1999

**Newton County Wildlife Association v. Rogers: Who Is Taking a Hard Look at the Environmental Impact of Timber Sales**

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NEWTON COUNTY WILDLIFE ASSOCIATION v. ROGERS: WHO IS TAKING A "HARD LOOK" AT THE ENVIRONMENTAL IMPACT OF TIMBER SALES?

I. INTRODUCTION

Like all other administrative agencies, the United States Forest Service is presumed to have superior knowledge to that of the courts and the public concerning the impact of proposed projects on the environment. Thus, when environmental groups and individuals challenge a final agency action, courts often limit the scope of judicial review to the agency's administrative record. In Newton

1. See Susannah T. French, Comment, Judicial Review of the Administrative Record in NEPA Litigation, 81 CAL. L. REV. 929-33 (1993) (focusing on problems facing environmental protection when reviewing courts concede all investigative power to federal agencies based on premise of superior agency knowledge of environment, and noting courts must struggle to balance discretion given to agencies to perform judicial duties and enforcement of law); Michael Goodman, Comment, Forest Service Appeals Reform: Searching for Meaningful Review, 3 N.Y.U. ENVTL. L.J. 117, 119-21 (1994) (discussing nearly unlimited discretion given to United States Forest Service by courts, thereby leaving room for agency bias, bad faith and abuse of power).

See also, e.g., Marsh v. Oregon Nat'l Resources Council, 490 U.S. 360, 377 (1989) (stating even when plaintiff or public expresses disagreement with opinions of agency specialists, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive"); Inland Empire Public Lands Council v. United States Forest Serv., 88 F.3d 754, 760 (9th Cir. 1996) (stating court must defer to Forest Service expertise particularly "when questions of scientific methodology are involved") (emphasis added); Northwest Motorcycle Ass'n v. United States Dept. of Agric., 18 F.3d 1468, 1476 (9th Cir. 1994) (giving complete deference to Forest Service in assessing public comment); in Northwest Motorcycle Ass'n, the Ninth Circuit stated: As the fact-finder in this case, the [Forest Service] Defendants were in the best position to determine the credibility of the comments offered by the public establishing the existence of 'user conflict' in the . . . [area]. Sitting as an appellate court in this matter, the court will not reverse the Defendants' implicit determination . . . .

Id.; Sierra Club v. Robertson, 810 F. Supp. 1021, 1027 (W.D. Ark. 1992) (stating Forest Service's actions are presumed to be correct and court will give deference to agency's "expertise and judgment") (citations omitted); Sierra Club v. Robertson, 784 F. Supp. 593, 601 (W.D. Ark. 1991) ("it is imprudent for the generalist judges of the federal district courts . . . to consider testimonial and documentary evidence bearing on those questions unless the evidence has first been presented to and considered by the agency"). In Robertson, the district court directed, "[i]f the agency acted improperly, the remedy 'is to order the agency to hold a proper hearing - not for the court to hold a hearing itself.'" Id. (citations omitted).

2. See Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998) (following Supreme Court view that judicial review of agency action is normally limited to agency's administrative record, which was prepared by agency at
County Wildlife Ass'n v. Rogers (Wildlife Ass'n II), the United States Court of Appeals, Eighth Circuit, upheld this view by limiting its review of four agency approved timber sales in Ozark National Park to the Forest Service's record. In so doing, the court ignored evidence of the timber sales' environmental impact and alternatives that the appellant environmental groups and individuals presented. The appellants, therefore, were unable to introduce this extrinsic evidence to prove the agency's record was incomplete.

Other circuit courts routinely permit extrinsic evidence to supplement an agency's administrative record when reviewing the environmental impact of a final agency action. In fact, federal district time project was assessed); Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991) (noting court's role in reviewing final agency action is to determine whether agency considered information available to it at time decision was made to approve proposed project). See also French, supra note 1, at 929 (pointing to judicial deference to agency decisions as one reason why courts confine review of agency action to administrative record).

3. 141 F.3d 803, 802-07 (8th Cir. 1998). For a discussion of the facts and holding of Newton County Wildlife Ass'n v. Rogers (Wildlife Ass'n II), see infra notes 74-88 and accompanying text.

4. See id. For a discussion of the court's analysis concerning the standard of review, see infra notes 89-102 and accompanying text.

5. See id. The Eighth Circuit dismissed the appellants' three claims that evidence of probable and actual environmental impact should be allowed to supplement the administrative record. See id. Subsequently, because the court adopted strict record review, all six of appellants' statutory-based claims were dismissed. See id. at 808-11. For a discussion of the Eighth Circuit's analysis and dismissal of appellants' claims in Wildlife Ass'n II, see infra notes 103-151 and accompanying text.

6. See id. at 807-08 (dismissing appellants' claims on basis of findings in Forest Service's record). This Note focuses on appellants' claim that the administrative record was incomplete because the Forest Service failed to follow the National Environmental Protection Act's (NEPA) procedural requirements, 42 U.S.C. §§ 4321-4370(d) (1994 & Supp. II 1996), and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1614 (1994 & Supp. II 1996). See Wildlife Ass'n II, 141 F.3d at 809 (determining whether Forest Service violated NEPA by failing to follow procedural requirements in approving four proposed timber sales in Ozark National Forest).

7. See French, supra note 1, at 948-50 & nn. 147-62 (discussing circuit and district court decisions allowing extrinsic evidence to supplement record review in NEPA cases). The D.C., Second, Fourth, Fifth, Ninth, Tenth and Eleventh circuits allow outside evidence to supplement the administrative record in cases similar to Wildlife Ass'n II. See, e.g., Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 n.22 (9th Cir. 1992) (affirming district court's admittance of plaintiff's expert's affidavit to understand complex issues in case); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (allowing plaintiffs' witnesses to testify at district court hearing); Sierra Club v. Hodel, 848 F.2d 1068, 1090 n. 17 (10th Cir. 1988) (relying on district court's conclusions "[b]ased on evidence and testimony adduced at trial . . ."); Webb v. Gorsuch, 699 F.2d 157, 159 n.2 (4th Cir. 1983) (stating "courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary"); Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 369 n.56 (D.C. Cir. 1981) (stating...
and appellate courts have created a broad exception to strict record review in environmental cases. These exceptions call into question whether or not a court’s review of agency actions should be limited to the administrative record prepared by that same agency. In other words, are courts overlooking the true environmental impact of agency actions when the boundaries of judicial review are confined to the agency’s own administrative record?

Part II of this Note examines the relevant federal statutes and cases pertaining to *Wildlife Ass’n II* and the dispute over limiting judicial review to an agency’s administrative record. Part III sets forth the factual and procedural history of *Wildlife Ass’n II*. Part

"[a]llegations that an impact statement fails to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court”); Sierra Club v. Hassell, 636 F.2d 1095, 1097-98 (5th Cir. 1981) (holding “[a] reviewing court is to review the administrative records as well as other evidence to determine whether the agencies adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary” when referring to a court record consisting of "voluminous administrative records, depositions and affidavits, and a transcript of the testimony before the district court . . ."); County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1977) (allowing plaintiffs bringing claims under NEPA to introduce new evidence). For a discussion of *County of Suffolk* and other courts’ opinions allowing extrinsic evidence in NEPA cases, see *infra* notes 66-73 and accompanying text.

8. See French, *supra* note 1, at 948-53 & nn.154-62, 166 (citing courts in note 7, *supra*, as well as others, accepting broad exception to record review). For example, in *Izaak*, the D.C. Circuit cited *County of Suffolk* in creating a broad exception to record review of agency action:

By referring to APA [Administrative Procedure Act] and the Supreme Court’s decision in *Overton Park*, we do not mean to imply that judicial review of [a final EIS] should be limited to the contents of the original administrative record, or that the District Court erred when it decided to permit introduction of new evidence. Suits challenging environmental impact statements seek to ensure compliance with a statute other than the APA. The reviewing court must ensure that the agency decision adequately discusses environmental effects and alternatives. Allegations that an impact statement fails to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court.

*Izaak*, 655 F.2d at 369 n. 56 (citation omitted). This exception to limiting judicial review to the administrative record occurs largely in cases challenging final agency action under NEPA. See French, *supra* note 1 at 939. For a discussion of the circuit trends since the 1970s, both limiting and expanding judicial review of administrative decisions, see *infra* notes 45-73 and accompanying text.

9. Cf. at 933 (stating, “[a] thoughtless or rigid application of the record rule would serve to undercut meaningful judicial review of agency action under [NEPA,] one of the United States’ most important environmental statutes”).

10. For a discussion of the relevant federal statutes and case law pertaining to *Wildlife Ass’n II*, see *infra* notes 15-73 and accompanying text.

11. For a discussion of the facts and procedural history of *Wildlife Ass’n II*, see *infra* notes 74-88 and accompanying text.
IV addresses the Eighth Circuit’s analysis of the case.\textsuperscript{12} Part V considers the Wildlife Ass’n II court’s decision in light of the relevant case law and statutory provisions, concentrating on the court’s holding that its review of the Forest Service’s approval and assessment of the timber sales was limited to the administrative record.\textsuperscript{13} Finally, Part VI focuses on the potential negative environmental impact that the Wildlife Ass’n II court’s decision will have on the Forest Service’s consideration and approval of future timber sales.\textsuperscript{14}

II. BACKGROUND

A. National Forest Management Act and National Environmental Protection Act: Protection of the Environment Through Required Agency Studies

The National Forest Management Act (NFMA)\textsuperscript{15} requires the Forest Service to develop “Land and Resource Management Plans” (Forest Plans) for all national forests.\textsuperscript{16} The Forest Service then

\begin{itemize}
\item \textsuperscript{12} For a discussion of the Wildlife Ass’n II court’s analysis, see infra notes 89-131 and accompanying text.
\item \textsuperscript{13} For a discussion of the Eighth Circuit’s holding as it compares to other case law and statutory provisions, see infra notes 132-159 and accompanying text.
\item \textsuperscript{14} For a discussion of the Wildlife Ass’n II decision’s impact, see infra notes 160-77 and accompanying text.
\item \textsuperscript{16} See id. § 1604(a). NFMA directs the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System . . . .” Id. A Land and Resource Management Plan (Forest Plan) must establish the overall management direction for the forest unit for ten to fifteen years. See id. § 1604(k); see generally 36 C.F.R. § 200, 217.1-219.29 (1998) (accompanying NFMA); Sierra Club v. Robertson, 28 F.3d 753, 755 (8th Cir. 1994) (defining Forest Plan according to NEPA). Thus, the Forest Plan is a statement of intent that sets forth guidelines and planning elements that the Forest Service will employ when making future site-specific decisions. See Robertson, 28 F.3d at 755.
\end{itemize}

The method for developing a Forest Plan is set forth in Forest Service regulations made pursuant to NFMA. See id. The Plan is developed according to a two-stage process. First, the Forest Supervisor commands a team that develops a proposed Forest Plan along with a draft and final EIS. See 36 C.F.R. § 219.10(a)-(b). In accordance with NEPA, the drafting team must formulate and evaluate a broad range of alternative management scenarios with the goal of “identifying the alternative that comes nearest to maximizing net public benefits.” Id. § 219.12(f). Next, the Regional Forester reviews the proposal and either approves or rejects it. See id. § 219.10(c). If the Forest Plan and EIS are approved, the Regional Forester’s Record of Decision supplements the reports. See id. § 219.4(b)(2).

The second stage begins when individual projects, such as timber sales, are proposed and assessed according to the Forest Plan. See Sierra Club, 28 F.3d at 755. The Forest Service must ensure that all projects are consistent with the plan. See 16 U.S.C. § 1604(i). Finally, the Forest Service conducts additional NEPA analysis, preparing environmental assessments (EAs) and possibly project EISs, to determine the effects of the specific proposed projects and to consider alternative ac-
assesses individual projects, such as timber sales, according to the Forest Plans.\textsuperscript{17} In addition, NFMA requires that the Forest Plans comply with the policies of the Multiple-Use Sustained Yield Act (MUSYA)\textsuperscript{18} and the provisions of the National Environmental Protection Act (NEPA).\textsuperscript{19} MUSYA generally directs that national forests "be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."\textsuperscript{20} Additionally, under

\textsuperscript{17} See 36 C.F.R. § 219.16. For discussion of additional NEPA analysis required, see infra notes 21-26 and accompanying text.

\textsuperscript{18} See 16 U.S.C. § 1604(i). For a discussion of the process by which individual projects are assessed according to the Forest Plan, see supra note 16 (explaining second step of Forest Plan process).

\textsuperscript{19} 16 U.S.C. §§ 528-531 (1994). Sections 1 and 2 of the Multiple-Use Sustained Yield Act (MUSYA) provide a broad policy statement of land-use management values. See id. §§ 528-29. Section 1 prescribes the purposes in establishing and administering national forests; section 2 directs that the administration of national forests is for "the multiple use and sustained yield" of these purposes and that "due consideration shall be given to the relative values of the various resources in particular areas." Id. § 529. Congress incorporated the policies of MUSYA into the planning process in NFMA, providing that "the National Forest System shall be maintained in appropriate forest cover with species of trees, degree of stocking, rate of growth, and conditions of stand designed to secure the maximum benefits of multiple use sustained yield management in accordance with land management plans." 16 U.S.C. § 1601(d)(1); see also 36 C.F.R. § 219.1; Goodman, supra note 1, at 119-21 (explaining issues confronting current land management practices as mandated by MUSYA and arguing that MUSYA gives Forest Service overly broad discretion in administration of national forests and does not establish enforceable standards for Forest Service to implement Act's goals); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971), rev'd on other grounds sub nom. (holding Forest Service required by MUSYA to perform only cursory consideration of national forest uses in response to plaintiff's contention that Forest Service managed Tongess National Forest almost solely for timber purposes). Although this Note focuses upon the requirements NEPA places on the Forest Service, the policy issues MUSYA presents are similar.

\textsuperscript{20} 42 U.S.C. §§ 4321-4370(c) (1994). For a discussion of NEPA's procedural and substantive requirements on administrative agencies and the Forest Service, specifically, see infra notes 21-30 and accompanying text.

In addition, when assessing the proposed timber sales in Ozark National Forest, in the Wildlife Ass'n II case, the Forest Service was required to follow the Arkansas Wilderness Acts of 1964 and 1984. See Wildlife Ass'n II, 141 F.3d at 810 (citing 16 U.S.C. § 1138(b); PUB. L. No. 98-508, 98 Stat. 2349 (1984)). "The Wilderness Act of 1964 makes agencies that administer wilderness areas responsible for preserving their wilderness character. The . . . Act of 1984 designated parts of the Ozark National Forest as wilderness areas." Wildlife Ass'n II, 141 F.3d at 810 (citations omitted).

\textsuperscript{21} 16 U.S.C. § 528. These listed uses for national forests obviously contradict each other and often lead to imbalance by the Forest Service when implementing timber sales. See Goodman, supra note 1, at 121-22 (noting MUSYA gives little guidance to Forest Service in evaluating multiple uses in administration of national forests). Goodman also remarks that the Forest Service's task in balancing MUYSA's prescribed forest uses, while under the increasing pressure in this decade from the timber industry and environmental groups alike, is insurmountable. See id. at 118 (arguing judicial review needed to aid and check Forest Service's decisions made under insurmountable weight).
NEPA, the Forest Service must promote prevention or elimination of “damage to the environment and biosphere,” when developing a Forest Plan for any national forest.21

In order to minimize damage to the environment, NEPA requires all federal agencies to prepare an Environmental Impact Statement (EIS),22 a “detailed statement” for all “major Federal actions significantly affecting the quality of the human environment.”23 If an agency is uncertain whether a project’s impact will significantly affect the environment, it must prepare an initial Environmental Assessment (EA).24 An EA analyzes and compares several alternative courses of action for a proposed project, including

21. 42 U.S.C. §§ 4321-4347. The language of NEPA makes Congress’s intent clear: “to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter,” such as “attain[ing] the widest range of beneficial uses of the environment without degradation.” 42 U.S.C. § 4331-32.

The principle Senate sponsor of NEPA, Senator Henry M. Jackson, described NEPA as “a Congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind [or] do irreparable damage to the air, land and water which support life on earth.” Philip Weinberg, It’s Time to Put NEPA Back on Course, 3 N.Y.U. ENVTL. L.J. 99, 101 (quoting 115 Cong. Rec. 40, 416 (1969)).

22. 42 U.S.C. § 4332. Although the language of NEPA makes Congress’s intent clear, as discussed in note 21 infra, the Supreme Court has emphasized NEPA’s requirement that agencies prepare EISs instead of promoting environmental goals. See Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (holding “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1974)). See also, Weinberg, supra note 21, at 99 (arguing Supreme Court erroneously concluded NEPA is procedural in nature, not substantive, despite obvious congressional intent).

23. 42 U.S.C. §4332(2)(C)(ii). The NEPA provisions require EISs to address unavoidable “adverse environmental effects” of a major agency action, “alternatives to the proposed action,” short-term and long-term effects of the action, and “any irreversible and irretrievable commitments of resources” that could occur if the action were implemented. Id. § 4332(2)(C)(ii)-(v). In addition, the Council on Environmental Quality (CEQ) regulations, which interpret NEPA and are binding on all federal agencies, explicitly require agencies to discuss mitigation measures in an EIS. See 40 C.F.R. §§ 1500-1508, 1500.3, 1508.25(b) (1998). See also French, supra note 1, at 945-48 (summarizing NEPA’s requirements on administrative agencies).

24. 40 C.F.R. § 1508.9(a)(1). The CEQ regulations state:

Environmental Assessment

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.
doing nothing, called the “No Action” alternative or “finding of no significant impact” (FONSI). Thus, if an agency issues an EA and FONSI, the agency need not prepare an EIS for a proposed project because it either is not a “major Federal action” or will not “significantly affect the quality of the human environment.”

A unique situation arises when the Forest Service deals with both NFMA and NEPA. First, in compliance with NEPA, Forest Service regulations require that a draft and final EIS accompany

(b) Shall include brief discussions of the need for the proposal, of alternatives, . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Id. § 1508.9(a)-(b).

An initial EA must consider “both quasi-political factors (including the unique characteristics of the area and the controversy surrounding the decision) and scientific questions (such as the uncertainty of the environmental effects and the cumulative impact of the project).” French, supra note 1, at 946 (footnote omitted). See also Cronin v. United States Dep’t of Agric., 919 F.2d 439, 443 (7th Cir. 1990) (defining EA as “rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement . . . is necessary”).

25. 40 C.F.R. § 1501.4(e).

26. Id. FONSI may be determined by the agency if it finds either that the environmental impacts of the proposed project are not significant or that the action to be taken is not “major.” See id. The most widely asserted claim in NEPA cases is that the agency should have prepared an EIS or that the EIS was prepared inadequately. See French, supra note 1, at 947; COUNCIL ON ENVTL. QUALITY, TWENTIETH ANNUAL REPORT app. B at 392 (1990) (noting two most common complaints from 1974 to 1988 were failure to prepare EIS and inadequate preparation of EIS). This is not surprising, considering that the agency makes the determination and has no check on its authority until an appeal is brought before it. See Goodman, supra note 1, at 155 (arguing Forest Service’s power continues to have no check in courts). Adding to the agencies’ power to determine whether proposed actions need to be evaluated is the principle of judicial deference to final agency decisions. See French, supra note 1, at 930 (explaining that following Supreme Court’s lead, “courts historically used the same criteria that appellate courts employ in reviewing district court decisions—the agencies are deemed to the key fact-finders, while the courts focus on the legality of the [sic.] actions”) (citations omitted).

Likewise, cases challenging Forest Service Plans’ adequacy often dispute whether an additional EIS should have been drafted to support individual EAs drafted for timber sales areas after the Forest Plan EIS was created. See Sierra Club v. United States Forest Serv., 46 F.3d 885, 835-39 (8th Cir. 1995). This is also an issue in the Note case, Wildlife Ass’n II. For a discussion of the NEPA issue in Wildlife Ass’n II, see infra notes 112-17 & 132-52 and accompanying text.

27. The Forest Service is frequently challenged under NEPA, not only because the Act is the most extensive environmental legislation Congress has passed, but also because the notice and comment process the Forest Service itself requires, promotes public awareness of major agency projects. Cf. Goodman, supra note 1, at 118 (explaining environmental and conservation groups actively challenge timber sales because Forest Service fails to create reasonable and neutral plans that balance timber output with other proscribed uses of national forests); French, supra note 1, at 955-56 n.182 (noting because of importance of Act, “NEPA became the most frequently-litigated of the environmental policies passed during the Sixties and Seventies.”) (citing LEAH J. WILDS, UNDERSTANDING WHO WINS: ORGANIZATIONAL BEHAVIOR AND ENVIRONMENTAL POLITICS 27 (1990)).
each Forest Plan. Second, because the Forest Service prepares an EIS to accompany each Forest Plan, courts generally consider the preparation of a EIS for a major Federal action unnecessary when a project is proposed in the planned area. Instead, the Forest Service normally completes EAs for each proposed action within a national forest, and, in conjunction with EAs, frequently issues FONSI s. Third, Forest Service regulations require periods of public comment when an action is proposed and approved by the agency. These comment periods increase the potential for suits

28. See 36 C.F.R. § 219.10(b). A Forest Plan is clearly a major Federal action of the type described in section 4332(2)(C) of NEPA. After the EIS is prepared, CEQ regulations order that impacts be discussed “in proportion to their significance.” 40 C.F.R. § 1502.2(b). The EIS must also address direct and reasonably foreseeable indirect ecological, aesthetic, cultural, historic, economic, social or health-related effects and their significance. See id. §§ 1502.16 & 1508.8. In addition, the EIS must respond to comments from any outside party either by modifying its alternatives, data, or analysis, or explaining why modification is not necessary. See id. § 1503.4(a). Lastly, a Record of Decision must be prepared, identifying the proposed action and all alternatives and factors the agency considered. See id. §§ 1502.2, 1502.19. See also French, supra note 1, at 945-46 (summarizing regulations prescribing EIS preparation).

29. See, e.g., Wildlife Ass’n II, 141 F.3d at 809 (concluding appellants’ NEPA claim that EIS assessing cumulative effect of four timber sales should have been prepared by Forest Service was without merit); Sierra Club, 46 F.3d at 837-38 (finding EIS was not required for project because Forest Supervisor made finding of no significant impact after assessing EA’s); Lockhart v. Kenops, 927 F.2d 1031-32 (8th Cir. 1991) (holding Forest Service complied with NEPA by revising EAs instead of developing EIS); Marble Mountain Audubon Soc’y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990) (dismissing plaintiff’s allegations that EIS failed to consider preservation for wildlife); Save the Yaak Comm. v. Block, 840 F.2d 714, 718 (9th Cir. 1998) (holding EA did not overlook significant environmental impact).

But see, e.g., House v. United States Forest Serv., United States Dep’t of Agric., 974 F.Supp. 1022, 1035, n.24 (E.D. Ky. 1997) (holding Forest Service required to prepare EA because biological assessment showed inadequate consideration of effects on Indian Bat); Natural Resources Defense Council, Inc. v. Duvall, 777 F. Supp. 1533, 1540 (E.D. Cal. 1991) (finding “given that the government’s premise is unsupported either as a matter of verifiable fact or as a matter of logic, the FONSI based on the premise is unreasonable . . . the FONSI suffers from a variety of . . . deficiencies.”); People ex rel. Van de Kamp v. Marsh, 687 F. Supp. 495, 501 (N.D. Cal. 1988) (holding EA “did not adequately address the wetlands, wildlife, and endangered species impacts, water quality impacts, cumulative impacts, or the adequacy of the mitigation proposal”).

30. See, e.g., Wildlife Ass’n II, 141 F.3d at 807 (accepting Forest Service’s determination of FONSI after completion of EAs); Sierra Club, 46 F.3d at 839 (holding although EA’s findings not elaborate, nothing in record suggested need for additional analysis and, therefore, EA consideration of environmental impact not “so deficient as to make the Forest Service’s FONSI arbitrary and capricious”); Lockhart, 927 F.2d at 1031 (finding EA with FONSI prepared by Forest Service meant no EIS was required under NEPA). For a discussion of the EA process prescribed by NEPA, see supra notes 24-26 and accompanying text.

31. See 36 C.F.R. § 215. The Forest Service is required to mail notices to portions of the public as part of its mandatory appeals process. See id. Before implementation, Forest Plans, as well as proposed timber sales, require a “notice and
based upon the Forest Service's preparation of the EIS and EAs because the public is made aware of the potential environmental effects of a project before any action takes place.\textsuperscript{32} Fourth, courts commonly extend liberal judicial deference to Forest Service decisions on whether a project EIS is necessary when the Forest Service has already developed Forest Plans covering land areas in which projects will take place.\textsuperscript{33}

comment" process. \textit{Id.} § 215.3(a)&(b). The Forest Plan and proposed timber sales must be published in a newspaper of general circulation according to section 215.5(b)(1), and notice must be sent to persons who have requested it or who are known to have "participated in the environmental analysis process" or "in the decision-[m]aking process" under section 215.5(b)(2)(i)&(ii). \textit{Id.} §§ 215.5(b)(1), 215.5(b)(2)(i) & (ii). Next, before enacting a project, the Forest Service is required to address public comments submitted during a thirty-day comment period. \textit{Id.} § 215.6(d). Then, after a decision is issued, only those individuals who have "provided comment or otherwise expressed an interest in particular proposed project by the close of the comment period" may participate in the administrative appellate procedure. \textit{Id.} § 215.11(a).

32. \textit{See} French, \textit{supra} note 1, at 990 (noting suits challenging agency EIS and EA preparation most frequent); Goodman, \textit{supra} note 1, at 118 (arguing Forest Service regulations on public comment periods benefit agency by delaying court action). Goodman argues that the amended notice and comment process, contained in 36 C.F.R. §§ 215-217.17, unfairly benefits the Forest Service. \textit{See} Goodman, \textit{supra} note 1, at 147-55. The thirty-day comment period is too short for challengers to construct all claims against the action in order to appeal to the Forest Service. \textit{See id.} at 151. Thus, challengers do not have adequate time and resources to bring all concerns to the Forest Service's attention at the time the decision is made to implement the agency action, while the Forest Service has additional time "to bolster" its decisions. \textit{See id.} at 147-51.

Furthermore, when courts adhere to strict record review, judges rely on the agency's decision-making process to address appellants' concerns; thus, if appellants' concerns are not raised or addressed by the agency, the notice and comment regulations may hinder complete judicial review of an agency's final action. \textit{See id.} at 152-53. \textit{See also}, \textit{Wildlife Ass'n II}, 141 F.3d at 808 (forbidding consideration of new evidence because all concerns should have been raised when agency made its decision) (citing Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991); Roanoke River Basin Ass'n v. Hudson, 940 F.2d 58, 63-64 (4th Cir. 1991) (disallowing evidence not presented to Forest Service during administrative comment period and appeals process).

33. \textit{See} French, \textit{supra} note 1, at 930 (explaining historically courts have given great deference to administrative agencies' decisions). By excluding contradictory extrinsic evidence and focusing solely upon the administrative records of agencies, the First, Seventh, Eighth and Ninth Circuits have often deferred to agency decisions. \textit{See id.} at 953-54. \textit{See also cf.} Goodman, \textit{supra} note 1, at 119-21 (arguing historically courts' deference to Forest Service too great). The Eighth Circuit in \textit{Wildlife Ass'n II} and other recent cases grants practically unlimited deference to the Forest Service in approving timber sales. \textit{See, e.g.}, Gregson v. Untied States Forestry Serv., 19 F. Supp. 2d 925, 927, 930 (E.D. Ark. 1998) (citing \textit{Wildlife Ass'n II} in determining Forest Plan EIS and individual EAs were adequate because of volume and consideration of environmental impact and alternatives); \textit{Wildlife Ass'n II}, 141 F.3d at 807 (finding district court did not abuse its discretion by limiting its review of final agency action to "voluminous" administrative record); Missouri Coalition for the Env't v. Corps of Eng'rs of the United States Army, 866 F.2d 1025, 1032-33 (8th Cir. 1989) (concluding volume of record, concerning environmental impact...
B. Standard of Review under the Administrative Procedure Act

The Administrative Procedure Act (APA) governs judicial review of final agency action. APA, in relevant part, states that a court may set aside a final agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In a line of cases beginning with Citizens to Preserve Overton Park v. Volpe, the Supreme Court considers this standard of review narrow, and, therefore, holds that judges are not empowered to substitute their own judgment for that of an agency. In addition, of dredged or fill material into area wetlands, plus consideration of twenty-eight alternatives in EA showed EIS was not needed. For a discussion of circuit cases granting judicial deference to administrative agencies, see infra notes 51-65 and accompanying text.

34. 5 U.S.C. §§ 551-706 (1994 & Supp. III 1997). Congress passed APA in 1946 to create a standard body of law applicable to administrative agencies, partially to safeguard private interests against quickly growing agency power. See French, supra note 1, at 936-37. APA’s provisions impose “procedural requirements on all federal agencies” and allow for “judicial review of agency actions to protect against biased or inadequate investigations and arbitrary decisions.” Id. at 937 (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 41-45, modified, 339 U.S. 908 (1950)).

35. See 5 U.S.C. § 702. APA gives courts general authority to review the legality of administrative decisions. See French, supra note 1, at 936-37 (stating APA’s arbitrary and capricious standard is standard of judicial review for NEPA and NFMA actions). The Supreme Court states that judicial review of administrative decisions is available where “there is no indication that Congress sought to prohibit judicial review and there is . . . no ‘showing of “clear and convincing evidence” of a . . . legislative intent’ to restrict access to judicial review.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1970) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) (quoting Brownell v. WeShung, 352 U.S. 180, 185 (1956))).

Additionally, in most cases, a reviewing court must refuse to conduct APA review of an administrative record when a plaintiff challenging the agency action has failed to exhaust all administrative remedies. See, e.g., Gregson v. United States Forestry Serv., 19 F. Supp. 2d 925, 929 (E.D. Ark. 1998) (refusing to review agency action because appellant failed to exhaust all administrative remedies before bringing action in court) (citing Darby v. Cisneros, 509 U.S. 137 (1993)); Sharps v. United States Forest Serv., 28 F.3d 851 (8th Cir. 1994)). Thus, judicial review is sought under APA for final agency actions that have already been appealed to and dismissed by the agency challenged. See, e.g., Wildlife Ass'n II, 141 F.3d at 806 (noting appellants’ appeals to Forest Service dismissed before action brought to district court). This requirement is also enumerated in the Forest Service’s mandatory appeals procedure. See 36 C.F.R. § 215. Section 215.20 specifies that an action in federal court is premature absent exhaustion of administrative remedies. See id. § 215.20.

36. 5 U.S.C. § 706(2)(A). According to APA, a court may set aside an agency decision only when they are: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, (2) unconstitutional, (3) not authorized by statute, (4) violative of established procedure, or (5) unsupported by substantial evidence. See id. § 706(2)(A)-(E).


38. See id. at 416 (establishing narrow standard of review under APA); see also In re Collins Securities Corp., 145 B.R. 277, 283 (E.D. Ark. 1992) (concluding
the Court has previously held in *Burlington Truck Lines, Inc. v. United States* that judicial review of final agency action is limited to the administrative record.

To determine whether a final agency action is "arbitrary or capricious," the Supreme Court directs a reviewing court to conduct a searching and careful inquiry into the specific facts of an agency decision. Ultimately, after carefully considering the relevant data, the reviewing court must determine whether the agency rec-

scope of judicial review is narrow and must be confined to administrative record and applicable law. See also French, supra note 1, at 939-40 (summarizing impact of *Overton Park* decision on judicial review of agency action).

Several commentators argue APA did not contemplate a narrow restriction of *de novo* review by citing its legislative history, while others note that administrative law under APA was developed through common law. See French, supra note 1, at 929-30 & n.1 (citing Kenneth C. Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 *UTAH L. REV.* 3, 3 (discussing legislative and common law development of APA)).


40. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (rejecting evidence offered by appellants to supplement administrative record and ruling remand to agency is required except in rare situations when administrative record is incomplete). If an agency's record does not support agency action, an agency has not considered all relevant factors, or a reviewing court cannot evaluate an agency's action on basis of its record, reviewing courts are to remand to the agency. *Id.* See also Camp v. Pitts, 411 U.S. 138, 142 (1973) (holding focal point for APA judicial review should be agency's administrative record already in existence at time action brought and, if record inadequate, proper remedy is to remand to agency to articulate reason for actions).

41. See *Overton Park*, 401 U.S. at 416. In *Overton Park*, the Supreme Court required the district court make a "searching and careful" factual inquiry to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416 (citations omitted). The Court, thus, established the "hard look" doctrine, by demanding courts make "thorough, probing, in-depth review" of agency action. *Id.* at 415. See also French, supra note 1, at 941 (arguing *Overton Park* 's "hard look" doctrine shows judicial willingness to place more stringent demands on agencies and to afford less deference to agency power); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (noting reviewing court may not "interject itself within the area of discretion of the executive . . .", but must ensure agency has taken "hard look" at relevant data to its final decision) (quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

42. See *Overton Park*, 401 U.S. at 415-20 (making no mention of what constitutes relevant data). Whether this relevant data comes only from the administrative record, or whether it is supplemented by extrinsic evidence, is left to the discretion of the reviewing court. See *id.* at 416, 420-21. While the Court remanded *Overton Park* for review "based on the full administrative record that was before the Secretary at the time he made his decision," the Supreme Court did not expressly limit the district court's review of the agency action to the administrative record. See *id.* at 420. See also French, supra note 1, at 941 (arguing *Overton Park* Court left door open to record review exceptions when "the bare record [does not disclose the factors that [the agency] considered or the [agency's] construction of the evidence"] (quoting *Overton Park*, 401 U.S. at 420). It is clear, however, that district and circuit courts still may not judge the substantive merits of an agency's decision under *Overton Park* and other Supreme Court decisions even
ord "articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"\textsuperscript{43} In applying this "hard look" doctrine, courts have not agreed on the issue of whether judicial review is limited to the administrative record.\textsuperscript{44}

though reviewing federal courts must ensure that the agency has taken a "hard look" at the data relevant to its final decision. See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) ("[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action taken.'") (quoting Kleppe, 427 U.S. at 390, 410 n.21).

43. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The Motor Vehicle Mfrs. court held that it must determine that the evidence before the agency provided a rational and ample basis for the agency decision, if the decision is to be upheld under the arbitrary and capricious standard of APA. See id. In practice, an agency can easily satisfy this rational basis standard. See id. See also Overton Park, 401 U.S. at 420 (establishing exception to record review where record is insufficient to illuminate rationality of agency decision by allowing testimony of administrative officials on remand).

44. See French, supra note 1, at 958 (discussing circuit split on limiting judicial review to administrative record in NEPA cases); e.g., County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1372-73 (2d Cir. 1977) (exemplifying broad view allowing extrinsic evidence to supplement administrative record); Cronin v. United States Dep't of Agric., 919 F.2d 439, 442-44 (7th Cir. 1990) (exemplifying narrow view limiting review to administrative record). Commentators and courts argue judicial review of administrative records in light of opposing, extrinsic evidence is crucial in NEPA cases to ensure that an agency has considered all relevant factors. See French, supra note 1, at 958 (discussing circuit split over record review in NEPA cases). See also Weinberg, supra note 21, at 99-108 (discussing and criticizing Supreme Court's role in limiting review to record in NEPA cases).

According to the Supreme Court, reviewing courts must access the reasonableness (or arbitrariness) of an agency's compliance with NEPA by determining whether it considered relevant factors. See Overton Park, 401 U.S. at 416 (failing to prescribe type of data reviewing court should consider in APA analysis under "hard look" doctrine). When judicial review of final agency action is limited to the record, the scope of relevant factors is limited to those the agency considered, not all relevant significant effects as NEPA mandates. See 42 U.S.C. § 4332(2)(C). See also French, supra note 1, at 957 (stating that courts allowing plaintiffs to introduce new evidence will make more complete review of agencies decisions); MARTIN SHAPO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 78-81 (1988) (arguing arbitrary standard will not lead courts to determination that all relevant factors were considered in agency decisions).

As interpreted by the Wildlife Ass'n II court, the "hard look" doctrine requires the reviewing court to find, after assuring the agency has taken a hard look at the environmental impact of a project: (1) the agency that prepared the record identified the environmental concern raised by appellants, and (2) the record contains a convincing statement that the concern was considered. See Wildlife Ass'n II, 141 F.3d at 808. Then, if the court determines that the record has identified and considered the concern raised, the record is found not to be arbitrary or capricious. See id. at 808-11.
C. The Record on Review and the NEPA Exception

Circuit courts are divided on whether judicial review of a final agency action is confined to the administrative record or whether extrinsic evidence of environmental impact and alternatives may also be considered, particularly in actions challenging agency decisions under NEPA. The primary conflict focuses upon whether NEPA should be classified as a procedural statute or a substantive statute. If courts interpret NEPA as merely procedural, judges

45. See, e.g., Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973) (permitting expansive judicial review of extrinsic evidence to determine whether Forest Service followed NEPA procedure); but see, e.g., Cronin v. United States Dep't of Agric., 919 F.2d 439, 444 (stating “[i]n short, only in an emergency should a reviewing court, whether a district court or any other federal court, conduct its own evidentiary hearing” when reviewing final agency action). See also French, supra note 1, passim; Daniel R. Mandelker, NEPA LAW AND LITIGATION § 4.09[1] (2d ed. 1992) (discussing NEPA cases allowing and rejecting extrinsic evidence on record review).

French and other commentators also argue that courts' traditional reasons for interpreting APA review so narrowly do not apply in NEPA cases because each leaves too much room for abuse under NEPA. See French, supra note 1, at 956. The traditional reasons for limiting judicial review of final agency action under APA to the administrative record are: (1) presumption of agency expertise, (2) protection of agency independence, (3) public participation in agency decision-making, and (4) threat of sandbagging, i.e. withholding significant concerns and information from an agency during the decision-making process and then blocking the project in court by claiming the agency ignored such significant information. See id. at 956-57 (discussing why traditional reasons for limiting review do not apply to NEPA).

The reasoning within the circuit split is complicated because of the meager discussions of judicial review in NEPA and the Act's minimal legislative history. See French, supra note 1, at 956 n.184 (discussing passage and early implementation of NEPA) (citing Frederick R. Anderson, NEPA IN THE COURTS, at 13-14, 16 (1973)). The Senate report on NEPA provides the only clear reference to judicial review in the Act's legislative history. In pertinent part, the Report states that "the 'environmental' desires of the American people [must be defined] in operational terms that the President, government agencies at all levels, the courts, private enterprise, and the public can consider to act upon." Id. (quoting Senate COMM. ON INTERIOR & INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 296, 91st Cong. 1st Sess. 13 (1969)).

46. See Weinberg, supra note 21, at 99-108 (arguing trend advanced by Supreme Court to restrict review of agency action to administrative record based on incorrect interpretation of NEPA as substantive statute). See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) (stating in dictum, "NEPA does set forth significant substantive goals for the Nation, but its mandate is essentially procedural"); but see, e.g., Sierra Club v. Hassell, 636 F.2d 1095, 1097-98 (5th Cir. 1981) (interpreting NEPA as substantive mandate on agencies). In Hassell, the Fifth Circuit departed from the Supreme Court trend and stated: "A reviewing court is to review the administrative records as well as other evidence to determine whether the agencies adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary." Hassell, 636 F.2d at 1097-98. In so stating, the Fifth Circuit was presented with a record consisting of "voluminous administrative records, dep-
must take a "hard look" at the agency decision to determine whether it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." In the alternative, if courts interpret NEPA as a substantive statute, judges must then determine not only whether agencies examined environmental impacts and alternatives, but also mitigated impacts. Courts addressing the substantive issue of whether an agency has proceeded with a final decision despite environmental impacts considered in the record, generally review the record in light of opposing extrinsic evi-

ositions and affidavits, and a transcript of the testimony before the district court . . . ." Id.

47. Overton Park, 401 U.S. at 415; 5 U.S.C. § 706(2)(A). Usually, under the procedural interpretation of NEPA, the fact that a given environmental impact is mentioned in an EA or EIS will satisfy NEPA's procedural mandates. See French, supra note 1, at 957-58 (noting unless challenged specifically, there is no minimum standard by which a court can determine whether all relevant factors of environmental impact have been considered in the administrative record).

If a court takes a "hard look" at an agency's final decision to ensure that environmental impact and alternatives have been considered, it is not the same as treating NEPA as a substantive statute. See Weinberg, supra note 21, at 105. Weinberg points out that even though the Supreme Court has stated in Strycker's Bay that "[a]n agency might well give the impacts of a proposal a hard look yet decide to proceed despite those impacts . . . ." it fails to require agencies to mitigate those impacts under NEPA. See id. (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. at 223-27 (1980). In Missouri Coalition for Env't v. Corps of Eng'rs of United States Army, the Eighth Circuit, following the Supreme Court's trend, stated that NEPA is a procedural act and the court is to review whether the agency considered environmental effects, not the correctness of the agency decision. See 866 F.2d 1025, 1032-33 (8th Cir. 1989).

48. See Weinberg, supra note 21, at 105-06 ("The real issue [in Strycker's Bay and other suits challenging agency compliance with NEPA] is whether NEPA mandates the agency not only to examine impacts but to mitigate those impacts as well."). NEPA "directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with" the Act. 42 U.S.C. § 4332. In addition, NEPA imposes the "responsibility . . . to use all practicable means . . . [to] attain the widest range of beneficial uses of the environment without degradation . . . ." Id. § 4331(b)(3). Weinberg emphasizes Congress's intent to place substantive environmental goals on agencies in enacting NEPA and argues courts must consider NEPA's purpose in requiring agencies to prepare EIS and EA reports if the environment is to be protected. See Weinberg, supra note 21, at 101. In fact, the Eighth Circuit held in Environmental Defense Fund, Inc. v. Froehlke that "[c]ourts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA . . . . [Including] whether the actual balance of costs and benefits struck by the agency according to these [NEPA-imposed] standards . . . clearly gave insufficient weight to environmental factors." 473 F.2d 346, 353 (8th Cir. 1972) (citing Environmental Defense Fund v. Corps. of Eng'rs, 470 F.2d 289, 298-300 (8th Cir. 1972)). In Environmental Defense Fund v. Corps. of Eng'rs, the Eighth Circuit court held that "[t]he unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." 470 F.2d 289, 298 (8th Cir. 1972).
dence.\textsuperscript{49} While the Supreme Court has not clearly defined the limits of admitting evidence to supplement administrative records in NEPA cases, various Court decisions show a trend toward limiting judicial review to the administrative record, and, in the process, interpreting NEPA as a procedural statute.\textsuperscript{50}

1. The Narrow View of the Seventh Circuit

Cronin \textit{v. United States Department of Agriculture} (Cronin)\textsuperscript{51} affirmed strict record review in NEPA cases by limiting judicial review of federal agency action to the administrative record.\textsuperscript{52} In \textit{Cronin}, individuals who frequented the Shawnee National Forest for recrea-

\begin{itemize}
\item \textsuperscript{49} See French, \textit{supra} note 1, at 957 (explaining NEPA documents usually contain errors of omission and evidence outside record must be admitted to check accuracy of agency findings). Omissions do not appear on the face of the EIS or EA that a court reviews in a suit claiming that an agency violated NEPA. See \textit{id}. As a result, in cases like \textit{Strycker's Bay}, courts reject the Supreme Court's reasoning that it is not a judge's role to review extrinsic evidence when answers to appellants' questions can not be found in the administrative record. See \textit{id}.
\item \textsuperscript{50} See generally Citizens to Preserve Overton Park, Inc. \textit{v. Volpe}, 401 U.S. 402 (1971); Camp \textit{v. Pitts}, 411 U.S. 138 (1973); Florida Power & Light Co. \textit{v. Lorion}, 470 U.S. 729 (1985); \textit{Vermont Yankee}, 435 U.S. 519. See also French, \textit{supra} note 1, at 944 (explaining Court's preference for limiting review to administrative record is based on deference to agency expertise, adequacy of records for judicial review, and obligation of challenging parties to make objections to agency before court action). French stresses that the Supreme Court has left room for exceptions to the limit on review. See \textit{id}. Even though the Court has not prohibited the admission of extrinsic evidence for judicial review, the scope and content of the exceptions are not clear to the district courts. See \textit{id}. at 944-45.
\item Weinberg would characterize the Supreme Court's position as a rejection of NEPA mandating substantive requirements. See Weinberg, \textit{supra} note 20, at 105-08 (citing \textit{Strycker's Bay} and Robertson \textit{v. Methow Valley Citizens Council}, 490 U.S. 332 (1989), as Court's ultimate neglect of NEPA's purpose). The shift in interpreting NEPA as both a substantive and procedural mandate on agencies in cases such as \textit{Froehlke} and \textit{Corps. of Eng'rs} to interpreting NEPA as solely a procedural requirement in \textit{Wildlife Ass'n II}, illustrates the Supreme Court's disregard for congressional intent in enacting NEPA. Commentators, such as Weinberg, French and Goodman argue that the switch in judicial interpretation of agency requirements under NEPA also illustrates the need for a clear rule allowing extrinsic evidence in judicial record review or amendment to NEPA by the legislature to assure that NEPA's purpose is followed. See French, \textit{supra} note 1, at 989-90; Goodman, \textit{supra} note 1, at 155; Weinberg, \textit{supra} note 21, at 116.
\item \textsuperscript{51} 919 F.2d 439 (7th Cir. 1990).
\item \textsuperscript{52} See \textit{id}. at 442-444. See, e.g., Valley Citizens for a Safe Env't \textit{v. Aldridge}, 886 F.2d 458, 460 (1st Cir. 1989) (asserting only three exceptions to record review: (1) where agency ignored important matter in EIS, (2) where agency improperly relied on secret information and (3) where extrinsic evidence would aid court in "understanding highly technical, environmental matters"); Missouri Coalition for Env't \textit{v. Corps of Eng'rs} of United States Army, 866 F.2d 1025, 1031 (8th Cir. 1989) (allowing "testimony of explanatory nature from agency" only when needed to show reasonableness of agency decision, while excluding other new evidence). See also French, \textit{supra} note 1, at 954 (discussing \textit{Cronin}'s role in reviving record review in NEPA cases in 1990's).
\end{itemize}
tion appealed from a district court denial of their request for a preliminary injunction. The plaintiffs alleged that the Forest Service’s authorized timber sale violated both NEPA and NFMA. The Seventh Circuit deferred to the forest supervisor’s decision in determining whether the sales complied with the statutes. The court held that “a reviewing court may . . . ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’” The Cronin court concluded that under APA a reviewing court does not review evidence and “only in an emergency should a reviewing court . . . conduct its own evidentiary hearing.”

The Eighth Circuit follows the Seventh Circuit’s approach and typically prohibits evidence to supplement the agency’s administrative record when reviewing under APA “unless a plaintiff can make a ‘strong showing of bad faith or improper behavior.’” As explained in Northwest Motorcycle Ass’n v. United States Dep’t of Agric., review of a final agency plan under APA does not require fact finding on behalf of the court. Consequently, the majority of Eighth Circuit decisions limit review of agency actions to the administrative record except in rare circumstances or emergency situations.

53. See Cronin, 919 F.2d at 441.
54. See id.
55. See id. at 442.
56. Id. (quoting Bowman Transp. Co. v. Arkansas-Best Freight Co., 419 U.S. 281, 286 (1974)). The Cronin court characterizes the standard of review by saying “[t]hat undemanding standard is satisfied here — especially when allowance is made for the fact that the decision is that of a local forest supervisor rather than of the members of a sophisticated agency in Washington.” Id.
57. Cronin, 919 F.2d at 442-444 (concluding when record is complete, plaintiffs must persuade court on basis of forest supervisor’s decision not to accept sales). The Cronin court interprets NEPA as merely a procedural statute. See id. at 445.
58. Maxey v. Kadrovach, 890 F.2d 73, 77 (8th Cir. 1989) (quoting Corning Sav. & Loan Ass’n v. Federal Home Loan Bank Bd., 736 F.2d 479, 481 (8th Cir. 1984)). See also, e.g., Wildlife Ass’n II, 141 F.3d at 807 (applying same bad faith exception quoted in Maxey and limiting review to administrative record); City of Richfield, Minnesota. v. F.A.A., 152 F.3d 905 (8th Cir. 1998) (limiting review to administrative record); Missouri Coalition for the Env’t v. Corps of Eng’rs of the United States Army, 866 F.2d 1025, 1031 (8th Cir. 1989) (allowing new evidence only to show reasonableness of agency’s action); Gregson v. United States Forestry Serv., 19 F. Supp. 2d 925 (E.D. Ark. 1998) (following Wildlife Ass’n II decision in limiting review to Forest Service’s record); Heartwood, Inc. v. United States Forest Serv., Inc., 999 F.Supp. 1286 (E.D. Mo. 1998) (limiting review to administrative record); Monarch Chem. Works, Inc. v. Exxon, 466 F. Supp. 639, 647 (D. Neb. 1979) (stating extrinsic evidence must be necessary for evaluating reasonableness of agency’s decision).
59. 18 F.3d 1468 (8th Cir. 1994).
60. See id. at 1476.
61. See Northwest Motorcycle, 18 F.3d at 1472 (concluding summary judgment is appropriate in case that involves challenge to Forest Service’s decision to close
Other Eighth Circuit cases, however, suggest the reviewing court may use outside evidence in its analysis of whether an agency's plan is arbitrary or capricious. Nevertheless, the recent decisions in *Wildlife Ass'n II* and *Gregson v. United States Forestry Serv.* limited judicial review of agency action to the administrative record and, thus, recommenced the Seventh Circuit's "record rule" trend in the Eighth Circuit.

2. The Broad View of the Second Circuit

In *County of Suffolk v. Secretary of Interior (County of Suffolk)*, the Second Circuit broadened the standard of judicial review of final agency actions by supplementing the administrative record with extrinsic evidence. The *County of Suffolk* court considered whether

trails in designated forest area to ORV use because record presents no genuine issues of material fact. See also Exon, 466 F. Supp. at 647 (restricting evidence outside of record to that necessary to evaluate reasonableness of agency's decision); French, supra note 1, at 953 n.166 (listing Eighth Circuit first in those restricting evidence to record).


64. See id. at 928, 930 (citing *Wildlife Ass'n II* opinion concerning standard and scope of review). In *Gregson*, plaintiffs challenged the Forest Service's proposal and decision to harvest and sell timber, commercially thin pine areas, and conduct other activities in Ozark National Forest under NFMA and NEPA. See id. at 928. The court limited it's review to the administrative record and granted summary judgment to the Forest Service under APA's "arbitrary and capricious" standard. See id. The Eighth Circuit's approach to record review after *Wildlife Ass'n II* is expressed in the analysis of the *Gregson* court:

The APA authorizes a reviewing court to set aside or hold unlawful any action by an agency that is found to be "without observance of procedure required by law." Additionally, when reviewing an administrative decision, the court examines whether the agency's decision was arbitrary and capricious. In the context of a decision made by the Forest Service, the court cannot "weigh the evidence independently and reach its own findings." Rather, the court's review is "limited to the record before the agency" to determine whether the agency has taken a "hard look at the environmental consequences of its actions."

*Id.* at 930 (citations omitted).

65. 562 F.2d 1368 (2d Cir. 1977).

66. *Id.* at 1372. The early 1970's trend stemmed from a belief that NEPA's preservationist goals could only be upheld by a demanding standard of judicial review of agency actions. See *French*, supra note 1, at 949 (arguing suits under
the Department of Interior's EIS, assessing a program for exploration of oil and gas resources, satisfied NEPA.\textsuperscript{67} The court held the record was insufficient and stated "in NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored."\textsuperscript{68} Accordingly, the\textit{ County of Suffolk} court supplemented the record with evidence presented by the challengers of the agency action.\textsuperscript{69}

The Second Circuit, however, limited its use of extrinsic evidence in\textit{ County of Suffolk}. Such evidence was "probative only insofar as it tended to show either that the agency's research or analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific community."\textsuperscript{70} Since the\textit{ County of Suffolk} decision, courts reviewing agency decisions under NEPA have accepted the use of evidentiary trials and hearings, expert witnesses, expert affidavits and other evidentiary documents.\textsuperscript{71} These reviewing courts, like the\textit{ County of
Suffolk court, have nevertheless limited the type of extrinsic evidence admitted.72

III. FACTS

In 1986, the United States Forest Service dispatched a ten-year Forest Plan for Ozark National Forest.73 Pursuant to NFMA and NEPA, an EIS analyzing the environmental impact of timber sales on the water, wildlife, fish and plant life in the wilderness area accompanied the Forest Plan.74 In the early 1990’s, the Forest Service proposed four timber sales in Ozark National Forest.75 These sales involved timber harvesting in 3,011 acres of the 1,118,500-acre forest and required 13.64 miles of road construction and 5.08 miles of new road.76

Prior to issuing the proposals, the Forest Service solicited comments and described the proposals by mailing notices to the public for each sale.77 After receiving responses to the mailings, the Forest Service prepared Biological Evaluations of the probable effects on known species in Ozark National Forest, as well as EAs, which evaluated assorted sale alternatives including the “no action” alternative, or FONSI.78 Then, the Forest Service circulated the EAs for further

72. See French, supra note 1, at 943-44 (discussing narrowing effects of Supreme Court trend). Courts limit the type of extrinsic evidence largely because of the Supreme Court’s decisions limiting judicial review of final agency actions. Id. For further discussion of the Court’s decisions, see supra notes 37-44 and accompanying text.

73. See Newton County Wildlife Ass’n v. Rogers, 141 F.3d 803, 806 (8th Cir. 1998) (discussing preliminary process which led to Forest Service approval of challenged timber sales). For a general discussion of the Forest Service’s requirements under NFMA for developing national Forest Plans, see supra notes 15-21 and accompanying text.

74. See id. The Wildlife Ass’n II court determined that the EIS was complete in “analyzing the environmental consequences of timber sales, including the impact of harvesting and road construction on water quality, wildlife and fish, wilderness areas, and threatened, endangered, and sensitive wildlife and plant species.” Id. For a discussion of the Forest Service’s EIS requirement, see supra notes 22-24, and accompanying text.

75. Id. at 806. As determined by the Forest Plan, the proposed sales coincided with areas which yielded a high level of timber. See id.

76. See Wildlife Ass’n II, 141 F.3d at 806-07. The timber sales were referred to as Sand Gap, Round Hill, Junction, and Sandy Springs. See id. at 806.

77. See id. at 807 (noting comment and notice period required by Forest Service regulations, 36 C.F.R. § 215). For a discussion of Forest Service’s comment and notice process, see supra notes 31-32 and accompanying text.

78. See Wildlife Ass’n II, 141 F.3d at 807, 810 (noting Forest Service prepared Biological Evaluations in response to public comments according to ESA regula-
public comment. By the fall of 1995, the Forest Service approved the sales. On December 20, 1995, after appealing to the Forest Service, Newton County Wildlife Association, the Sierra Club and other interested parties (collectively Wildlife Association) filed suit in the United States District Court, Eastern District Arkansas, Western Division.

Wildlife Association sought to enjoin the timber sales in Ozark National Forest by suing the United States Forest Service and four of its employees. After being denied a preliminary injunction to stop the sales, the appellants sought judicial review of the Forest Service's final agency action in approving the four timber sales in Ozark National Forest. In *Wildlife Ass'n II*, the Eighth Circuit af-

ations, 50 C.F.R. § 402.14 (1998), and EAs as required by CEQ regulations, 40 C.F.R. § 1508.9(a)(1) (1998)). For a discussion of Forest Service's regulations proscribing EA preparation and FONSI determination, see supra notes 25-26, and accompanying text.

79. *See Wildlife Ass'n II*, 141 F.3d at 807. The Forest Service requires the District Ranger to circulate EAs before determining whether a site-specific EISs must be developed. See 36 C.F.R. § 215. The Eighth Circuit did not hold that the Forest Service erred in deciding not to complete an EIS specifically for the four timber sales. *See Wildlife Ass'n II*, 141 F.3d at 809.

80. *See id.* at 807. The Forest Service issued Decision Notices for two of the sales on May 27, 1994, and administrative appeals to the approvals were rejected in the fall of 1994; the sales took place shortly thereafter. *See id.* Similarly, the Forest Service issued Decision Notices for the remaining two sales on May 22, 1995, and the Forest Service rejected administrative appeals that fall. *See id.* For a discussion of the Forest Supervisor's two-step approval procedure under NFMA, see supra notes 16-17 and accompanying text.

81. *See Wildlife Ass'n II*, 141 F.3d at 807. Wildlife Association properly brought the action to court after all administrative remedies were exhausted. *See id.* For a discussion of challengers' requirements to exhaust administrative remedies under APA in the case of the Forest Service and other agencies, see supra note 35. Here, the Forest Service rejected all administrative appeals to the approved timber sales before suit was brought in the United States District Court, Eastern District Arkansas, Western Division. *See id.;* Newton County Wildlife Ass'n v. Rogers, 948 F. Supp. 50 (E.D. Ark. 1996).


83. *See Wildlife Ass'n II*, 141 F.3d at 807 (noting it was appellants' second appeal in this action). For a discussion of the case's procedural history, see supra note 83. When the court received the second amended complaint for its review, it
firmed the district court's grant of summary judgment in favor of the Forest Service. In so doing, the Eighth Circuit limited judicial review to the administrative record. Ultimately, the *Wildlife Ass'n II* court held that the district court correctly limited judicial review to the administrative record and that *Wildlife Association's* claims were without merit.

IV. NARRATIVE ANALYSIS

In the *Wildlife Ass'n II* decision, the Eighth Circuit confined judicial review to the administrative record when determining whether the Forest Service's approval of the timber sales was "arbitrary or capricious." The Eighth Circuit agreed with the district court's decision to limit judicial review to the administrative record before it. Consequently, the *Wildlife Ass'n II* court excluded *Wildlife Association's* extrinsic evidence on the environmental impact of post-sale logging and road construction. In addition, the Eighth

noted, "Counsel for the Forest Service advised at oral argument that approximately three-fourths of road work and timber harvesting in the four sale areas is now completed." *Wildlife Ass'n II*, 141 F.3d at 807. For a discussion of the importance of plaintiffs winning at the injunction stage of the judicial process, see infra notes 169-75 and accompanying text.

84. See *Wildlife Ass'n II*, 141 F.3d at 807.
85. See id. at 806. The Eighth Circuit excluded the extrinsic evidence appellants presented in affirming summary judgment in favor of the Forest Service. See id. at 807.
86. See id. On the issue of scope of judicial review, the *Wildlife Ass'n II* court held that "the district court did not abuse its discretion by conducting its judicial review on the voluminous administrative record compiled by the Forest Service for the four timber sales." Id. Thus, the court emphasized the record's volume, giving broad deference to the Forest Service's decision and expertise. See *Wildlife Ass'n II*, 141 F.3d at 807.
87. See id. at 811 (determining claims without merit because each "considered" in Forest Service's record). *Wildlife Association* brought several claims based upon alleged Forest Service violation of substantive statutes. See id. at 807 (listing statutes: (1) Wild & Scenic Rivers Act (WSRA), (2) National Forest Management Act (NFMA), (3) National Environmental Policy Act (NEPA), (4) Clean Water Act, (5) Wilderness Act, and (6) Endangered Species Act (ESA)). The Eighth Circuit reasoned that *Wildlife Association* failed to relate each argument to APA standard of review. See id. For a discussion of the *Wildlife Ass'n II* court's reasoning in dismissing each of the claims, see infra notes 103-31 and accompanying text.
88. See id. at 807-08. By limiting its review of agency action to the record in *Wildlife Ass'n II*, the Eighth Circuit continued the Supreme Court trend of "record review". See *Wildlife Ass'n II*, 141 F.3d at 807-08. For a discussion of the "record review" trend, see supra notes 45-65 and accompanying text.
89. See id. at 807 (concluding "the district court did not abuse its discretion by conducting its judicial review on the voluminous administrative record compiled by the Forest Service for the four timber sales") (citations omitted).
90. See id. at 807 (holding district court "properly excluded the *Wildlife Association's* voluminous evidence . . . because its lawsuit challenges the Forest Ser-
Circuit dismissed Wildlife Association’s two challenges to record review under NEPA, and the Endangered Species Act (ESA) and the Clean Water Act, collectively. Finally, the court dismissed Wildlife Association’s six statutory-based claims against the Forest Service on the grounds that nothing in the administrative record proved that the agency acted arbitrarily or capriciously under APA standard of review.

A. Standard of Review Limited to the Record

The Eighth Circuit characterized Wildlife Association’s appeal as a cause of action for APA review. Following three major Supreme Court decisions, the Eighth Circuit established three principles in limiting judicial review to the administrative record in Wildlife Ass’n II. First, following Camp v. Pitts, the court noted that APA review of agency action is normally limited to the administrative record. Second, under the ruling in Florida Power & Light

vice’s timber sales decisions, not post-sale activities implementing the sales”). Wildlife Association argued that its extrinsic should be admitted under the bad faith exception because of the discrepancy between the actual, environmentally damaging logging and road construction and that activity studied in the EA’s. See id. at 807-08. The Eighth Circuit notes that the Forest Service “emphatically denies” the discrepancy asserted by plaintiffs, but cites no authority for its exclusion of post-sale evidence produced by appellants. Id. at 808.


92. See id. at 808-811. For a discussion of the six claims and the court’s analysis, see infra notes 103-31 and accompanying text.

93. See id. at 807. APA’s standard of review states that a final agency action may be put aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971)). Wildlife Association claimed that the Forest Service violated at least six federal statutes. See id. The Eighth Circuit declared, however, that the appeal dealt “primarily with a single cause of action for APA review—not, as the Wildlife Association pleaded, with multiple statutory claims for relief.” Wildlife Ass’n II, 141 F.3d at 807.


96. See Wildlife Ass’n II, 141 F.3d at 807 (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)). In Camp, the plaintiffs challenged the Comptroller of Currency’s action to deny authorization of a new bank in South Carolina. See Camp v. Pitts, 411 U.S. 138, 138-39 (1973). The Supreme Court held that the court of appeals inappropriately found that the administrative record was insufficient for adequate judicial review and the case should be remanded to the district court for a de novo trial. Id. at 139-40, 142. Instead, the Court determined that “the focal point for judicial review should be the administrative record already in existence, not some new
Co. v. Lorion, the Eighth Circuit stressed that, under proper procedure, it should remand to the agency for additional investigation except in rare circumstances. And, third, following Citizens to Preserve Overton Park, Inc. v. Volpe, the Wildlife Ass'n II court determined that Wildlife Association should make "a strong showing of bad faith or improper behavior by the Forest Service" in order to persuade the court to review extrinsic evidence at the appeal of a final agency action.

The Eighth Circuit rejected Wildlife Association's three challenges to strict record review in accordance with these principles.

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record made initially in the reviewing court" when applying APA's "arbitrary and capricious" standard to agency decisions. Id. at 142.


98. See Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998) (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)). In Lorion, the Court reiterated Camp's holding that APA review should focus on the administrative record before the agency at the time its decision is made. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). The Court concluded that "[t]he factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking." Id. at 744. Thus, Lorion established a general rule of restricting judicial review of agency decisions to the administrative record. See French, supra note 1, at 945 (discussing the lack of Court's concern in Lorion, Camp and Overton Park about agencies' abilities to develop adequate record for judicial review).


100. Id. at 420. For a general discussion of Overton Park, see supra notes 37-44 and accompanying text. See also Wildlife Ass'n II, 141 F.3d at 807 (noting Eighth and Seventh Circuits follow Overton Park ruling in Maxey v. Kradrovach, 890 F.2d 73, 77 (8th Cir. 1989), and Cronin v. United States Dep't of Agric., 919 F.2d 439, 444 (1990), respectively).

101. See Wildlife Ass'n II, 141 F.3d at 807-808. The first challenge to record review concerned the bad faith exception laid out in Overton Park. See id. Wildlife Association argued that the bad faith exception was invoked because of the discrepancy between the environmental harm of the actual sales and lesser harm of the activity studied in the EAs. See id. Without discussion of its analysis, the Wildlife Ass'n II court stated that appellants' "threshold showing of bad faith [was] woefully inadequate to justify going outside the administrative record." Id. at 808. The threshold showing of bad faith must be strong according to the Supreme Court. See Overton Park, 401 U.S. at 420. To reach the conclusion that appellants' showing of bad faith on the part of the Forest Service was inadequate, the court placed considerable weight on the volume of the record. See Wildlife Ass'n II, 141 F.3d at 807. While mentioning the "voluminous administrative record" several times throughout the opinion, the court's logic proceeded to conclude that the record was, therefore, complete and adequately considered all of the issues on appeal. See id. at 807-809.

The second challenge concerned the alleged violation of NEPA by failing to consider all relevant environmental factors. See id. at 808. The court rejected the contention on two grounds. First, the outside evidence concerned "post-sale implementation activity." Id. The Wildlife Ass'n II court quoted precedent in saying that its task during record review "is to make sure the Forest Service considered the information available at the time it made its decision; if the agency's decision was proper at the time it was made, our inquiry is at an end." Id. (quoting Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991)). Second, Wildlife Association
B. No Finding of Arbitrariness in the Record

After adopting strict record review of the Forest Service's approval of the timber sales, the Eighth Circuit analyzed the decision under the arbitrary and capricious standard set out in APA.\(^{102}\) The *Wildlife Ass'n II* court found no evidence of arbitrariness when reviewing the record under six substantive federal statutes.\(^{103}\) Thus, the court dismissed the claims, stressing that Wildlife Association pointed to nothing *in the administrative record* that proved arbitrariness or capriciousness on the part of the Forest Service in assessing and approving the timber sales.\(^{104}\)

failed to justify why expert opinions and studies were not offered to the agency during its decision making process. See *Wildlife Ass'n II*, 141 F.3d at 808 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978) (interpreting NEPA as procedural).

Before reaching its conclusion, the Eighth Circuit expressly failed to consider the Second Circuit's NEPA exception to strict record review. See *id.* (citing National Audubon Soc'y v. Hoffman, 132 F.3d 7, 14-16 (2d Cir. 1997) and County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977)). The Eighth Circuit states, "[w]e need not decide whether to adopt the Second Circuit's view that courts should be more willing to go outside the administrative record in considering NEPA challenges." *Id.* The *Wildlife Ass'n II* court apparently decided not to consider the Second Circuit's view because appellants were trying to bring in evidence of post-sale environmental impact. See *id.* For a discussion of the Second Circuit's view, see *supra* notes 66-73 and accompanying text.

The final challenge to the Forest Service's approval of the four timber sales, based on ESA and the Clean Water Act, alleged that evidence outside of the record should be admitted because the citizen-suit provisions of the Acts were invoked. See *Wildlife Ass'n II*, 141 F.3d at 808 (citing citizen-suit provisions § 1540(g)(1) of ESA and § 1365(a)(1) of Clean Water Act). The *Wildlife Ass'n II* court disagreed, saying that while "these statutes provide for judicial review . . . [they] do not prescribe a standard for that review." *Id.* The Eighth Circuit, therefore, adopted the Supreme Court's reasoning: "'where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held.'" *Id.* (quoting United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963)).

102. See *id.* at 807-08 (citing 5 U.S.C. § 706(2)(A)). For a discussion of the arbitrary and capricious standard in general, see *supra* notes 34-44 and accompanying text.


104. See *id.* at 808-11 (stating for each claim, Forest Service considered issue in administrative record and reached decision of FONSI).
1. **WSRA Considered**

Wildlife Association argued that the Forest Service violated its duties under WSRA in two ways: both to protect the quality of water in the wilderness area and to cooperate with the Secretary of Interior and proper State agencies to eliminate or diminish water pollution in Buffalo River.\(^\text{105}\) The *Wildlife Ass'n II* court rejected the first argument because it determined that the EAs adequately discussed the impact of the sales on Buffalo River and Richland Creek, and called for protective mitigation measures of the affected waters.\(^\text{106}\) In addition, the court rejected the second argument, finding that the Forest Service did not fail to cooperate with appropriate state water pollution control agencies.\(^\text{107}\)

2. **NFMA Considered**

Wildlife Association asserted four specific violations of the Ozark National Forest Plan and EIS as amended in 1991.\(^\text{108}\) The Eighth Circuit deemed all violations "relatively insignificant issues," none of which "comes close to establishing that approval of the sales are arbitrary or capricious."\(^\text{109}\) The court characterized the issues raised as insignificant because (1) the Forest Service explained in the record that the requirements in the Plan should be

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\(^{105}\) *Id.* at 809. The appellants specifically alleged that the Forest Service failed "to protect the water quality of designated segments of the Buffalo River and Richland Creek, and to 'cooperate with the Secretary of the Interior and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.'" *Id.* (quoting WRSA, 16 U.S.C. § 1283(c)(1994)).

\(^{106}\) *See id.* at 808-09 (looking to Wildlife Association to prove record established that "the Forest Service acted arbitrarily and capriciously in finding that logging and road work will have an insignificant effect on WSRA-designated river components").

\(^{107}\) *Wildlife Ass'n II*, 141 F.3d at 809 (declining to hold Forest Service failed to cooperate solely because Arkansas Department of Pollution Control and Ecology and Arkansas Natural and Scenic Rivers Commission opposed sales). The Eighth Circuit adds that "[t]he record reflects that the Forest Service considered the State's objections even though they were not expressed until after the comment period ended." *Id.*

\(^{108}\) *See id.* (noting four inconsistencies: "(1) failed to timely make available an inventory map of all forest roads with their management objectives; (2) failed to designate "Special Interest" areas; (3) increased net logging road mileage within the Forest; and (4) authorized road construction and logging within 198 feet of the Highlands Trail").

\(^{109}\) *Id.* For a discussion of the arbitrary or capricious analysis, see *supra* notes 34-44 and accompanying text.
viewed as "forest-wide" concepts, and (2) the sales only encompassed a small area of Ozark National Forest.110

3. NEPA Considered

The *Wildlife Ass'n II* court based its analysis of the Forest Service's EIS and EAs on two principles initially adopted by the Eighth Circuit in *Sierra Club v. United States Forest Serv.*111 First, the *Wildlife Ass'n II* court stated, "[w]e 'must affirm if we find the Service took a "hard look" at the project, identified the relevant areas of environmental concern, and made a convincing statement for its FONSI.'"112 Second, the court recognized that "'[a]n EA cannot be both concise and brief and provide detailed answers for every question.'"113

The *Wildlife Ass'n II* court used these principles to dismiss Wildlife Association's claim that the Forest Service should prepare an EIS for the site-specific timber sales, in addition to the Forest Plan EIS.114 The court also determined that the Forest Service's EAs pre-

110. See id., 141 F.3d at 809 (providing following example of typical Forest Service explanation: "Forest Plan's requirement of no net increase in logging roads is a forest-wide concept, and the four sales in question involve less than ten miles of new road and reconstruction of less than twenty miles of road").

111. 46 F.3d 885 (8th Cir. 1995).

112. *Wildlife Ass'n II*, 141 F.3d at 809 (quoting Sierra Club v. United States Forest Serv., 46 F.3d 835, 838-39 (8th Cir. 1995)). The Eighth Circuit in *Wildlife Ass'n II* is applying one of the four factors that the District of Columbia Circuit listed "to be considered in determining whether an agency's decision to forego an EIS is arbitrary and capricious: (1) whether the agency took a 'hard look' at the problem." 977 F.2d 428, 434 (8th Cir. 1995) (citations omitted).

113. *Wildlife Ass'n II*, 141 F.3d at 809 (quoting Sierra Club, 46 F.3d at 840). This second principle adopted by the *Wildlife Ass'n II* court calls into question the proper interpretation of 40 C.F.R. § 1508.9(a)-(b). See 40 C.F.R. § 1508.9(a)-(b) (1998) (calling for EA to be both "brief" and "sufficient"). According to the *Wildlife Ass'n II* court, "sufficient" means that the Forest Service's EAs "considered" issues raised by Wildlife Association. See *Wildlife Ass'n II*, 141 F.3d at 809-11. Commentators, such as Weinberg, however, urge courts to review agency actions beyond mere consideration of the agencies' findings of environmental impact and assess the finding's accuracy and agency's mitigation efforts. See Weinberg, supra note 21, at 101.

114. See *Wildlife Ass'n II*, 141 F.3d at 809 (concluding EAs sufficient in meeting NEPA standards prior to timber sales). The *Wildlife Ass'n II* court, although "[r]ecognizing that federal agencies must study cumulative environmental impacts and prepare comprehensive EIS's when appropriate" nonetheless concluded the agency properly used its power of discretion in determining no further EIS was needed because "the Forest Service's EAs were not arbitrary or capricious compliance with its NEPA obligations in making [the] timber sale decisions." *Id.*

Thus, the court found appellants' claim that NEPA required a second EIS to be prepared specifically for the timber sales in order to assess the cumulative effects of the sales to be without merit. *See id.* The Eighth Circuit's decision follows the Supreme Court's ruling in *Kleppe v. Sierra Club*. See Kleppe v. Sierra Club, 427 U.S. 390, 410-14 (1976) (holding NEPA does not require second EIS if Forest Ser-
pared for each timber sale analyzed the cumulative effects of the timber sales on wildlife, fish and watershed resources adequately.\(^{115}\) Again, the Eighth Circuit concluded that the Forest Service did not arbitrarily or capriciously fail to comply with NEPA regulations because the administrative record considered cumulative impacts and forest management issues for the whole forest.\(^{116}\)

4. **Clean Water Act Considered**

The *Wildlife Ass'n II* court quickly dismissed Wildlife Association’s Clean Water Act claims.\(^{117}\) First, the appellants’ alleged that the Forest Service failed to obtain required permits to reduce timber sale pollution.\(^{118}\) Second, Wildlife Association asserted that the timber sales violated the Clean Water Act because they were contrary to the state’s antidegradation policy.\(^{119}\) The Eighth Circuit simply concluded that the Forest Service’s record showed that the

\(^{115}\) See *Wildlife Ass’n II*, 141 F.3d at 809 (stating following three reasons for Forest Service’s compliance with NEPA: “[1] Each timber sale EA is over one hundred pages long and is ‘tiered’ to the Forest Plan EIS . . . [2] [w]hile the EA’s do not cross reference each other, each expressly addresses cumulative environment impact . . . [3] [t]he EAs study areas significantly larger than the area to be logged”).

\(^{116}\) See id. (holding because administrative record contained national Forest Plan and accompanying EIS for Ozark National Park, it reflected Forest Service’s adequacy in assessing cumulative environmental impact of proposed sales on forest).

\(^{117}\) See id.

\(^{118}\) See id. at 810 (providing Wildlife Association’s precise claim: “the Forest Service failed to obtain necessary NPDES and dredge and fill permits for the discharges of pollutants that will accompany logging and road construction under the timber sales”). The Eighth Circuit considered the following factors in determining that the claim was “without merit”: Wildlife Association did not cite to any authority for its claim under Clean Water Act; EPA did not intervene although the duty of administering the permits lies with it; EPA did not include logging and road construction in the list of “point sources requiring NPDES permits” and both “are exempt from dredge and fill requirements so long as construction and maintenance comply with best management practices.” *Id.* Finally, the *Wildlife Ass’n II* court stressed that “[t]he administrative record contains no evidence those practices have not been followed.” *Wildlife Ass’n II*, 141 F.3d at 810 (emphasis added).

\(^{119}\) Id. The *Wildlife Ass’n II* court reasoned that the Forest Service’s determination that the state law placed no additional obligations on the agency was not arbitrary or capricious because the “Arkansas statewide policy for nonpoint sources [logging and related road construction included] is so broadly stated.” *Id.* at 810.
agency did not act arbitrarily or capriciously in deciding not to comply with state law.\(^\text{120}\)

5. Wilderness Act Considered

Wildlife Association argued that the quality of the waters flowing through the wilderness areas would be degraded from logging activity upstream.\(^\text{121}\) The Eighth Circuit agreed with the district court’s decision that Wilderness Association’s argument ran counter to section 7 of the Arkansas Wilderness Act because enjoining timber harvesting near the waterways would create protection areas or buffer zones, which are prohibited by the Act.\(^\text{122}\) In addition, the Eighth Circuit supported the Forest Service’s determination that the timber sales would have no significant effect on the water quality of the Buffalo River and Richland Creek.\(^\text{123}\) Again, the Wildlife Ass’n II court briefly reasoned that “[t]he Wildlife Association points to nothing in the administrative record establishing that this analysis was arbitrary or capricious.”\(^\text{124}\)

6. ESA Considered

Under ESA, Wildlife Association alleged three violations on the Forest Service’s part.\(^\text{125}\) First, the Eighth Circuit reviewed the Forest Service’s Biological Evaluations and EAs, and held that the sales

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120. Id. The Eighth Circuit’s reasoning under both allegations was notably sparse. Id.

121. See Wildlife Ass’n II, 141 F.3d at 810. The Wildlife Association made this argument even though the four timber sales were not located within the parts of Ozark National Forest that the Arkansas Wilderness Act of 1984 designated as wilderness areas. See id.


123. See Wildlife Ass’n II, 141 F.3d at 810. The Eighth Circuit states that the Forest Service “thoroughly considered the effect of logging and road construction on the water quality.” Id. The Forest Plan “conclud[ed] that with mitigation measures and best management practices the impact on water quality would be insignificant.” Id.

124. Id.

125. See id. at 810. First, appellants argued that the Forest Service acted arbitrarily and capriciously by approving the timber sales before the United States Fish and Wildlife Service assessed the affect of logging in the specified area on any species listed in the Act. See Wildlife Ass’n II, 141 F.3d at 810. Second, Wildlife Association argued that EPA required the Forest Service to prepare biological “assessments” to decide whether to consult with the Fish and Wildlife Service. See id. at 811. Third, the Eighth Circuit also refuted Wildlife Association’s claim under ESA, which alleged that the Forest Service’s assessment of the sales’ impact on the bald eagle was inadequate. See id.
would have no effect on any listed endangered species. Accordingly, the court concluded that the Forest Service did not violate ESA because it failed to consult with the Fish and Wildlife Service before approving the sales. Second, the Eighth Circuit stated that ESA only required the Forest Service to prepare biological assessments for "major construction activities." Third, the Wildlife Ass'n II court held that each EA, as provided in the record, adequately assessed the impacts of the sales on the bald eagle under ESA. Overall, the Eighth Circuit held that the Forest Service was not "arbitrary or capricious" in carrying out its statutory obligations because the administrative record considered each claim brought by Wildlife Association.

V. CRITICAL ANALYSIS

In Wildlife Ass'n II, the Eighth Circuit declared that judicial review of agency action is confined to the administrative record. In so doing, the Eighth Circuit directly dismissed the Second Circuit's trend, which allows for an exception to such strict record review in NEPA cases. The decision, in addition, affirmatively acknowl-

126. See id. According to the Eighth Circuit, "[a] finding of no effect obviates the need for consultation with the Fish and Wildlife Service." Id. (citing regulations to ESA, 50 C.F.R. § 402.14); see also Southwest Center for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996) (holding Forest Service's initial decision that salvage timber sale would have no effect on threatened or endangered species of spotted owl, obviated need for formal consultation with Fish and Wildlife Service).

127. See Wildlife Ass'n II, 141 F.3d at 811.

128. See id.

129. See id.

130. See id. Consistently throughout its opinion, the Eighth Circuit asserts that the court's role in reviewing the record is to determine whether the agency considered the challenged method. See id. Eighth Circuit reviewing courts, therefore, do not have the role of determining whether the record is correct. Wildlife Ass'n II, 141 F.3d at 811. See also United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963) (determining "where Congress has simply provided for, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held."); Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 685-86 (D.C. Cir. 1982) (concluding Forest Service's analysis of proposed action qualified as imposition of specific mitigation measures to address concerns and supported decision not to prepare EIS). The District of Columbia Circuit also held appropriate standard of review under ESA is arbitrary and capricious, not de novo. See id.

131. See Wildlife Ass'n II, 141 F.3d at 807 (affirming district court's decision to conduct judicial review on administrative record). For a discussion of the appellate court's reasoning, see supra, notes 86-104 and accompanying text.

132. See id. at 808 (reasoning Second Circuit's view does not apply because Wildlife Association tried to admit evidence of environmental impact after sales were approved). Wildlife Association also attempted to admit expert opinions and
nowledged the Seventh Circuit's narrow approach to NEPA cases and, consequently, reaffirmed the Eighth Circuit's dismissal of extrinsic evidence. The *Wildlife Ass'n II* court's analysis was insufficient, however, because the accuracy of the Forest Service's findings was never analyzed.

In failing to assess the accuracy of the Forest Service's administrative record by reviewing the record's findings in light of extrinsic studies analyzing the environmental impact of the sales known during the Forest Service's decision making process, as well as evidence of reasonable alternatives to the sales that the Forest Service did not consider. See id. Reasoning that "the Association failed to provide adequate justification for its failure to present those materials to the agency during its decision-making process," the *Wildlife Ass'n II* court quickly disregards the Second Circuit's view that extra-record evidence should be introduced on judicial review an agency's decision. Id. (citing Vermont Yankee, 435 U.S. 519, 553-54). For a discussion of the Second Circuit's view exemplified by the *County of Suffolk* decision, see supra notes 66-73 and accompanying text.

133. See id. at 807 (citing Cronin to support view that supplementation of administrative record can occur only upon showing of bad faith or improper behavior). See also, Cronin v. United States Dep't of Agric., 919 F.2d 439, 444 (7th Cir. 1990) (allowing supplementation of administrative record only in emergency situations); French, supra note 1, at 930 (discussing narrow trend of Seventh Circuit to restrict judicial review of agency action to administrative record.

134. *See Wildlife Ass'n II* at 808. In several NEPA cases prior to *Wildlife Ass'n II*, the Eighth Circuit allowed extra-record evidence review without requiring an emergency situation. For a list of Eighth Circuit cases allowing extrinsic evidence, see supra note 63. Since *Wildlife Ass'n II*, however, the two cases concerning judicial review of an agency action have confined review to the administrative record and in so doing, cited *Wildlife Ass'n II*. See, e.g., Gregson v. United States Forestry Serv., 19 F. Supp. 2d 925, 928, 931-932 (citing *Wildlife Ass'n II* heavily). For a brief discussion of the *Gregson* decision, see supra notes 64-65 and accompanying text.

135. *See Wildlife Ass'n II*, 141 F.3d at 808 (stating "[t]his court's task is to make sure the Forest Service considered the information available at the time it made its decision; if the agency's decision was proper at the time it was made, our inquiry is at an end." ) (quoting Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991). The Eighth Circuit interprets the word "proper" in the quote above as merely considering the information. See id. at 808-811. "Proper" could also carry the connotation of accuracy and completeness, as the Second Circuit held in *County of Suffolk*. See *County of Suffolk* v. Secretary of Interior, 562 F.2d 1368, 1372-73 (2d Cir. 1977) (holding EIS and accompanying document inadequate).

The Eighth Circuit's conclusion not to accept Wildlife Association's expert analysis is not necessarily incorrect. The *Wildlife Ass'n II* court rejected the evidence based upon the accepted principle that courts may not substitute their judgment for that of the agency, and Wildlife Association's failure to explain why its evidence was not presented to the Forest Service at the time of decision-making. *See Wildlife Ass'n II*, 141 F.3d at 808; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1991) (discussing review of record before Secretary at time decision was made).

The Eighth Circuit has arguably ignored its responsibility under NEPA to ensure that the Forest Service based its decision on relevant factors and benefit to the environment. See Weinberg, supra note 21, at 108-110 (arguing courts are acting in contradiction to Congressional intent in NEPA if fail to analyze policy in judicial review of agency action). For a discussion of these procedural and substantive requirements prescribed by NEPA, see supra notes 45-50 and accompanying text.
evidence, the Eighth Circuit quickly decided that the Forest Service's assessment of the timber sales complied with NEPA's procedural requirements. If the court in *Wildlife Ass'n II* had considered the record's accuracy in terms of both the environmental affect of the timber sales and mitigating alternatives, it would have complied with NEPA's purpose, namely Congress's intent in enacting NEPA as a check on agency action that fails to promote the Act's environmental goals. Instead, the court ignored NEPA's principles when determining whether the Forest Service's record followed the procedural requirements of the Act. The *Wildlife Ass'n II* court, therefore, simply did not take a hard, critical look at the administrative record to determine whether it was a true assessment of the timber sales' environmental impact and mitigating alternatives.

A. The Purpose of NEPA and the *Wildlife Ass'n II* Decision

Arguably, the Forest Service did not violate any procedural provisions in NEPA. The Eighth Circuit, however, erred in determining that the administrative record was adequate simply because the Forest Service complied with the Act's procedural requirements. The *Wildlife Ass'n II* court considered two aspects of the

136. See *Wildlife Ass'n II*, 141 F.3d at 809 (reasoning Forest Service's issuance of Forest Plan EIS and FONSIIs after preparing EAs was evidence enough NEPA was followed). For a discussion of the court's brief analysis of appellants' NEPA claim, see supra notes 112-17 and accompanying text.

137. For a discussion of NEPA's goals, see supra notes 21-22, 45-50 and accompanying text.

138. See *Wildlife Ass'n II*, 141 F.3d at 809 (discussing only Forest Service's process of preparing Forest Plan EIS and individual EAs).

139. Cf. Weinberg, supra note 21, at 109 (arguing courts must evaluate both environmental impact and mitigating alternatives when assessing agencies' decisions).

140. See *Wildlife Ass'n II*, 141 F.3d at 809 (reasoning Forest Plan EIS and individual EAs consider cumulative effects of challenged timber sales without EIS for timber sales). The Eighth Circuit determined that the EAs are adequate because "each EA is over one hundred pages long . . . and is consistent with the policy behind 40 C.F.R. § 1502.20 to save money and time by avoiding repetitive inquiries." Id.

Forest Service compliance with NEPA is closely connected with NFMA, as discussed in Part II of this Note. See supra notes 27-33 and accompanying text. Accordingly, the *Wildlife Ass'n II* court held that the Forest Service complied with NFMA's procedural provisions as well as NEPA. See *Wildlife Ass'n II*, 141 F.3d at 809 (discussing claim under NFMA). For a discussion of the *Wildlife Ass'n II* court's decision not to require the Forest Service to prepare a second EIS, see supra notes 112-17 and accompanying text.

141. See *Wildlife Ass'n II*, 141 F.3d at 809 (discussing only procedural requirements in NEPA with respect to EIS, EAs and FONSI). NEPA, however, is not only a procedural statute according to its legislative history; its provisions clearly state en-
record in determining the Forest Service’s compliance with NEPA: (1) the record’s volume\textsuperscript{142} and (2) the fact that the record considered the concerns raised by the appellants.\textsuperscript{143} In short, the court concluded that the sheer volume of the record weighed substantially in showing ample preparation of the EIS and EAs and, thus, consideration of any challenges to the timber sales.\textsuperscript{144}

The court’s determination that the record was complete does not necessarily follow from the apparently thorough process of studies and notices the Forest Service conducted in Ozark National Park.\textsuperscript{145} In other words, a thorough procedural process does not

environmental goals the agencies are required to advance. See Weinberg, supra note 21, at 101. For a discussion of NEPA’s purpose, see supra notes 21-22, 45-50 and accompanying text.

\textsuperscript{142} See \textit{Wildlife Ass’n II}, 141 F.3d at 807, 809 (suggesting sheer volume of record was enough to show Forest Service adequately considered environmental impact and alternatives to timber sales in light of any challenge, and EAs, each over one hundred pages long, were adequate to show cumulative effects of timber sales). Many courts mention the length of the record before a brief analysis of procedural compliance with NEPA. See, e.g., Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (noting 547-page record was compiled); Missouri Coalition for Env’t v. Corps of Eng’rs, 866 F.2d 1025, 1033 (8th Cir. 1989) (stating “[t]he sheer volume of the administrative record in this case is evidence that the [agency] gave environmental effects the type of consideration required under NEPA.”) (citing Baltimore Gas & Electric Co. v. NRDC, Inc., 462 U.S. 87, 98 (1983)); Gregson v. United States Forestry Serv., 19 F. Supp. 2d 925, 928 (E.D. Ark. 1998) (noting three-volume record was reviewed).

But see, Sierra Club v. Hassell, 636 F.2d 1095, 1097-98 (5th Cir. 1981) (reviewing extrinsic evidence to assess accuracy of agency’s decision not to prepare EIS despite “voluminous administrative records”); see also Goodman, supra note 1, at 118 (arguing volume of record does not equal accuracy and Forest Service often used reasoning above to its advantage in preparing substantively inadequate assessments of timber sales).

\textsuperscript{143} See \textit{Wildlife Ass’n II}, 141 F.3d at 808 (stating court’s role in review of agency’s administrative record is to determine whether agency considered issues raised by appellants, not whether agency’s findings were accurate). See also, Missouri Coalition, 866 F.2d at 1033 (noting “the question is whether an agency ‘considered’ environmental effects, not the ‘correctness’ of the decision”) (citing Olmstead Citizens for a Better Community v. United States, 793 F.2d 201, 207 (8th Cir. 1986)).

\textsuperscript{144} See \textit{Wildlife Ass’n II}, 141 F.3d at 808-11 (basing reasoning on premise that voluminous record and mere consideration show adequacy of findings in EAs). For a discussion of the court’s brief analysis of appellants’ statutory claims, see supra notes 103-31 and accompanying text.

\textsuperscript{145} See Goodman, supra note 1, at 118 (contending “[a]lthough [forest plans] have taken years and tremendous resources to develop, they have failed to alleviate the problems that precipitated the passage of [ ] NFMA”). Most importantly, in \textit{Wildlife Ass’n II}, the Forest Service’s determination of FONSI after developing an EA for each sale may have been inaccurate when assessed in the light of either the cumulative environmental impact of the sales, for which an EIS was never prepared, or the opposing evidence of negative environmental impact from appellants’ expert affidavits and opinions. See \textit{Wildlife Ass’n II}, 141 F.3d at 809 (discussing court’s determination that administrative record was complete under NEPA requirements). If the \textit{Wildlife Ass’n II} court determined that FONSIs were
necessarily (and, in practice, not likely) ensure that an agency's record is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."146 The Supreme Court's standard of review does give great deference to agency decisions.147 In NEPA cases, however, courts should take a hard look at the accuracy of an agency's decision in light of opposing, extrinsic evidence because only so doing will give effect to the purpose of NEPA.148

NEPA's purpose and the Supreme Court's "hard look" doctrine direct the Wildlife Ass'n II court to allow appellants' to augment the Forest Service's administrative record.149 It is important, in the face of an agency's duty to comply with both the procedure and the purpose of NEPA, that the record's convincing statement required by the "hard look" doctrine, ensures either that the action an agency has taken is not against a valid environmental concern or that the agency has taken steps to mitigate the concern.150 As the County of Suffolk court stated, the only fair way to do so is to consider
the accuracy of the record in light of opposing, extrinsic evidence.\textsuperscript{151}

B. Bad Faith and Judicial Deference to the Forest Service in \textit{Wildlife Ass'n II}

Not only did the \textit{Wildlife Ass'n II} court ignore NEPA's purpose in reviewing the Forest Service's administrative record, but the court also erred in ignoring the Forest Service's history of bad faith and bias toward timber sales.\textsuperscript{152} Although the Eighth Circuit correctly assumed that the Forest Service is authorized to determine how timber sales will impact the environment,\textsuperscript{153} the court too quickly presumed that the Forest Service did not abuse its discretion in approving the timber sales.\textsuperscript{154} By examining procedural compliance only, reviewing courts, like the \textit{Wildlife Ass'n II} court, place little pressure on agencies to check the accuracy of their findings when preparing the prescribed statements.\textsuperscript{155}

In fact, in \textit{Wildlife Ass'n II} and other similar cases, the Forest Service has practically no check on its administrative agency author-

\textsuperscript{151} See County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1368 (2d Cir. 1977). For a discussion of the \textit{County of Suffolk} decision and its influence on the trend to admit extrinsic evidence in NEPA challenges to agency actions, see supra notes 66-74 and accompanying text.

\textsuperscript{152} See generally Goodman, supra note 1, at 133-36 (discussing Forest Service's history of bad faith and bias toward timber sales).

\textsuperscript{153} See \textit{Wildlife Ass'n II}, 141 F.3d 807 (acknowledging "[i]f the agency record is for some reason inadequate, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation'") (citing Florida Power & Light v. Lorion, 470 U.S. 729, 744 (1985)). For a discussion of judicial deference to agency power, see supra note 1 and accompanying text. The Forest Service is presumed to have specific knowledge of the environmental impact of timber sales. See French, supra note 1, at 958-965 (arguing that many administrative agencies in fact are not as knowledgeable concerning technical and scientific matters as are experts, who appellants attempt to introduce during judicial review).

\textsuperscript{154} See generally \textit{Wildlife Ass'n II}, 141 F.3d at 807 (reasoning, throughout analysis of Forest Service's compliance with NEPA, that "voluminous" record is complete because many environmental factors and alternatives were considered). For a discussion of the Eighth Circuit's brief analysis of the claims brought against the Forest Service, see supra notes 103-31 and accompanying text.

Courts have allowed the Forest Service almost unlimited discretion in approving timber sales. See Goodman, supra note 1, at 155. Judicial review of the Forest Service's records in light of extrinsic evidence can be an important check on the agencies' power and on its compliance with NEPA. See id. at 137 (arguing NFMA enacted as check on abuse of agency power and Forest Service has violated Act's purpose by overriding environmental concerns when approving timber sales).

\textsuperscript{155} See French, supra note 1, at 957-58 (pointing out that if there are no protests to agency action, administrative records assumed to be complete and accurate).
The impact of this practically unlimited discretion has led to the Forest Service repeatedly favoring industry at the expense of the environment. If the *Wildlife Ass'n II* court considered such bias and bad faith, perhaps *Wildlife Association* could have been awarded a preliminary injunction to stop the timber sales while the merits of its claims were remanded to the Forest Service or, more appropriately, considered by the Eighth Circuit.

VI. IMPACT

The Supreme Court has left open the crucial question as to whether judicial review of agency action should be limited to the administrative record. When courts follow the Seventh Circuit's view of strict record review in cases dealing with the Forest Service, as the Eighth Circuit did in *Wildlife Ass'n II*, judges are often blind to the actual environmental impact of agency-approved projects, such as timber sales. In addition, as illustrated in Part V of this Note, courts following strict record review ignore NEPA's purpose and the history of agency bad faith. Such ignorance results in two detrimental effects: (1) pressure is placed on environmental groups and individuals, instead of the Forest Service, to challenge the accuracy of the agency's findings during the planning and ap-

156. See, e.g., Cronin v. United States Dep't of Agric., 919 F.2d 439, 444 (7th Cir. 1990) (limiting district court to record compiled by agency because agency appropriate place to consider evidence). The facts in the record are, therefore, assumed to be true. See, Missouri Coalition for Env't v. Corps of Eng'rs, 866 F.2d 1025, 1033 (8th Cir. 1989) (stating not role of court to determine truth of agency's findings). Thus, the only restrictions on the agency are to guess what topics should be considered in case of protest. See French, *supra* note 1, at 958 (criticizing courts that will not sit as fact-finders or allow appellants to present facts inconsistent with agency's administrative record).

157. See Goodman, *supra* note 1, at 133-36, 147-55 (summarizing in detail three major Forest Service biases, including local community bias, timber industry bias, budget maximizing bias, as well as bad faith in appeals process). For a discussion of the comment process, see *supra* notes 31-32 and accompanying text.

158. See *Wildlife Ass'n II*, 141 F.3d at 806-07 (affirming district court's denial of preliminary injunction and noting seventy-five percent of logging and road construction completed by appeal). It is proper course, the Eighth Circuit notes, to remand to agency for additional investigation if the record is somehow inadequate. See Lorion, 470 U.S. 729, 744. Of course, some courts would first conduct minimal judicial fact-finding by allowing extrinsic evidence from the party seeking the injunction to determine whether such further agency investigation is needed. See generally County of Suffolk, 562 F.2d at 1368.

159. For a discussion of the Supreme Court's trend toward strict record review, see *supra* note 37-44, 50 and accompanying text.

160. See *Wildlife Ass'n II*, 141 F.3d at 807 (ignoring expert opinions that environmental effects and alternatives not thoroughly considered by Forest Service).

161. For a critique of courts that ignore NEPA's purpose and a discussion of Forest Service Bad Faith, see *supra* notes 132-59 and accompanying text.
proval process, and (2) injunctions against potentially harmful timber sales will continue to be denied without proof of accurate environmental impact.

First, courts refusing to admit extrinsic evidence except in emergency situations or when the record obviously lacks content do not assure the Forest Service will make thorough findings. Thus, not only do logging activities continue in the face of strong public contest to negative environmental impact but such courts also, in effect, shift the burden of accurate assessment of timber sales to environmental groups and individuals who protest agency actions. This court-imposed burden on the public runs counter to Congress’s stated purpose in NEPA and will continue to discredit protecting the national environment as the Act intends.

Second, the Supreme Court could help prevent much environmental damage caused by deficient agency process by establishing a

162. See French, supra note 1, at 976-83 (arguing burden on appellants challenging agency actions to ensure studies completed during decision-making process). For a discussion of the burden placed on challengers of the Forest Service’s actions in particular, see supra notes 31-32 and accompanying text.


164. See French, supra note 1, at 976-83 (arguing reviewing courts should have burden of examining accuracy of agencies’ findings with extrinsic evidence presented in court); Goodman, supra note 1, at 119 (concluding courts should actively review citizen appeals of agency decisions and allow appellants to augment administrative record).


166. See County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1385 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (noting that forcing plaintiffs to prove alleged environmental impacts during the administrative process “would in effect shift the burden of insuring the adequacy of the EIS to environmental challengers, even though the primary and nondelegable responsibility for providing such analysis lies with the agency”). For a discussion of the County of Suffolk decision, see supra notes 66-73 and accompanying text. See also French, supra note 1, at 976-83 (discussing cyclical administrative process and courts’ duty to review challengers’ evidence extrinsic to administrative record in order to insure adequacy of agencies’ findings).

167. See Weinberg, supra note 21, passim (stressing Supreme Court thwarts NEPA’s purpose of imposing environmental responsibility on agencies).
clear exception to record review for courts to follow in NEPA cases.\textsuperscript{168} Such a rule could potentially increase the number of injunctions awarded against timber sales until an objective, judicial assessment of potential environmental impact is reached.\textsuperscript{169} For two reasons, it is critical to NEPA’s purpose that an injunction is ordered at the district court level when challengers of approved timber sales bring suit against the Forest Service. First, exhaustion of administrative remedies takes significant time, during which approved timber sales are not ceased by the Forest Service.\textsuperscript{170} Second, by the time a court can determine whether an agency’s findings in approving a project indeed show ample steps (and, hopefully, accuracy and mitigation) to protect the environment from negative impact, the damage can be nearly complete.\textsuperscript{171}

\textbf{Wildlife Ass’n II} is clearly on point. By the time the second appeal reached the Eighth Circuit, seventy-five percent of the logging and road construction had been completed.\textsuperscript{172} The Eighth Circuit even used this fact as a reason not to consider extrinsic evidence when reviewing the record.\textsuperscript{173} Clearly, the court never questioned the truth of the Forest Service’s findings even with knowledge that opposing expert evidence existed. The court, therefore, completely deferred to the Forest Service in the face of adamant public challenge, which lasted for over three years.\textsuperscript{174}

The decision in \textit{Wildlife Ass’n II} demonstrates that courts need a rule to assure judges will take a “hard look” at administrative records on review in order to make sure agency findings are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{175} If the Supreme Court continues, however, to ignore the Congressional intent in NEPA, environmental groups

\begin{itemize}
  \item \textsuperscript{168} See cf. id. at 104-108 (criticizing Court for ignoring Congress’s clear intent that agencies mitigate environment impact of “major Federal actions”).
  \item \textsuperscript{169} See Froehlke, 473 F.2d at 353 n.18 (quoting Senator Jackson—“If an environmental policy is to become more than rhetoric, [c]oncern for environmental quality must be a part of every phase of Federal action.”). See 115 Cong. Rec. 29,087 (1969) (containing words of Senator Jackson, as quoted in \textit{Froehlke}). See also, Goodman, supra note 1, at 155 (arguing judicial review of Forest Service appeals meaningless if courts continue giving broad discretion to Forest Service).
  \item \textsuperscript{170} See, e.g., \textit{Wildlife Ass’n II}, 141 F.3d at 807 (suggesting process is long and laborious). For \textit{Wildlife Ass’n II}’s procedural history, see supra note 83.
  \item \textsuperscript{171} See, e.g., id. (noting seventy-five percent of project complete at time of action).
  \item \textsuperscript{172} See id. For a discussion of the facts of \textit{Wildlife Ass’n II}, see supra notes 74-88 and accompanying text.
  \item \textsuperscript{173} See id.
  \item \textsuperscript{174} See id. For a discussion of the \textit{Wildlife Ass’n II} court’s analysis, see supra notes 89-131 and accompanying text.
  \item \textsuperscript{175} Overton Park, 401 U.S. at 415; APA, U.S.C. 706(2)(A).
\end{itemize}
and individuals concerned with environmental goals should challenge their legislatures to amend NEPA to make agency compliance with its stated purpose mandatory.176

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176. See Weinberg, supra note 21, at 116 (asserting Congress or EPA should "amend NEPA to require mitigation of environmental harms, thereby restoring the statute's substantive component").