in Buzzards Bay was not harmless). Specifically, because the Coast Guard failed to conduct any sort of environmental analysis pertaining to the proposed regulations, the First Circuit declined to enforce these federal regulations. Id. at 29.

46. Id. at 29 (vacating injunction against Massachusetts oil spill regulations).

47. Id. at 29 (explaining introduction of MOSPA in response to 2003 Buzzards Bay oil spill); see also Marine Oil Spill Prevention & Response Program, Mass. Dep't of Envtl. Prot., [hereinafter Oil Spill Program] http://www.mass.gov/dep/cleanup/oilsprep.htm (last visited Mar. 8, 2012) (summarizing purpose of MOSPA). "The purpose of the Act was to strengthen statutes governing Massachusetts' ability to prevent and respond to oil spills." Oil Spill Program, supra.

48. Buzzards Bay, 644 F.3d at 29 (discussing federal government's concern for Massachusetts state laws infringing upon federal powers).

49. Id. (discussing federal government's challenge to state regulations concerning oil vessels traveling in Massachusetts coastal waters).

50. See id. (describing district court's treatment of federal government's initial complaint regarding MOSPA enactment); see also Massachusetts I, 440 F. Supp. 2d 24, 48 (Mass. Dist. Ct. 2006), vacated, 493 F.3d 1 (1st Cir. 2007) (holding MOSPA provisions to be "preempted, invalid, and unconstitutional" and enjoined enforcement of statutes). Through the Supremacy Clause of the United States Constitution, Congress has made it clear there are certain instances in which federal actions preempt the enforcement of state laws. Massachusetts I, 440 F.Supp. 2d at 29-30. The district court reasoned the federal government might be better positioned than the state to balance any competing interests that may arise in the regulation of local waters. Id. at 32. After conducting a preemption analysis, the
remanded the case to the district court.51 The First Circuit concluded the district court incorrectly utilized the preemption analysis for resolving federal-state conflicts.52 On remand, the focus of litigation shifted after the Coast Guard promulgated a new final rule in 2007 (2007 Rule) addressing the navigation of oil-transporting vessels in Buzzards Bay.53 The 2007 Rule expressly stated federal law would preempt the manning and escort provisions of MOSPA, thereby leaving no ambiguity regarding the issue of preemption.54 The manning provisions of MOSPA set forth requirements for how many licensed officers and personnel must be present on vessels transporting oil in Buzzards Bay.55 The escort

district court concluded the PWSA had such an effect over the MOSPA, and ordered an injunction of the newly enacted MOSPA provisions. Id. at 48.

51. See United States v. Massachusetts (Massachusetts II), 493 F.3d 1, 4-5 (1st Cir. 2007), (explaining procedural posture of case and remanding case to district court). The First Circuit held the district court acted “prematurely” and “did not adhere to the analytical structure the Supreme Court has required to resolve federal-state conflicts in this area.” Id. at 5.

52. See Buzzards Bay, 644 F.3d at 29 (describing First Circuit’s decision to vacate district court’s injunction on MOSPA provisions and remand to district court to engage in correct preemption analysis); see also Massachusetts II, 493 F.3d at 25 (holding district court erred in concluding PWSA left no room for state regulation of coastal waters by applying incorrect model of preemption analysis). Massachusets argued that in the absence of a conflicting federal regulation, states have leeway to regulate particularly sensitive local waterways. Massachusetts II, 493 F.3d at 4. The First Circuit noted the Supreme Court requires conflicts between federal and state laws regarding protection against maritime oil spills be resolved in one of three ways: conflict preemption analysis, field preemption analysis, or overlap preemption analysis. Id. at 3. Here, the First Circuit determined the district court used a field preemption analysis to conclude that provisions of the PWSA preempted conflicting provisions of the MOSPA when the district court should have used an overlap preemption analysis. Id. at 4.

53. See Buzzards Bay, 644 F.3d at 29 (noting Coast Guard’s promulgation of final rule “changed the legal seascape” regarding navigation of Buzzards Bay); see also United States v. Massachusetts (Massachusetts III), 724 F. Supp. 2d 170, 174 (Mass. Dist. Ct. 2010), rev’d in part, vacated in part, 644 F.3d 26 (1st. Cir. 2011) (observing Coast Guard’s express preemption in final rule forced Massachusetts to attack federal regulations from procedural stance).

54. Regulated Navigation Area; Buzzards Bay, MA; Navigable Waterways Within the First Coast Guard District, 72 Fed. Reg. 50,052-02, 50,056-57 (August 30, 2007) (to be codified at 33 C.F.R. pt. 161, 165) [hereinafter Proposed Regulations] (preempting state provisions). “To the extent not otherwise already preempted, this rule is intended to, and does, preempt those provisions of [MOSPA] regarding enhanced manning requirements for tank barges and tow vessels in Buzzards Bay, and tugboat escorts for certain waters . . . .” Id. (emphasis added) (citations omitted).

provisions of MOSPA mandated certain oil-transporting vessels could not traverse Buzzards Bay without a tugboat escort.\textsuperscript{56}

The 2007 Rule resolved the question of federal preemption in favor of the Coast Guard, which forced Massachusetts to utilize an alternative avenue to challenge the conflicting federal regulations.\textsuperscript{57} The Commonwealth asserted the Coast Guard violated NEPA and certain provisions of the Administrative Procedure Act (APA) when it promulgated the 2007 Rule.\textsuperscript{58} The district court ruled the Coast Guard violated NEPA by failing to adhere to the obligatory NEPA procedural requirement of preparing either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA).\textsuperscript{59} The district court, however, concluded this failure was “harmless error,” entered judgment for the Coast Guard, and enjoined enforcement of MOSPA provisions.\textsuperscript{60}

On appeal, the First Circuit again addressed the conflict between federal and state law involving the manning and escort requirements for vessels navigating in Buzzards Bay.\textsuperscript{61} The disagreement between the federal and state approaches to the regulation of oil barges in Buzzards Bay arose because the Coast Guard provisions required substantially less stringent levels of oversight and regulation than the MOSPA provisions.\textsuperscript{62} MOSPA required

\textsuperscript{56} See id. § 6 (establishing specific escort requirements for oil-transporting vessels traveling through Massachusetts waters).

\textsuperscript{57} See Massachusetts III, 724 F. Supp. 2d at 174 (explaining Massachusetts’ introduction of new argument alleging Coast Guard violated NEPA in failing to prepare EIS without explanation).

\textsuperscript{58} United States v. Coal. for Buzzards Bay, 644 F.3d 26, 30 (1st Cir. 2011) (discussing Commonwealth’s counterclaims alleging Coast Guard’s procedural violations).

\textsuperscript{59} Massachusetts III, 724 F. Supp. 2d at 174 (explaining Coast Guard’s failure to provide EIS for 2007 Rule “can only be described as an act of procedural hubris”). The Coast Guard did not explain their failure to provide any sort of environmental analyses, and erroneously concluded the 2007 Rule was not “highly controversial in terms of scientific validity or public opinion[.]” Id. (internal quotations omitted).

\textsuperscript{60} Id. at 175 (holding Coast Guard’s procedural violation of NEPA in failing to present EA or EIS was harmless because Coast Guard’s rulemaking process was functionally equivalent to environmental analysis). The district court reasoned that to require a more formal assessment would be a “waste of time” because Massachusetts could not identify any environmental issues left unaddressed by the Coast Guard in the rulemaking process. Id. (internal quotations omitted). For a further discussion of harmless error, see infra notes 167-175 and accompanying text.

\textsuperscript{61} See Buzzards Bay, 644 F.3d at 29-30 (assessing nature of conflicting federal and state provisions governing Buzzards Bay navigation).

\textsuperscript{62} Id. at 36 (noting Coast Guard 2007 Rule was subject to widespread opposition). “In the view of many, the proposed rule threatened to decrease materially the level of protection against oil spills in Buzzards Bay.” Id. Massachusetts was
tugboat escorts for all vessels carrying six thousand or more barrels of oil transiting Buzzards Bay. The 2007 Rule conversely required tug escorts for single-hulled barges and allowed double-hulled barges to navigate without a tugboat escort. This provision was especially important because the OPA has called for the complete phase out of single-hulled tank barges by 2015. Thus, beginning in 2015, the 2007 Rule would leave all tank vessels transporting oil through Buzzards Bay unescorted.

MOSPA further commands all tow vessels transiting Buzzards Bay and carrying six thousand or more barrels of oil have at least one licensed deck officer or tow vessel operator to serve as a lookout on board at all times. Additionally, MOSPA requires three officers or tow vessel operators man a tow vessel when it is escorting a tank barge. The 2007 Rule took a divergent approach to man-

primarily concerned that Coast Guard regulations were too narrow, as they only required escort requirements of single-hulled tank barges instead of all tank barges. Id.

63. Id. at 29-30 (describing Massachusetts' tugboat escort requirements); see also MASS. GEN. LAWS ANN. ch. 21M, § 6(a) (West, Westlaw through 2012) (requiring tank vessels carrying six thousand or more barrels of oil to be escorted by tugboat).

64. See Proposed Regulations, supra note 54, at 50,059 (stating tug escorts must accompany only single-hull tank barges in Buzzards Bay to prevent barges from danger of grounding or collision in event of accident); see also 33 C.F.R. § 138.220(b) (2011) (defining single hull); 33 C.F.R. § 157.03 (2011) (defining double hull). The Coast Guard excluded double-hull barges from the escort requirement because they are well equipped to withstand grounding or collisions and there has never been a major oil spill from a double-hull tank barge in Buzzards Bay. Proposed Regulations, supra note 54, at 50,054. "[S]ingle-hull means the hull of a tank vessel that is constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue, that is not a double hull as defined in 33 CFR part 157." 33 C.F.R. § 138.220(b) (2011). "Double hull means watertight protective spaces that do not carry any oil and which separate the sides, bottom, forward end, and aft end of tanks that hold any oil within the cargo tank length from the outer skin of the vessel as prescribed in § 157.10d." 33 C.F.R. § 157.03 (2011).

65. See Ramsey, supra note 5, at 14 (noting OPA calls for complete phase-out of all double-hulled barges by 2015).


67. United States v. Coal. for Buzzards Bay, 644 F.3d 26, 30 (1st Cir. 2011) (describing Massachusetts vessel Manning requirements); see also MASS. GEN. LAWS ANN. ch. 21M, § 4(a) (West, Westlaw through 2012) (setting Manning requirement for one lookout licensed deck officer on tow vessels transiting Buzzards Bay).

68. Buzzards Bay, 644 F.3d at 30 (describing additional vessel Manning requirements); see also MASS. GEN. LAWS ch. 21M, § 4(a) (West, Westlaw through 2012) (providing Manning requirements to include crew of three licensed officers for tow vessels pulling or pushing tank barges in Buzzards Bay).
ning regulations and required only one pilot be present to direct single-hull barges.69

The substance of the public comments submitted in response to the proposal of the 2007 Rule properly illustrates the serious nature of the ongoing conflict between federal and state navigation regulations for Buzzards Bay.70 These comments reflected fervent concern about the detrimental environmental effects of replacing the MOSPA provisions with less stringent federal regulations.71 Worried local officials, state legislators, and other state government representatives urged the Coast Guard to adopt stricter tug escort standards similar to those included in MOSPA, contending that tug escorts for all tank barges—not just single-hulled vessels—were necessary to reduce the risk of oil spills in Buzzards Bay.72

With the question of preemption no longer at issue, the First Circuit focused solely on NEPA compliance in its most recent review of the Buzzards Bay conflict.73 Relying on APA standards for evaluating agency actions, the First Circuit analyzed the Coast Guard regulations to determine whether it complied with NEPA procedures, and thereby possessed the authority to set any regulations aside that were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”74

69. See Proposed Regulations, supra note 54, at 50,509 (stating each single-hull tank barge carrying oil in Buzzards Bay must be directed and controlled by pilot).

70. See Buzzards Bay, 644 F.3d at 36 (discussing concerns voiced in comments to proposed rule submitted to Coast Guard).

71. Id. (observing strong opposition toward Coast Guard’s 2007 Rule). Many members of the public believed “protections beyond those described in the proposed rule were needed to prevent environmental damage to Buzzards Bay.” Id.

72. Id. (describing extent of strong public and congressional resistance to 2007 Rule). But see Swanson, supra note 5, at 380-81 (suggesting instituting less stringent tank vessel standards would conflict with constitutional mandate of federal maritime uniformity).

73. Buzzards Bay, 644 F.3d at 30-31 (noting court’s instant analysis focused on NEPA compliance).

74. Id. at 30 (noting arbitrary and capricious review standard of administrative law); see also 5 U.S.C. § 706(2)(A) (2006) (discussing to what extent court may hold agency actions to be unlawful); Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 824 F.2d 1258, 1267 (1st Cir. 1987) (describing responsibility of courts under arbitrary and capricious standard). When reviewing agency actions, courts seek to determine if “the agency [ ] adequately explained the facts and policies upon which it relied” to reach their decision. Natural Res. Def. Council, Inc., 824 F.2d at 1267. Courts will only “delve into the soundness of the agency’s reasoning only to ascertain that the conclusions reached are rationally supported.” Id. The scope of the APA’s arbitrary and capricious standard is beyond the scope of this Note, as the First Circuit did not reach the issue in Buzzards Bay. See Buzzards Bay, 644 F.3d at 31.
In *Buzzards Bay*, the Coast Guard argued NEPA’s requirement that federal agencies prepare an EA or EIS for any major agency action was not absolute and it was exempt from this requirement under regulations established by the Council for Environmental Quality (CEQ). When promulgating the 2007 Rule, the Coast Guard adopted supplemental procedures providing categorical exclusions (CEs) for its responsibility to issue an EA or EIS. The Commonwealth countered that the Coast Guard’s reliance on the exemptions did not apply in “extraordinary circumstances” and the highly controversial nature of federal and state navigation laws in Massachusetts qualified as an extraordinary circumstance. The First Circuit agreed with the Commonwealth and concluded the manning and escort requirements were indeed highly controversial, and as such, the Coast Guard was obligated to conduct a formal environmental analysis under NEPA. Accordingly, the court held that the Coast Guard’s failure to satisfy its NEPA obligations was not a harmless error and vacated the district court’s injunction of the relevant MOSPA provisions.

75. *Buzzards Bay*, 644 F.3d at 29-30 (discussing Coast Guard’s contention that its regulations qualified for EA and EIS exemptions). A categorical exclusion applies when a certain action does not “individually or cumulatively have a significant effect on the human environment and [has] been found to have no such effect in procedures adopted by a Federal agency in implementation of [the action].” *Id.* at 31-32.

76. *Id.* at 32 (discussing Coast Guard’s adoption of supplemental procedures that provide for certain exemptions from abiding by NEPA procedures); see also *COMMANDANT INSTRUCTION M16475.ID, UNITED STATES COAST GUARD 2-4-2-9* (Nov. 29, 2000) [hereinafter COMDTINST M16475.ID], available at http://www.uscg.mil/directives/cim/16000-16999/CIM_16475_ID.pdf (stating purpose of Coast Guard supplemental procedures). The supplemental procedures provided exclusions for “regulations establishing, disestablishing, or changing Regulated Navigation Areas and security of safety zones and regulations in aid of navigation.” *Buzzards Bay*, 644 F.3d at 32 (citations and quotations omitted) (internal quotation marks omitted). The stated purpose of COMDTINST M16476.ID is to establish policies and procedures to ensure appropriate environmental review and NEPA compliance measures for Coast Guard actions. COMDTINST M16475.ID, *supra*, at 1-1.

77. See *Buzzards Bay*, 644 F.3d at 35 (discussing Commonwealth’s argument that proposed Coast Guard action was “highly controversial” and constituted an “extraordinary circumstance” preventing agency action from being exempted from NEPA requirements).

78. See *id.* at 35-36, 38 (deciding Coast Guard violated obligatory NEPA procedures by failing to issue EA or EIS for promulgated oil-transporting vessel regulations).

79. *Id.* at 39 (ordering remand to Coast Guard for further proceedings); see also *Oil Spill Act Information, MASS. DEPT’ OF ENVT'L. PROT.* (July 14, 2011), http://www.mass.gov/dep/cleanup/laws/spillact.htm (announcing official reinstatement of MOSPA provisions). Following the court’s decision, “[o]n July 11, 2011, the First Circuit issued its mandate, which lifted the injunction that had prevented MassDEP from implementing and enforcing MOSPA’s manning and Tugboat Es-
III. BACKGROUND

A. More Boats, More Spills: Oil-Transporting Vessel Regulation is Born

The United States has long recognized the importance of establishing regulatory oversight of maritime vessels to protect and preserve United States' waters. Congress first manifested this commitment to keeping our waterways safe and clean in its passage of the Tank Vessel Act of 1936. In the early 1970s, maritime vessel regulation gained widespread attention as oil spills became more prevalent. Emerging environmental concerns resulted in vessel regulations that not only instituted safety measures but also protected marine habitats. Accordingly, Congress significantly expanded the federal government's role in regulating dangerous vessels by enacting the PWSA, which consists of two titles regulating different, yet overlapping, aspects of maritime oil transportation. Title I of the PWSA delegates to the Coast Guard the authority to promulgate regulations governing the traffic and navigation of vessels and protection of the marine environment. Title II requires the Coast Guard to issue rules pertaining to the "design, construction, alteration, repair, maintenance, operation, equipping, person...

80. See Brooks, supra note 5, at 230 (discussing early Congressional recognition of need to regulate transport of dangerous vessels).
82. See Brooks, supra note 5, at 230-32 (noting heightened federal involvement in regulation of design and construction of oil tankers as oil transportation increased and spills became more frequent).
83. Id. at 230-31 (discussing growing popularity of environmental issues in United States and its relation to more stringent oil tanker regulation).
85. See Ports and Waterways Safety Act § 1223(a) (authorizing Secretary of Transportation to improve vessel navigation safety).
nel qualification, and manning of vessels[.]

The extensive authority bestowed upon the Coast Guard highlighted the federal government’s role in the regulation of vessels and oil spill prevention.

As the oil transport industry increasingly threatened United States’ waterways, states also began to enact stricter regulations to monitor vessels and protect coastal waterways from the possibility of oil spills. Conflicts between these state laws and the overarching federal laws soon followed, evoking questions as to what extent a system of uniform federal laws would preempt state regulations. Proponents of federal preemption argue stricter state laws frustrate the goal of creating a uniform national shipping industry, whereas opponents argue states should be permitted to set stiffer standards if they so desire.

B. Battle of the Laws: Conquering the Federal Preemption Question

The United States Supreme Court first addressed the question of federal preemption as it applied to oil spill prevention and response requirements in *Ray v. Atlantic Richfield Company* (*Ray*). In *Ray*, the Court held that the PWSA provisions regulating the design and

86. See Ports and Waterways Safety Act § 3703(a) (requiring Secretary of Transportation to promulgate regulations related to overall operation of vessels to protect against hazards to life, property, vessel safety, and marine environment); see also Brooks, supra note 5, at 251 (summarizing Title II of PWSA).

87. See Ports and Waterways Safety Act § 1221 (2006) (creating federal policy to respond to increasing danger of vessel traffic in nation’s waterways); see also Brooks, supra note 5, at 251 (noting enactment of PWSA extended Coast Guard and federal government’s power to regulate coastal waters).

88. See United States v. Locke, 529 U.S. 89, 94 (2000) (discussing both federal and state creation of more stringent oil transport regulations following large-scale oil spills). In 1967, the American oil tanker Torrey Canyon spilled 120,000 tons of oil off the coast of England, and in 1989 the supertanker Exxon Valdez spilled more than fifty-three million gallons of oil off the coast of Alaska. *Id.* Such incidents consistently prompted federal and state initiatives to increase preventative measures in oil tanker regulation. *Id.*

89. See, e.g., *Locke*, 529 U.S. at 94 (explaining “ensuing question of federal preemption” regarding danger of tanker oil spills); Ramseur, supra note 5, at 24 (noting “primary obstacle” to achieving unified oil spill regulation was whether federal laws would preempt state laws); Swanson, supra note 5, at 380 (illustrating lack of clarity on how federal and state laws governing oil spill prevention were to interact).

90. See Ramseur, supra note 5, at 24 (discussing arguments for and against federal preemption of oil spill legislation).

construction of vessels preempted conflicting state maritime safety laws and emphasized the importance of uniformity in oil tanker regulation.\(^9\) The Court, however, also acknowledged state regulations can be enforced when they address purely local issues and the goals do not conflict with any substantive federal law.\(^9\)

Despite such efforts by the Supreme Court to clarify state and federal jurisdiction of oil spill governance in Ray, it was still largely unclear which state oil-transporting vessel regulations might overcome federal preemption.\(^9\) The Exxon Valdez oil spill disaster added to the confusion and led to the passage of the OPA.\(^9\) The OPA amended the PWSA and attempted to refine oil spill regulation by combining the existing federal laws into one program, expanding liability provisions, and imposing new requirements regarding oil spill prevention and response.\(^9\) The OPA is extensive and intricate; consisting of nine titles that address such matters as: liability and compensation, licensing requirements, duties of officers, manning and reporting standards, and tank vessel construction.\(^9\) The passage of the OPA, however, did not fully resolve questions of federal and state jurisdiction over oil spill legislation, particularly in regarding oil tanker vessel regulation.\(^9\)

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92. Id. at 165 (finding in favor of federal preemption for laws governing Puget Sound vessels). The Court found, “The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.” Id.

93. Id. at 164 (explaining states may enforce their own local laws as long as they do not directly conflict with federal laws). The Court determined the Washington laws at issue in Ray addressed general vessel safety rather than local concerns, and were therefore preempted by federal provisions governing the issue. Id. at 164-65.

94. See Brooks, supra note 5, at 234 (noting lack of clarify on local states rules in instances not specifically addressed in Ray).


96. See Ramseur, supra note 5, at 12-17 (summarizing key purposes of OPA).

97. See Locke, 529 U.S. at 101-02 (discussing extensive nature of nine titles that make up OPA).

98. See id. at 94 (observing ongoing controversy between federal regulatory schemes governing oil tankers and conflicting state laws); see also Swanson, supra note 5, at 380 (explaining why OPA did not necessarily cure conflict between federal and state oil spill laws). The OPA allowed application of state law in certain areas “without fully clarifying how federal and state law were to interact.” Swanson, supra note 5, at 380.
The Supreme Court most recently addressed the battle between federal and state authority of oil spill governance in the seminal decision of United States v. Locke (Locke). In Locke, the Court limited the degree to which state rules on oil spill prevention can avoid federal preemption. Locke concerned the validity of the State of Washington’s oil spill prevention laws involving oil tanker design, equipment, reporting, and operating requirements. The Court compared Washington’s law to both the PWSA and the OPA and concluded federal laws would almost always preempt conflicting state laws regarding maritime oil commerce. Locke provided for the preservation of state laws in light of the federal laws if they concerned the liability of oil spills. The Court, however, strongly rejected state involvement in the operation, manning, equipping, and construction of oil-transporting vessels.

99. Locke, 529 U.S. at 94 (identifying and explaining federal preemption issue). The court stated, “Today we must determine whether these more recent state laws can stand despite the comprehensive federal regulatory scheme governing oil tankers.” Id.

100. See Brooks, supra note 5, at 262 (describing Court’s ruling in Locke to strongly reflect favoring of federal authority).

101. Locke, 529 U.S. at 97 (discussing state regulations at issue). The Court noted Washington’s coastal waters were subject to large amounts of oil transport due to its vicinity to major waterways and subsequent role as a shipping hub for the oil industry. Id. at 95. Because of the vast amount of oil transported throughout Washington’s waters, the state established strict spill prevention standards to provide “the best achievable protection [ ] from damages caused by the discharge of oil.” Id. at 97 (internal quotation marks omitted).

102. See id. at 107 (upholding long-established principle from Ray that federal law will preempt state law in maritime commerce regulation). The Court noted, “state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.” Id. at 108. The test to determine the validity of state oil regulation laws depends on whether local laws are consistent with federal statutes, which are written to ensure uniformity of regulation for maritime commerce. Id. The Court pointed to the PWSA, reiterating that Title I of the Act gives states some leeway in regulating local ports and waters, but Title II strictly requires the promulgation of uniform, national rules regarding the general design, operation, and seaworthiness of oil-transporting vessels. Id. at 108-99.

103. Id. at 105 (discussing Court’s reasoning). “The evident purpose of the saving clauses is to preserve state laws which, rather than imposing substantive regulation of a vessel’s primary conduct, establish liability rules and financial requirements relating to oil spills.” Id.

104. Id. (confirming OPA saving clauses apply only to state oil spill liability laws, not vessel operation, design, or manning guidelines).
C. Introducing NEPA: Recognizing a Newfound Environmental Commitment

As oil spill regulation of United States’ coastal waters gained increasing attention, the introduction of NEPA began to revolutionize the landscape of environmental law in the United States. NEPA presented ambitious political goals and unprecedented initiatives, illustrating the federal government’s newfound commitment to protecting the environment. The implementation of NEPA silenced the critics averring federal agencies lacked direction and incentive to incorporate environmental values into agency actions. Referred to as “our basic national charter for protection of the environment,” NEPA established a basic policy to ensure the government gave suitable consideration to the environment before undertaking any major federal action that might pose environmental risk. In one respect, NEPA directs administrative agencies to consider every significant environmental impact from proposed actions. Additionally, NEPA ensures each agency notifies the pub-


107. See Dreher, supra note 4, at 2 (discussing factors contributing to NEPA’s creation). It became clear agencies were instituting actions that would come to have “irreversible consequences” in causing environmental harm. Id. NEPA was created to minimize this harm by ordering agencies to adequately consider the impact their actions might have on the environment. Id.

108. 40 C.F.R. § 1500.1(a) (2011) (stating basic purpose of NEPA is to protect environment).


110. Balt. Gas and Elec. Co., 462 U.S. at 97 (discussing NEPA’s initial aim of obligating agencies to consider environmental consequences any agency actions may have).
lic that it gave proper consideration to relevant environmental concerns as a part of their decision-making process.\textsuperscript{111}

NEPA provides a straightforward procedural framework to fulfill its environmental objectives in a simple and constructive manner.\textsuperscript{112} The most significant NEPA requirement directs all federal agencies to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment.\textsuperscript{113} This is accomplished through the preparation of an EIS or EA.\textsuperscript{114} An EIS addresses all apparent adverse environmental impacts of a proposed action, acknowledges avenues of possible mitigation alternatives, identifies what kind of resources would have to be utilized, and responds to outside parties’ comments on the issue.\textsuperscript{115}

The Council on Environmental Quality (CEQ), an organization created by NEPA, advises the President on issues relating to environmental quality.\textsuperscript{116} The CEQ promulgates regulations to guide agencies when determining which actions require the preparation of an EIS.\textsuperscript{117} These regulations also allow for the more limited analysis of an EA.\textsuperscript{118} An agency should prepare an EA when it

\textsuperscript{111} Id. (discussing NEPA’s second goal of ensuring public is kept informed of all environmental impacts of proposed agency actions); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 392, 349 (1989) (observing availability of environmental information to public is critical as public’s response can potentially affect agency decision making).

\textsuperscript{112} See 42 U.S.C. § 4332(C)(i)-(v) (listing steps federal agencies must take when considering environmental impacts of actions); see also Alm, supra note 25 (discussing simple procedural structure of NEPA established to carry out substantial environmental goals); Tripp & Alley, supra note 105, at 79 (describing NEPA process as simple and “straightforward”).

\textsuperscript{113} See 42 U.S.C. § 4332(C) (requiring proposals for federal actions that significantly affect environment to contain detailed statements noting environmental impacts, adverse environmental effects, and any potential alternatives to action proposed); see also Dreher, supra note 4, at 2 (discussing environmental assessment measures to be NEPA’s “action-forcing mechanism” to reduce environmental damage stemming from federal agency actions).

\textsuperscript{114} See 42 U.S.C. § 4332(C) (describing factors to be taken into consideration for NEPA environmental analysis).

\textsuperscript{115} Id. (listing statutory requirements of EIS); Robertson, 490 U.S. at 351-52 (discussing EIS requirements).

\textsuperscript{116} See 42 U.S.C. § 4342 (creating CEQ). The CEQ was established to assist the President in “formulat[ing] and recommend[ing] national policies to promote the improvement of the quality of the environment.” Id.

\textsuperscript{117} See generally 42 U.S.C. § 4332(C) (noting requirements of EIS); 40 C.F.R. § 1507.3 (2011) (explaining specific procedures agencies must abide by in preparing EIS). NEPA commands that any federal agency action affecting the quality of the environment requires “a detailed statement by the responsible official on [ ] the environmental impact of the proposed action[.]” 42 U.S.C. § 4332(C).

\textsuperscript{118} See 40 C.F.R. § 1508.9 (2011) (setting forth requirements for less intensive analyses of EA).
is uncertain whether the potential impacts of a project are environmentally significant. NEPA imposes these environmental analysis requirements on agencies with the hope that an enhanced knowledge base will cause agencies to make more informed and less environmentally damaging decisions.

Agencies can identify actions that do not “have a significant effect on the human environment” as categorical exclusions (CEs). By designating an action as a CE, the agency does not have to prepare an EIS or EA. Agency reliance on CEs to evade any sort of environmental analysis regarding agency actions, however, is often the subject of legal challenges. Under the APA, NEPA violations are subject to judicial review, and courts have the authority to decide whether an agency’s failure to comply with the

119. See Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004) (noting CEQ regulations permitted agencies to conduct more limited environmental analysis in EA rather than EIS). In an EA, an agency is required to briefly analyze whether the preparation of an extensive EIS is necessary. Id. If the agency determines an EIS is not required under the applicable CEQ regulations, it can issue a “finding of no significant impact (FONSI),” which presents the reasons the action will not have a significant impact on the human environment. Id. at 757-58 (internal quotation marks omitted).

120. 40 C.F.R. § 1500.1(c) (2011) (explaining NEPA’s goals); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (noting NEPA requires agencies to adequately identify and evaluate all environmental costs and prohibits uninformed and unwise decisions); Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (noting when agencies make decisions without considering environmental impacts, “harm that NEPA intends to prevent has been suffered”); Susannah T. French, Judicial Review of the Administrative Record in NEPA Litigation, Comment, 81 CALIF. L. REV. 929, 946-47 (July 1993) (describing purpose of NEPA’s educational function). The requirement of accurate EAs and EISs is important because without public knowledge of environmental risks, NEPA is unable to obtain desired levels of environmental protection. French, supra, at 947. “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

121. 40 C.F.R. § 1508.4 (2011) (defining categorical exclusion); see also 40 C.F.R. § 1501.4(a)(2) (stating federal agencies may not have to require EIS or EA if proposed regulations fall into categorical exclusion). Categorical exclusions include actions “which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” 40 C.F.R. § 1508.4.

122. See Town of Marshfield v. FAA, 552 F.3d 1, 2-4 (1st Cir. 2008) (holding CE regarding aircraft rerouting measures employed by FAA exempted agency from preparing EA or EIS); Wilderness Watch & Pub. Embs. for Envtl. Responsibility v. Mainella, 375 F.3d 1085, 1094-95 (11th Cir. 2004) (explaining applicability of CEs to except agencies from usual NEPA review procedures).

123. See French, supra note 120, at 947 (observing typical environmental challenges to agency decisions involve NEPA violations and include alleged failures to prepare EIS).
procedural NEPA obligations constitutes a harmless error.\textsuperscript{124} If the court concludes previous environmental studies illustrate the same impact analysis an EA or EIS would, it renders harmless the failure to provide either report and waives the obligation.\textsuperscript{125}

Despite its substantive foundation, the Supreme Court has held NEPA is primarily a procedural law.\textsuperscript{126} NEPA cannot require agencies to favor environmental concerns over other considerations in assessing agency actions.\textsuperscript{127} Instead, NEPA only mandates an agency take a "hard look" at the environmental consequences of the proposed actions.\textsuperscript{128} In essence, NEPA lacks the power to compel agencies to act in any particular way.\textsuperscript{129} This largely procedural quality of NEPA has resulted in criticism, leading to assertions that NEPA is ineffective, time consuming, and expensive, especially

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\textsuperscript{124} See Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 61 (1st Cir. 2001) (applying doctrine of harmless error to judicial review of administrative actions). The First Circuit noted that in certain circumstances, it is illogical to require an environmental analysis when the agency already made a reasoned finding that the environmental effects of an action would be \textit{de minimis}. \textit{Id.} at 61-62. In such circumstances the court has the authority to decide the error was harmless and waive statutory requirements, so long as environmental effects were reasonably taken into account. \textit{Id.} at 62.

\textsuperscript{125} See id. (noting as long as negative environmental effects were reasonably taken into account it is not necessary to demand another environmental analysis). Once an action's consequences are analyzed and found to be absent, agency mistakes can be disregarded if it is clear that an additional analysis would only cause further expense and delay. \textit{Id.} at 61-62.


\textsuperscript{127} See Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (holding role of courts is only to ensure agencies complied with NEPA procedures in assessing environmental consequences, not to mandate certain course of action).

\textsuperscript{128} See, e.g., Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) (mandating agencies to comply with NEPA's environmental assessment obligations to properly inform agency and public about any and all environmental harm that may ensue); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (emphasizing courts cannot replace agency determinations with their own judgment regarding environmental consequences of its agency actions so long as agency reached such determinations lawfully).

\textsuperscript{129} See Dreher, \textit{supra} note 4, at 3 (noting NEPA does not require federal agencies to select most environmentally-friendly option).\end{flushright}
when courts are inclined to defer to agency findings.\(^{130}\) Nonetheless, NEPA has met its goal of instilling a degree of environmental awareness in federal agencies over the past forty years of its existence.\(^{131}\)

IV. NARRATIVE ANALYSIS

"In this case, our task begins and ends with the issue of NEPA compliance."\(^{132}\)

In *Buzzards Bay*, the United States Court of Appeals for the First Circuit recognized the significance of the distinction between federal and state preventative measures for oil spill protection.\(^{133}\) The First Circuit, however, declined to address the familiar federal pre-emption question surrounding oil spill governance, but instead emphasized the role of NEPA compliance for the promulgations of federal Coast Guard regulations.\(^{134}\)

A. Are Agencies Ever Exempt from NEPA Obligations? The Coast Guard’s Supplemental Procedures

The First Circuit initially noted the Coast Guard’s obligation to conduct an EA or EIS under NEPA can at times be relinquished if


\(^{131}\) See Envtl. Law Inst., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* 5-8 (2008) [herein after NEPA Success Stories], [available at http://ceq.hss.doe.gov/nepa_information/NEPA_Success_Stories.pdf](http://ceq.hss.doe.gov/nepa_information/NEPA_Success_Stories.pdf) (asserting NEPA has changed governmental decision-making for better and procedures employed by NEPA achieved many environmental successes); see also Dreher, * supra* note 4, at 4-7 (discussing instances of NEPA success). Dreher contends, "NEPA has unquestionably improved the quality of federal agency decision-making in terms of its sensitivity to environmental concerns." Dreher, * supra* note 4, at 4.

\(^{132}\) United States v. Coal. for Buzzards Bay, 644 F.3d 26, 31 (1st Cir. 2011) (focusing on NEPA compliance as main issue driving First Circuit’s analysis).

\(^{133}\) See id. at 28 (observing overarching issue was federal preemption of state oil-transporting vessel laws). The First Circuit alluded to the federal preemption issue that seemingly guided the case, and noted the oil spill in Buzzards Bay “sparked a pitched battle between federal and state sovereigns over the nature of preventative measures needed to safeguard against the risk of oil spills.” *Id.*

\(^{134}\) *Id.* (deciding to ignore federal preemption issue and instead address whether federal oil spill rules promulgated by the Coast Guard complied with NEPA procedures).
the action at issue is "categorically excluded." The Coast Guard included such exclusions in its supplemental procedures, codified in Commandant Instruction M16475.ID (COMDTINST M16475.ID). The court agreed the 2007 Rule did meet some of the exclusions listed in COMDTINST M16475.ID, but also noted that a CE designation does not automatically relieve an agency of the obligation to prepare either an EA or EIS. Moreover, COMDTINST M16475.ID notes there are instances in which an action may be excluded, but also constitute an "extraordinary circumstance," and thus still require the preparation of an EA or EIS.

The Coast Guard asserted it possessed the discretion to determine whether any of the extraordinary circumstances applied to the 2007 Rule. Exercising this exclusive authority, the Coast Guard concluded none of the extraordinary circumstances applied to the promulgation of the 2007 Rule, and accordingly the preparation of any type of environmental analysis was not necessary. The court, however, disagreed. The court noted that in addition to the Coast Guard’s own supplemental procedures, the Coast Guard also must adhere to an incorporated Department of Transportation order (DOT order). The DOT order, which was included in COMDTINST M16475.ID, provides another set of extraordinary circumstances. These circumstances overlap the Coast Guard’s supplemental procedure and specifically mandate an EA or EIS if a

135. See id. at 31 (explaining pertinence of categorical exclusions). When a proposed action does not have a significant effect on the environment it can be exempted from preparing an EIS or EA. Id. at 32.

136. Id. at 32 (noting Coast Guard adoption of supplemental procedures); see also COMDTINST M16475.ID, supra note 76 (listing thirty-five applicable CEs).

137. Buzzards Bay, 644 F.3d at 32 (stating agency may still be required to conduct EA or EIS for final rule despite applicability of CE). The Coast Guard pointed to two CEs applicable to the 2007 Rule: (1) the regulation established, disestablished or changed Regulated Navigation Areas and security or safety zones, and (2) the regulation aided navigation. Id.

138. Id. at 32 (discussing Coast Guard procedures that noted CEs may involve extraordinary circumstances and require EA or EIS despite designation as exclusion). The court cited CEQ regulations require preparation of an EA or EIS if the action being excluded has a "significant environmental effect." Id. (citation omitted).

139. Id. at 33 (discussing Coast Guard contention that it has ability to interpret its own supplemental procedures).

140. Id. at 32-33 (discussing Coast Guard implication that its NEPA compliance procedures are "subject to creative interpretation").

141. Id. at 33 (noting agency’s interpretations of its own regulations cannot be wholly inconsistent with provisions of regulations at issue).

142. Buzzards Bay, 644 F.3d at 32 (describing applicability of DOT order).

143. Id. at 32 (discussing extraordinary circumstances mandating EA or EIS preparation as listed in Coast Guard procedures and additional DOT order).
normally excluded circumstances.\textsuperscript{144}

In \textit{Buzzards Bay}, the Coast Guard argued that even though it explicitly used its supplemental procedures to guide its promulgation of the 2007 Rule and ensure compliance with NEPA, the preexisting compliance procedures listed in COMDTINST M16475.ID were subject to creative interpretation.\textsuperscript{145} Additionally, because reassignment moved the Coast Guard from the DOT to the Department of Homeland Security in 2003, it had the authority to ignore the DOT order because the order was no longer relevant to their supplemental procedures.\textsuperscript{146} The First Circuit rejected these arguments and held that while agencies have the power to interpret their own regulations, they cannot use this power to read a regulatory provision in a way "utterly contrary to its plain language."\textsuperscript{147}

The court reasoned the Coast Guard attempted to disregard the plainly stated provisions of its own established procedural requirements, and such agency interpretations do not warrant judicial deference.\textsuperscript{148} Further, the court noted the Coast Guard never informed the public that NEPA procedures changed after its reassignment to the DHS, explained the DOT order would no longer be included in COMDTINST M16475.ID, or announced its departure from the extraordinary circumstances analysis.\textsuperscript{149} Because the Coast Guard incorporated the DOT order in COMDTINST

\begin{itemize}
\item \textsuperscript{144} \textit{Dep’t of Transp., Order DOT 5610.1C, 23, Procedures for Considering Environmental Impacts} (1979), available at \url{https://www.transportationresearch.gov/dot/ftwa/ReNepa/Lists/aReferences/Attachments/246/5610.1c.pdf} (listing circumstances when agency actions may not require EIS or EA).
\item \textsuperscript{145} \textit{Buzzards Bay}, 644 F.3d at 32-33 (summarizing Coast Guard’s argument concerning interpretation of extraordinary circumstances listed in supplemental procedures). Exemplifying the Coast Guard’s attempt to interpret their supplemental procedures is a provision making an extraordinary circumstance applicable when an agency action "is likely to be highly controversial in terms of scientific validity or public opinion." \textit{Id.} at 33, n.4. The Coast Guard sought to interpret this provision as applicable when there is a "scientific controversy," which completely disregards the "public opinion" language in the same provision. \textit{Id.}
\item \textsuperscript{146} \textit{Id.} at 32-33 (noting reassignment of Coast Guard from DOT to DHS in relation to creative interpretation argument).
\item \textsuperscript{147} \textit{Id.} at 33 (explaining First Circuit’s decision to not allow Coast Guard to interpret its supplemental procedure regarding extraordinary circumstances so broadly).
\item \textsuperscript{148} \textit{Id.} at 33 (discussing Coast Guard’s interpretation of COMDTINST M16475.ID). The court held the Coast Guard’s interpretation of COMDTINST M16475.ID "defies logic and exceeds the bounds of reasonable agency interpretations entitled to deference." \textit{Id.}
\item \textsuperscript{149} \textit{Id.} at 33 (describing Coast Guard’s failure to provide public with new information regarding its supplemental procedures). The court noted agencies must present proposals to the public regarding any change in their rulemaking process so the public will have a fair opportunity to express their views. \textit{Id.} Here,
\end{itemize}
M16475.ID, the extraordinary circumstances listed in both documents were applicable. The First Circuit concluded the issue of NEPA compliance in Buzzards Bay must be based on the express content of COMDTINST M16475.ID and the DOT order. The court thereby rejected the Coast Guard’s stretched interpretation of its own procedures.

B. Caught in the Act: The Coast Guard Shirks Its Duty and Violates NEPA

Once the First Circuit decided to rely on COMDTINST M16475.ID to determine whether the Coast Guard complied with NEPA, the court then addressed whether the Coast Guard acted arbitrarily by relying on a CE to avoid conducting any considerable environmental analysis. COMDTINST M16475.ID included a standard environmental checklist providing factors the Coast Guard must consider when determining whether an extraordinary circumstance existed, which thus prevented the Coast Guard from relying on a CE. The completed checklist contained negative responses to whether the proposed action is “likely to have a significant effect on public health or safety,” whether the proposed action has the potential “to be highly controversial in terms of scientific validity or public opinion,” and whether the proposed action would potentially violate state environmental law.

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150. See Buzzards Bay, 644 F.3d at 32 (explaining DOT order continues to govern Coast Guard actions despite reassignment of Goad Guard from DOT to DHS). The Coast Guard listed the extraordinary circumstances to include: agency actions affecting health and public safety; those touching upon a site near a unique characteristic of the geographic area; those likely to be highly controversial in terms of scientific validity or public opinion; and those creating a potential or threatened violation of state law. Id. at 35.

151. Id. at 33-34 (discussing Coast Guard’s interpretation of what constitutes extraordinary circumstance relating to NEPA compliance). The First Circuit held that because they were dealing with the public, the Coast Guard is “bound by its express reliance on the document that includes the incorporated DOT order and makes no reference to the supposed DHS policy.” Id. at 33.

152. Id. at 34 (holding argument of creative interpretation rendered useless because Coast Guard failed to provide any sort of notice that procedures changed).

153. See id. at 34-35 (addressing potential NEPA violation issue).

154. Id. at 34 (explaining how Coast Guard utilized supplemental procedures to ensure compliance with NEPA).

155. Buzzards Bay, 644 F.3d at 34 (internal quotation marks omitted) (describing content of COMDTINST M16475.ID relating to extraordinary circumstance analysis).
The Coast Guard argued that because Massachusetts never objected to the proposed 2007 Rule during the notice-and-comment period, it could rely on a CE exempting it from preparing an EA or EIS. The First Circuit, however, disagreed and asserted that during the rulemaking process, “ferocious and widespread opposition” to the Coast Guard existed regarding the agency’s approach to oil vessel regulation in Buzzards Bay. The Coast Guard recognized this opposition but wrote it off as “mere[ly] political.” In analyzing the Coast Guard’s construal of the negative public sentiment surrounding the 2007 Rule, the court focused on the extraordinary circumstances exception for proposed actions that are “likely to be highly controversial in terms . . . public opinion.” The court held the Coast Guard’s decision to disregard the apparent controversy surrounding oil vessel regulation in Buzzards Bay and failure to conduct further environmental analysis was arbitrary and capricious. The Coast Guard’s reliance on a CE, therefore, was inappropriate.

156. See id. (summarizing Coast Guard’s argument that it was exempt from preparing environmental analysis in their promulgation of 2007 Rule); see also 5 U.S.C. § 553 (2006) (mandating notice and comment requirements of agency rulemaking process under APA); La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1177 (1st Cir. 1992) (describing notice and comment provision under § 553 of APA). The Coast Guard relied heavily upon Department of Transportation v. Public Citizen, a 2004 Supreme Court decision holding that when a party challenges an agency’s compliance with NEPA it must structure its participation to effectively alert the agency of its disagreement. Buzzards Bay, 644 F.3d at 34. The First Circuit countered, however, and held the agency bears the responsibility to ensure its actions comply with NEPA. Id. The APA requires an agency publish proposed substantive regulations and provide for a period of public consideration and comment. Sullivan, 965 F.2d at 1177.

157. See Buzzards Bay, 644 F.3d at 36 (asserting public opposition to 2007 Rule was obvious).

158. Id. (discussing Coast Guard’s classification of public comments as political). The First Circuit responded that citizens justifiably rely on political leaders to represent their concerns, and the controversy at issue raised potentially serious environmental issues. Id. Thus, it was the exact type of controversy the Coast Guard guidelines directed decision makers to consider. Id.

159. Id. at 35 (emphasizing proposed federal regulations were highly controversial amongst public). While other extraordinary circumstance exceptions may have applied, an extreme controversy clearly existed so it was unnecessary to address the other exceptions. Id.

160. See id. at 35 (discussing holding regarding Coast Guard’s interpretation of extraordinary circumstances exception and reliance on CE for proposed 2007 Rule). The court reviewed the applicability of the extraordinary circumstances exception using the Coast Guard’s guidelines. Id. COMDTINST M16475.1D instructed decision makers “not to interpret the word ‘environmental’ too narrowly” so they would not miss a controversial issue that should be dealt with through NEPA procedures. Id.

161. Id. at 36 (holding Coast Guard’s reliance on CE was erroneous because extraordinary circumstances exception was applicable to 2007 Rule). Given that
The Coast Guard was fully aware of the serious disagreement regarding the displacement of state protections afforded by MOSPA by the federal 2007 Rule. The Coast Guard also knew the environmental harm would likely continue if its proposed federal standards became effective. The court additionally recognized the Coast Guard was involved in litigation relating to another matter concerning the environmental effects on Buzzards Bay at the time of the proposed 2007 Rule. According to the court, this should have alerted the Coast Guard of the likelihood of serious disagreement over its latest oil vessel regulations. The First Circuit concluded the Coast Guard's dismissal of reasonable environmental concerns did not fulfill the NEPA procedural obligations; therefore, the Coast Guard acted arbitrarily and capriciously.

C. What Makes an Error Harmless?

The First Circuit concluded its discussion by addressing the Coast Guard's final argument that its failure to prepare an EA or EIS constituted harmless error. The Coast Guard contended it previously conducted studies that were functionally equivalent to an EIS or EA during the rulemaking process; thus, its failure to produce an environmental analysis of the Buzzards Bay vessel regulation under NEPA procedures was harmless. The 2007 Rule was highly controversial and probably created a threat to existing state law, the Coast Guard was obligated at the very least to determine whether further environmental analysis was required. Id.

162. Buzzards Bay, 644 F.3d at 36 (discussing Coast Guard's knowledge of widespread public opinion that protections beyond those afforded in 2007 rule were necessary to prevent environmental harm to Buzzards Bay).

163. Id. (noting many believed proposed rule threatened to decrease protection against oil spills in Buzzards Bay). "In the view of many, the proposed rule threatened to decrease materially the level of protection against oil spills in Buzzards Bay." Id.

164. Id. (noting Coast Guard's involvement in prior controversial matter regarding environmental regulation of Buzzards Bay).

165. Id. (asserting existence of previous Buzzards Bay conflicts should have alerted Coast Guard of serious disagreement about displacing state law).

166. See id. (asserting Coast Guard’s failure to address any meaningful environmental concern was arbitrary and capricious).

167. Buzzards Bay, 644 F.3d at 37 (addressing harmless error argument).

168. Id. (discussing Coast Guard's contention that EA or EIS would have produced same results as reached in previously conducted environmental analyses); see also Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 61 (1st Cir. 2001) (holding failure to produce formal environmental assessment was harmless because agency previously determined environmental effect of action would be de minimis). The Coast Guard relied heavily on a First Circuit decision to support its conclusion that it was extraneous to prepare an additional EA or EIS because it previously determined the environmental impact of the 2007 Rule would be de minimis. Buzzards Bay, 644 F.3d at 37.
recognized that in certain circumstances, it might be pointless to require an agency to prepare an EA or EIS when the agency already made a "reasoned finding that the environmental effects are de minimis." The court explained, however, that these circumstances did not exist in Buzzards Bay. Here, the Coast Guard mentioned two prior local studies when promulgating the 2007 Rule, but it did not confirm the continued environmental relevance of those studies.

The Coast Guard suggested the public comments on the environmental effects of the 2007 Rule constituted a sufficient analysis of the potential impact of the federal regulations at issue. The First Circuit rejected this argument and held the public comments may have brought the environmental concerns to the Coast Guard’s attention, but they did not "bridge the gap between agency awareness of potentially detrimental environmental effects and agency analysis of those effects." NEPA obligates agencies to take a "hard look" at the potential environmental effects of a proposed action, and reliance on public comments submitted without notice of meaningful environmental analysis fails to fulfill this requirement.

The court found the Coast Guard did not perform any environmental analysis in establishing its oil spill regulations for vessel transport in Buzzards Bay, and such a mistake did not constitute a

169. See Buzzards Bay, 644 F.3d at 37 (noting First Circuit’s previous decision concluding EAs or EISs may not be required in all circumstances); see also Save Our Heritage, 269 F.3d at 61-62 (holding agency’s failure to complete formal assessment under NEPA is harmless error in certain instances). As long as significant environmental effects have previously been adequately taken into account, there is no need to require a formal EA or EIS. Id.

170. Buzzards Bay, 644 F.3d at 38 (noting Coast Guard did not perform any environmental analyses, thereby distinguishing Buzzards Bay from Save Our Heritage).

171. Id. at 37-38 (discussing Coast Guard reliance on two previous studies to support the illogicalness EA or EIS). The Coast Guard cited a 1996 regional risk assessment expressing recommendations for regulated navigation areas, a 2003 safety assessment recognizing one way to lessen the risk of oil spills in Buzzards Bay was to establish requirements for escort tugs, and a 1999 regulatory assessment describing the potential impact of oil spills in the Puget Sound. Id.

172. Id. at 38 (addressing Coast Guard’s suggestion that public comments sufficiently compensate for missing EA or EIS).

173. Id. (discussing significance of preparing environmental analysis required by NEPA).

174. See id. at 31 (discussing role of judicial review in NEPA compliance analysis). Courts must make sure agencies take a "hard look" at the environmental consequences of any given action, and the First Circuit concluded that relying on public comments without producing any sort of substantial environmental analysis did not constitute a "hard look." Id. at 38.
harmless error.\textsuperscript{175} Thus, the Coast Guard failed to satisfy the procedural obligations of NEPA in establishing oil spill prevention provisions for vessel transport in Buzzards Bay.\textsuperscript{176} Declining to address the overarching preemption issue or the applicability of additional extraordinary circumstance exceptions, the court remanded \textit{Buzzards Bay} to the Coast Guard to adequately perform relevant NEPA obligations.\textsuperscript{177}

\section{Critical Analysis}

The \textit{Buzzards Bay} decision demonstrates a significant turning point in the development of oil spill regulation by recognizing state interests in an area of the law that has long been controlled by federal directives.\textsuperscript{178} In \textit{Buzzards Bay}, the First Circuit upset years of litigation focused on federal preemption of Massachusetts oil spill laws and utilized a loophole in the Coast Guard’s procedures to sidestep the issue of preemption altogether.\textsuperscript{179} By reinstating Massachusetts’ laws mandating strict standards for oil-transporting vessels in Buzzards Bay, the court acknowledged the widespread

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\textsuperscript{175} \textit{Buzzards Bay}, 644 F.3d at 38 (noting procedural shortcomings of Coast Guard’s promulgation of 2007 Rule).
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\textsuperscript{176} \textit{Id.} at 39 (holding Coast Guard’s failure to prepare environmental analysis of proposed regulations was not harmless and violated NEPA).
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\textsuperscript{177} \textit{Id.} (discussing common remedies for further proceedings when error is held to be not harmless). “Where, as here, an agency has failed to satisfy its obligations under the NEPA and its error is not demonstrably harmless, the appropriate remedy is a remand to the agency for performance of those obligations.” \textit{Id.} (citation omitted).
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\textsuperscript{178} \textit{See} id. at 28-29 (vacating injunction against enforcement of state oil spill prevention provisions); \textit{see also} United States v. Locke, 529 U.S. 89, 117 (2000) (asserting political responsibility for oil tanker transit belongs to Congress and Coast Guard to confront adoption of governing regulations to ensure adequate uniformity). The MOSPA provisions at issue are those the First Circuit reinstated to protect against oil spills by requiring a tugboat escort for all tank vessels transiting Buzzards Bay. \textit{Buzzards Bay}, 644 F.3d at 29. The state regulations also “demand[ed] the navigation watch on all tow vessels transiting Buzzards [B]ay . . . shall consist of at least 1 licensed deck officer or tow vessel operator.” \textit{Id.} at 30.
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\textsuperscript{179} \textit{See} Buzzards Bay, 644 F.3d at 28 (asserting court will not address preemption question in appeal). \textit{But cf.} Massachusetts II, 493 F.3d 1, 25 (1st Cir. 2007) (remanding to district court on preemption grounds); Massachusetts III, 724 F. Supp. 2d 170, 175 (Mass. Dist. Ct. 2010) (asserting Coast Guard’s errors were harmless); Massachusetts I, 440 F. Supp. 2d 24, 48 (Mass. Dist. Ct. 2006) (holding challenged Massachusetts state provisions preempted by federal Coast Guard regulations). The law of preemption “leaves the last word under Federal law regarding the formulation of regulations to control vessel traffic, to enhance vessel safety and to decrease environmental hazards in Buzzards Bay to the Coast Guard.” \textit{Massachusetts III}, 724 F. Supp. 2d at 175.
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environmental concern instigated by oil spills and emphasized the importance of establishing adequate preventative measures.  

A. No Preemption Here: How the First Circuit Dodged the Issue

When the First Circuit faced reconciling federal and Massachusetts oil-transporting vessel standards in Buzzards Bay, prior litigation focused primarily on the federal preemption issue. The district court consistently deemed the federal Coast Guard regulations as controlling when confronted with conflicting state laws, and the promulgation of the 2007 Rule bolstered this federal authority by expressly preempting certain oil vessel provisions of MOSPA. The First Circuit appeared to realize the more stringent manning and tug escort standards employed by Massachusetts could not overcome the predominating influence of federal authority guiding this area of oil spill regulation. The Commonwealth also recognized this preemptive roadblock and, unwilling to surren-
der, based its second appeal on the Coast Guard’s alleged violation of NEPA procedures.\textsuperscript{184}

The First Circuit arguably had two avenues to sustain the trend of partiality towards federal oil-transporting vessel regulation.\textsuperscript{185} First, the court could have relied upon the Coast Guard’s supplemental procedures and upheld the Coast Guard’s interpretation of CEs.\textsuperscript{186} The First Circuit previously relied upon such CEs to preclude agencies from conducting a traditional NEPA review.\textsuperscript{187} Alternatively, the court could have affirmed the district court’s judgment, which held that even though the Coast Guard erred in failing to prepare an EIS or an EA before promulgating its vessel regulations, the error was harmless.\textsuperscript{188} The First Circuit, however, opted to construe the NEPA standards narrowly by giving special weight to policy considerations and using the standards to fault the Coast Guard despite the considerable authority given to the federal

\textsuperscript{184} See Buzzards Bay, 644 F.3d at 30 (discussing Massachusetts’ claim that Coast Guard violated NEPA by failing to produce any formal environmental assessment); see also Massachusetts III, 724 F. Supp. 2d at 174 (discussing express preemption of MOSPA provisions). The Coast Guard’s enactment of the Final Rule left “no ambiguity regarding the intention to preempt MOSPA.” Massachusetts III, 724 F. Supp. 2d at 174. Thus, Massachusetts initiated a procedural attack alleging NEPA violations. \textit{Id.}

\textsuperscript{185} See 40 C.F.R. § 1501.4(a)(2) (2011) (exempting proposed action from environmental review if it comes within CE); see also Locke, 529 U.S. at 89 (observing it is chiefly Coast Guard’s responsibility to determine requisite degree of regulation of oil tanker transit to appropriately safeguard environment’s coastal waters); Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 61 (1st Cir. 2001) (holding failure to prepare environmental assessment can be considered harmless, and remand may be unnecessary if agency already reasonably found proposed action’s environmental effects were insignificant).

\textsuperscript{186} See Buzzards Bay, 644 F.3d at 34 (discussing Coast Guard’s reliance on CEs listed in supplemental procedures to avoid preparation of environmental analysis); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 352, 358-59 (1989) (holding agencies are entitled to deference in interpreting their own actions so long as interpretation was consistent with controlling regulations). Because Massachusetts never objected to the Coast Guard’s assertion that the proposed regulations were not highly controversial or would not potentially violate state law, the Coast Guard believed it had no reason to know the regulations were creating a controversy. \textit{Buzzards Bay}, 644 F.3d at 34.

\textsuperscript{187} See Town of Marshfield v. FAA, 552 F.3d 1, 3-4 (1st Cir. 2008) (holding CEs for aircraft rerouting measures employed by FAA exempted agency from preparing EA or EIS). The court held the previous noise studies conducted by the FAA to measure the impact of rerouting measures on the surrounding communities sufficiently established that no significant environmental impact would result from the new regulations. \textit{Id.}

\textsuperscript{188} See Save Our Heritage, 269 F.3d at 61-62 (internal citations omitted) (noting agency error might be harmless if requirement of agency to comply with previously evaded NEPA procedures “would accomplish nothing beyond further expense and delay”).
government in the area of oil spill regulation. By utilizing matters of public concern, highlighting the potential adverse environmental effects, and emphasizing the policy issues surrounding oil spill prevention provisions, the First Circuit dodged the overarching preemption issue, found the Coast Guard in violation of NEPA, and reinstated the more stringent state standards for oil-transporting vessels.

B. NEPA Prevails Over Forty Years Later

The First Circuit’s application of NEPA in Buzzards Bay illustrates the substantive impact the procedural statute can have on controversial environmental issues. Often subject to criticism for its inability to contribute to actual environmental development, the First Circuit employed NEPA to initiate action to strengthen federal oil spill regulation and prevention measures. Courts and Congress have largely placed matters of oil spill regulation and the oversight of oil-transporting vessels in the purview of the federal government. Courts and Congress have also recognized state interests in the regulation of coastal waters, especially when state sovereigns have legitimate grounds to safeguard their local resources

189. See Buzzards Bay, 644 F.3d at 35-36 (declining to rely on Coast Guard’s interpretation of CE). The First Circuit alluded to the widespread public concern for lower federal oil tanker standards, but concluded the controversy generated by the Coast Guard regulations was very apparent. Id. at 36. The court also emphasized the existence of public opposition to the 2007 Rule in holding that the Coast Guard’s failure to conduct any sort of substantial environmental analysis was not harmless. Id. at 37. The potential impacts of the regulations were enhanced due to the extensive levels of environmental controversy surrounding disagreement between federal and state oil spill prevention provisions. Id. at 36.

190. See id. at 39 (summarizing holding of case).

191. See id. at 39 (illustrating NEPA’s impact on controversial environmental issue—oil spill regulation); see also Dreher, supra note 4, at 7 (noting NEPA’s function as “critical tool” in addressing major environmental decisions that affect lives and communities of public at large).

192. See Dreher, supra note 4, at 11-15 (addressing arguments that NEPA is ineffective and counter-productive, time-consuming, mismanages resources, and generates wasteful litigation); Tripp & Alley, supra note 105, at 81 (asserting many view NEPA to be more burdensome than valuable). But see Buzzards Bay, 644 F.3d at 38-39 (finding NEPA violation and remanding to Coast Guard for more thorough environmental analysis). The First Circuit emphasized conducting an adequate assessment of environmental impacts through an EA or EIS was one of NEPA’s central objectives, and the Coast Guard’s shirk of this duty prevented full disclosure of its proposed action and potential to cause environmental damage. Buzzards Bay, 644 F.3d at 38.

and protect against the risk of environmental harm. In Buzzards Bay, NEPA enabled the First Circuit to reconcile these competing interests by holding state laws will govern oil-transporting vessels in Massachusetts until the Coast Guard adequately considers all environmental effects and impacts its regulations may have.

The heightened judicial scrutiny employed by the First Circuit demonstrates NEPA's potential to result in environmentally preferable actions through compliance with its procedural requirements. Because the Coast Guard failed to produce an EA or EIS assessing the potential effects of its oil-transporting vessel manning and escort requirements, the public lacked sufficient information regarding the potential impacts of the Coast Guard's federal regulations. This is one of NEPA's central purposes, and the court appropriately upheld this purpose by finding that the Coast Guard failed to comply with the requisite NEPA procedures. The conflict in Buzzards Bay presented the very real possibility that a formal

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194. See 46 U.S.C. § 3703(a), (c) (2006) (requiring Coast Guard to consider views of "officials of State and local governments" and "representatives of environmental groups") on arriving at national oil-transporting vessel standards); Ray v. Atl. Richfield Co., 435 U.S. 151, 164 (1978) (explaining states are not prevented from enforcing local laws as long as no federal laws are in direct conflict).

195. See Buzzards Bay, 644 F.3d at 39 (stating holding and remanding regulations back to Coast Guard demanding they comply with NEPA procedural requirements); see also Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (discussing negative effects of failing to prepare environmental analyses). In reaching its holding in Buzzards Bay, the First Circuit focused entirely on the issue of NEPA compliance. Buzzards Bay, 644 F.3d at 31. When agencies make decisions without considering environmental impacts, "the harm that NEPA intends to prevent has been suffered." Watt, 716 F.2d at 952.


197. See Buzzards Bay, 644 F.3d at 38 (reasoning Coast Guard's failure to perform any sort of environmental analysis on proposed action deprived public of relevant information regarding effects of federal oil spill prevention provisions).

198. See, e.g., Robertson, 490 U.S. at 352 (discussing complete and substantive environmental assessment is key component of informed agency action under NEPA); Dreher, supra note 4, at 3 (noting primary purpose of NEPA includes requirement of comparing environmental impacts of actions with potential alternatives to promote avoidance of "ill-considered" agency decisions).
assessment of the Coast Guard’s regulations would confirm the federal provisions pose a greater risk of oil spills to Massachusetts’ coastal waters than the stricter state provisions.\textsuperscript{199} Had the Coast Guard conducted such an assessment and presented the results to the public as required by NEPA, the possibility of these risks would have risen to the forefront.\textsuperscript{200} This would have created a greater incentive for the Coast Guard to work with the Commonwealth and the public to develop more stringent oil-transporting vessel requirements.\textsuperscript{201}

The Buzzards Bay decision exemplifies NEPA’s ability to improve the quality of federal agency decisions in light of environmental concerns.\textsuperscript{202} Critics of NEPA argue NEPA procedures are time consuming and ineffectual, push to minimize the responsibility of agencies to evaluate potential environmental impacts, and limit public participation in the environmental assessment process.\textsuperscript{203} Buzzards Bay refutes these criticisms, confirms that NEPA can be effective, and encourages often narrow-minded agencies to display sensitivity toward controversial environmental issues.\textsuperscript{204} The First Circuit properly interpreted NEPA’s procedural requirements and effectively pressured the Coast Guard to act with greater consideration of environmental impacts when addressing oil spill

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\textsuperscript{199} See Buzzards Bay, 644 F.3d at 36 (observing Coast Guard’s knowledge of opposition to 2007 Rule and plausible fear that environmental harm may result if protections afforded by MOSPA were replaced with proposed federal standards governing manning and escort requirements of oil-transporting vessels).

\textsuperscript{200} See Dreher, \textit{supra} note 4, at 3-4 (explaining public participation fostered by NEPA can significantly contribute to EIS process and aid agencies in addressing environmental issues).

\textsuperscript{201} See id. (noting allowance for public participation as part of NEPA procedures often provides agencies with valuable information not otherwise obtained); NEPA Success Stories, \textit{supra} note 131, at 6 (asserting improved environmental actions result when federal agency experts take public perspectives into account as part of decision-making process).

\textsuperscript{202} See Dreher, \textit{supra} note 4, at 4 (discussing instances where proposed federal actions posing serious environmental consequences were improved due to NEPA procedures).

\textsuperscript{203} Id. at 11-14 (discussing widespread criticisms of NEPA). Many people believe that despite the well-intentioned purposes of NEPA, its procedures do not actually have a considerable effect on ultimate decisions agencies make. Id. at 11.

\textsuperscript{204} See Buzzards Bay, 644 F.3d at 39 (reinstating Massachusetts’ laws providing strict standards for oil-transporting vessels in Buzzards Bay and ordering Coast Guard to correctly perform their failed environmental assessment obligations under NEPA); see also 40 C.F.R. § 1500.1(c) (2011) (summarizing purpose of NEPA). "NEPA's purpose is not to generate paperwork... but to foster excellent action." § 1500.1(c).
prevention measures. The court's unwillingness to defer to the Coast Guard's eschewal of the pressing environmental risk posed by relaxed manning and escort standards for oil-transporting vessels demonstrates the NEPA's ability to contribute to future environmentally-friendly actions.

VI. IMPACT

In light of the First Circuit's holding in Buzzards Bay, the Coast Guard will be forced to reconsider its governance of manning and tugboat escort requirements for Buzzards Bay. The First Circuit's conclusion that the Coast Guard was in violation of NEPA procedures reflects a heightened concern toward oil spill regulation and commands agencies to give environmental concerns significant consideration when undertaking agency action. Buzzards Bay calls the federal government to action by encouraging it to reform its approach to oil spill regulation, and represents a momentous step toward cleaner coastal waters.

Massachusetts will now have the opportunity to work alongside the Coast Guard as it prepares an EA or EIS to assess the potential environmental impacts of the proposed 2007 Rule. Given the


206. See Buzzards Bay, 644 F.3d at 38-39 (stating Coast Guard's failure to study environmental impact was not harmless); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) (mandating agencies comply with NEPA's environmental assessment obligations to properly inform agency and public about any and all environmental harm that may ensue); Dreher, supra note 4, at 24 (asserting NEPA is foundation for environmental protection and informed federal decision making only if agencies comply with its procedural framework). "The administrative record, viewed as a whole, does not show that the Coast Guard ever analyzed, or even adequately studied, the environmental impact of its proposed action." Buzzards Bay, 644 F.3d at 38-39.

207. See Buzzards Bay, 644 F.3d at 39 (remanding case to Coast Guard and mandating performance with procedural NEPA obligations).

208. See Wilderness Watch & Pub. Emps. for Envtl. Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) (emphasizing NEPA requirements must be imposed before agency decisions are made to ensure all relevant environmental considerations were taken into account); Dreher, supra note 4, at 14 (observing critical role of courts in ensuring NEPA requirements are "faithfully implemented"); Tripp & Alley, supra note 105, at 86-87 (noting heightened judicial scrutiny allows for greater enforcement of NEPA obligations and public opportunities to push for environmentally preferable alternatives).

209. See Coakley Press Release, supra note 66 (explaining Massachusetts Attorney General's belief that decision in Buzzards Bay will have powerful impact on oil spill regulation). The Buzzards Bay decision "is an important step towards preventing future oil spills in Buzzards Bay." Id.

210. Id. (discussing opportunity of Massachusetts state government to work with Coast Guard to implement successful oil-transporting vessel regulations); see
high levels of public opposition, concern, and debate surrounding the extent of oil-transporting vessel regulation in Buzzards Bay, the Coast Guard will face substantive and practical arguments that the regulations do not sufficiently safeguard Cape Cod’s coastal waters from the risk of oil spills.\textsuperscript{211} While NEPA does not obligate the Coast Guard to enforce the least environmentally harmful actions, the Coast Guard will be compelled to address and respond to an array of environmental issues upon conducting an adequate environmental assessment.\textsuperscript{212} The Massachusetts Department of Environmental Protection stated it is prepared to undertake serious efforts to work with the Coast Guard to develop a regulatory program for oil-transporting vessels that provides the greatest level of protection to the waters of Buzzards Bay.\textsuperscript{213}

Federal courts have the authority to ensure agencies comply with NEPA, and it is the judiciary’s responsibility to command adequate environmental review of agency actions.\textsuperscript{214} The First Circuit’s authoritative reprimand of the Coast Guard for its clear failure to comply with NEPA guidelines suggests the Coast Guard will likely address environmental concerns more seriously when making regulatory determinations.\textsuperscript{215} On a broader level, the

\textit{also} United States v. Locke, 529 U.S. 89, 117 (2000) (observing states’ authorization to participate in oil spill regulation); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989) (explaining core purpose of EIS is to allow interested parties to evaluate severity of potential adverse environmental effects of agencies’ proposed actions). For a discussion of the details of the controversy surrounding the Coast Guard’s 2007 Rule, see \textit{supra} notes 41-79 and accompanying text.

211. \textit{See Buzzards Bay}, 644 F.3d at 28 (discussing notable controversy surrounding regulation of vessel traffic in Buzzards Bay due to its role as valuable natural resource and major channel of maritime commerce). The First Circuit recognized that “[i]n the view of many, the proposed rule threatened to decrease materially the level of protection against oil spills in Buzzards Bay.” \textit{Id.} at 36.

212. \textit{See Robertson}, 490 U.S. at 350 (explaining other values may trump environmental concerns so long as agency adequately identified and studied environmental concerns).

213. \textit{See Coakley Press Release, supra note 66} (discussing eagerness of Massachusetts to work with Coast Guard in hopes of establishing more stringent federal standards for oil vessels navigating in Buzzards Bay). Massachusetts DEP Commissioner Kenneth Kimmell stated, “[The Massachusetts DEP] looks forward to working with the Coast Guard to develop a regulatory program that ensures that single- and double-hulled vessels traveling through Buzzards Bay do not pose an environmental threat to the valuable and historic natural resources within and throughout Buzzards Bay.” \textit{Id.}


215. \textit{See, e.g.,} 42 U.S.C. § 4332(G) (2006) (requiring proposals for federal actions significantly affecting environment to contain detailed statements noting environmental impacts, adverse environmental effects, and any potential alternatives
court’s decision in *Buzzards Bay* proposes the notion that courts will watch agency decision-making closely and holds them to higher standards when it comes to the consideration of pressing environmental issues.216

The First Circuit’s use of NEPA to avoid the overarching pre-emption question altogether indicates federal courts recognize the significance of effective oil spill regulation.217 The First Circuit’s tactic of second-guessing the Coast Guard and departing from the deference given to federal authorities regarding oil spill preventative measures represents the court’s acknowledgement of the threat oil spills pose to our Nation’s waters.218 *Buzzards Bay* tests the predisposition of Congress and the Coast Guard to control regulatory maritime law and suggests that oil-transporting vessels may face stricter national standards in coming years.219

Oil consumption in the United States is expected to increase, and studies estimate a substantial portion of the oil will be imported and transported via our nation’s coastal waters.220 In light of the recent Deepwater Horizon oil spill in the Gulf of Mexico, there is no doubt oil spill regulation remains a critical environmental issue.221 The First Circuit utilized NEPA to confront this issue di-

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216. See Tripp & Alley, *supra* note 105, at 86-87 (suggesting heightened judicial scrutiny of agency decision-making processes will provide for more widespread consideration of environmental consequences).

217. See United States v. Locke, 529 U.S. 89, 94 (2000) (discussing dangers of oil spills); United States v. Coal. for Buzzards Bay, 644 F.3d 26, 28 (1st Cir. 2011) (declining to address federal preemption). “The maritime oil transport industry presents ever-present, all too real dangers of oil spills from tanker ships, spills which could be catastrophes for the marine environment.” Locke, 529 U.S. at 94.

218. See *Buzzards Bay*, 644 F.3d at 36 (calling attention to “not implausible fear that environmental harm would ensue” if MOSPA provisions were preempted by federal regulations). In reinstating MOSPA provisions that require a tugboat escort for all tank vessels transiting Buzzards Bay and imposing stricter crew and lookout requirements, the First Circuit recognized that these standards may be more appropriate than the less stringent standards in the Coast Guard’s 2007 Rule. *Id.* at 30. For a discussion of the conflicting federal and state oil-transporting vessel provisions at issue, see *supra* notes 61-72 and accompanying text.

219. See *Locke*, 529 U.S. at 117 (describing overarching power of federal government regarding oil transit throughout nation’s coastal waters); Swanson, *supra* note 5, at 380-81 (observing that without uniform national system of vessel regulation laws, varying state laws could have adverse effect on commerce).

220. See Rameuer, *supra* note 5, at 25 (discussing studies supporting proposition that United States will continue to import substantial amounts of oil in coming years).

221. See *Mass. Spill Efforts*, *supra* note 15 (explaining increased efforts of Massachusetts state government to establish preventative measures to control possibil-
rectly in *Buzzards Bay*, asserting that agencies and states must act with thorough consideration when implementing oil spill regulations.\(^{222}\) In *Buzzards Bay*, the court achieved NEPA’s purpose by holding the Coast Guard responsible for failing to properly evaluate the environmental consequences of its actions.\(^{223}\) The First Circuit’s decision signifies that, going forward, federal and state authorities alike will be encouraged and required to devote increased levels of time and resources to establish sufficient measures to protect against the risk of oil spills in the United States.\(^{224}\)

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\(^{222}\) See *Buzzards Bay*, 644 F.3d at 28-29 (addressing conflict between federal and state oil spill preventative measures in Massachusetts). The First Circuit described the conflict as “a pitched battle between federal and state sovereigns over the nature of preventative measures needed to safeguard against the risk of oil spills.” *Id.* at 28. The court used NEPA to guide its analysis, concluding that proper consideration must be given to the environment in order for oil spill regulations to be valid. *Id.* at 38-39.

\(^{223}\) See *id.* at 38 (noting Coast Guard’s failure to adequately analyze environmental effects of oil-transporting vessel regulations was error of function, not merely of form); see also President Barack Obama, *supra* note 1 (calling federal agencies to action). President Obama commanded agencies to “promote public involvement and transparency” in implementing NEPA’s commitment to environmental quality. President Barack Obama, *supra* note 1.

\(^{224}\) See *Buzzards Bay*, 644 F. 3d at 39 (remanding to Coast Guard commanding appropriate environmental analysis of oil-transporting vessel regulations); Ramseur, *supra* note 5, at 25 (discussing variables and issues to be considered in future of oil spill regulation).

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