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Accountability for Mitigation Through Procedural Review: The NEPA Jurisprudence of Judge Betty B. Fletcher, a Trustee of the Environment and Woman of Substance

Kenneth S. Weiner

ACCOUNTABILITY FOR MITIGATION THROUGH PROCEDURAL REVIEW: THE NEPA JURISPRUDENCE OF JUDGE BETTY B. FLETCHER, A TRUSTEE OF THE ENVIRONMENT AND WOMAN OF SUBSTANCE

Kenneth S. Weiner*

Abstract: In the past thirty years, as judges who first required compliance with the mandates of the National Environmental Policy Act of 1969 retired or died, the First and Ninth Circuits became the most stalwart keepers of NEPA's flame. This article explores how, despite the procedural characterization of NEPA, Judge Betty B. Fletcher of the Ninth Circuit has been able to focus attention on NEPA's substantive goal of achieving productive harmony between people and nature, while respecting the limits of judicial review of executive action. Judge Fletcher insists public officials answer a simple question: If you are not well-informed about whether environmental harm will occur, how can you have given the proposal a "hard look"? Judge Fletcher holds United States government officials accountable when making decisions affecting people and nature—accountable to prepare and fully disclose the required studies, so the democratic process of civic and civil debate can occur; accountable to search for better alternatives; and perhaps most important, accountable to any promises they make that their actions will not harm environmental quality for present and future generations. This is the jurisprudence Judge Fletcher has bequeathed to the United States, and to those around the world who look to the United States and NEPA for leadership on environmental stewardship.

INTRODUCTION

The National Environmental Policy Act of 1969[1] (NEPA) has often been called our nation's environmental Magna Carta. NEPA's structure

* Senior Partner, Environmental, Land & Natural Resources, K&L Gates LLP (Seattle office). Mr. Weiner founded Preston Thorgrimson/Preston Gates Ellis's environmental, land use, and natural resources practice after serving as Deputy Executive Director and Counsel for the White House Council on Environmental Quality under Presidents Carter and Ford (1976–1980). Mr. Weiner is a principal author of the federal National Environmental Policy Act Rules, the Washington State Environmental Policy Act Rules, and other federal, state, and local environmental and land use laws. He has counseled private companies, public clients, and nongovernmental organizations on environmental compliance, restoration, and sustainability for more than thirty years. He has written and taught extensively on environmental law and has served as adjunct faculty at the University of Washington School of Law. He has been married to Judge Fletcher's daughter Kathy Fletcher, see *infra* note 68, since 1980—that is, since shortly after Judge Fletcher joined the Ninth Circuit. Although the author and the judge have not discussed active NEPA cases in the intervening thirty years, a matter of great judicial restraint for both of us, it is apparent we share an abiding appreciation for NEPA.

1. 42 U.S.C. §§ 4321–4370 (2006).

and language are constitutional in character. Widely recognized as the world's first comprehensive statement of environmental policy, NEPA became a model for environmental policy and law around the globe. NEPA has and may continue to have as much "impact" as any environmental statute in history, even as we move into the twenty-first century challenge to confront global climate change.[2]

Ninth Circuit Court of Appeals Judge Betty Binns Fletcher has profoundly understood and has steadfastly defended NEPA as our nation's fundamental democratic response to respecting the earth and all the inhabitants thereof. For thirty years, she has strictly interpreted the law in accordance with its stated purpose: to achieve harmony between people and nature. As the judges who first required compliance with NEPA's mandates retired or died—such as William O. Douglas and Thurgood Marshall on the Supreme Court, and Skelly Wright and Harold Leventhal on the D.C. Circuit Court of Appeals—the First and Ninth Circuits became the most stalwart keepers of NEPA's flame. As we enter the new millennium, one judge stands out as the leading judicial interpreter of our nation's environmental charter and its relevance to current issues: Judge Fletcher of the Ninth Circuit.

While some federal agencies and courts seek to relegate NEPA to the dustbin (perhaps recycling box) of a paperwork exercise, Judge Fletcher has thoughtfully developed a NEPA jurisprudence that points the way to focus on the statute's substantive goals, while respecting the procedural review role of the courts. As might be expected by her fans and critics alike, she has applied a rigorous analysis whose logic does not readily leave room for dissent. Even when Judge Fletcher's decisions are reversed or when she is writing a minority opinion, those with whom she disagrees often use or borrow heavily from her legal analysis and differ instead on the interpretation of the facts.

NEPA was passed by Congress in 1969, and we commemorate its fortieth anniversary this year.[3] Judge Fletcher was confirmed a decade

2. *See* Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP. 10,675 (2009).

3. *See* Symposium, *NEPA at 40*, 39 ENVTL. L. REP. 10,575 (2009). NEPA has stood essentially unamended since its enactment, as have the 1978 Council on Environmental Quality NEPA Rules. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 815–17 (2d ed. 1994). Two presidential proclamations on NEPA aptly encompass Judge Fletcher's tenure on the federal bench. The first, by President Jimmy Carter, who appointed Judge Fletcher, was issued on the occasion of NEPA's first decade. Proclamation No. 4710, 45 Fed. Reg. 757 (Jan. 1, 1980). More recently, President Barack Obama recognized NEPA's fortieth anniversary. Proclamation No. 8469, 75 Fed. Reg. 885 (Dec. 31, 2009). Both proclamations highlight the values of environmental trusteeship and sustainability, and of government accountability, full disclosure, public participation and democracy that permeate Judge Fletcher's NEPA jurisprudence.

later in 1979, and we honor her thirtieth anniversary on the bench this year. These milestones represent remarkable longevity for a statute and a judge.

Despite this passage of time, in 2008 alone Judge Fletcher authored two landmark decisions on NEPA's role on our society's response to climate change and to the plight of our oceans and their species.[4] These issues could not be more timely and central, at a local and global level, to the well-being of both the human species and life on earth. As much as any single person, Judge Fletcher reminds us that NEPA is relevant today.

This Article explores Judge Fletcher's NEPA jurisprudence, focusing on her singular contribution to resolving the tension between substance and procedure in judicial review. In short, the courts are required to hold federal agencies to a standard of strict compliance with NEPA's procedural provisions, yet not to substitute their judgment for that of executive branch officials on substantive decisions about approving or conditioning proposed federal actions. Much of the substance of decisions affecting the environment—namely, whether national environmental policy goals are achieved—turns on the effectiveness of "mitigation measures" to avoid or otherwise ameliorate adverse environmental impacts.

Judge Fletcher has developed a jurisprudence that holds agencies accountable for the quality of their NEPA analyses and documents relating to mitigation measures, while keeping within the existing doctrines of judicial review of administrative action and deference to the agency's substantive decisionmaking role. The effect of these cases is to retain NEPA's intended focus on substance while respecting the traditional review role of the courts.

I. *SUBSTANCE v. PROCEDURE* FRAMES THE ISSUE

The story must begin with an understanding of the famous NEPA case of *Substance v. Procedure*. If you know this "case" well, you can skip ahead to Part II—but be forewarned, Judge Fletcher's jurisprudence is built on this foundation.

4. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008); Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir.), *rev'd*, 555 U.S. __, 129 S. Ct. 365 (2008).

A. NEPA Requires Agencies to Think and Then Act

At its core, NEPA places two basic mandates on all agencies of the federal government: (1) to think about the environmental consequences of their activities and decisions, and (2) to act to restore and protect environmental quality consistent with other essential considerations of national policy. The duty of federal agencies to *think* about the environment is NEPA's procedural mandate. The duty of federal agencies to *act* to protect and restore the environment is NEPA's substantive mandate.[5]

The procedural and substantive mandates overlap in the key concept of "mitigation," which means avoiding or otherwise reducing environmental damage that could result from a government action. Mitigation is one of the three types of alternatives that NEPA requires governmental officials to explore before making decisions.[6] Exploring alternatives is the heart of the NEPA process, because NEPA's substantive goal—to change government behavior, so that agencies protect the environment to the fullest extent possible—can be met only if the agencies look for a better way to carry out their business.[7]

Mitigation measures are therefore substantive because they refer to actions the government will take to prevent environmental harm or improve the environment. The NEPA requirement to develop and explore alternatives, including mitigation measures, is procedural because it refers to the thinking process of giving a hard look to avoiding environmental impacts if you can.[8]

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5. For a more complete explanation of NEPA's mandates and role and a section-by-section explanation of the CEQ NEPA Rules, see Kenneth S. Weiner, *Basic Policies and Purposes of the NEPA Regulations*, *in* ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 61 (Ray Clark & Larry Canter eds., 1997).

6. 40 C.F.R. § 1508.20 (2008). The other alternatives that officials must consider are a "no action" alternative and "other reasonable courses of action." *Id.* § 1508.25.

7. *See* 40 C.F.R. §§ 1500.1 (purpose of CEQ regulations), 1502.1 (purpose of environmental impact statement requirement), 1502.14 (alternatives as the "heart" of environmental impact statement), 1508.25 (definition of "scope" of environmental impact statement); Weiner, *supra* note 5, at 74–77 (explaining these provisions and the meanings and misperceptions of mitigation); *see also* Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10,060, 10,065 (1989).

8. Since NEPA's enactment in 1970, and the subsequent enactment of many state NEPAs, proposed actions have improved dramatically by taking environmental quality into account from the outset. Prior to NEPA, agencies typically proposed actions that did not consider environmental quality. As agencies incorporated environmental review under NEPA, they began to develop different proposals than in the past, proposals that would often produce different and generally improved actions, particularly in contrast to pre-1970s actions. In addition, because NEPA greatly opened up the planning and decisionmaking process to the public, proposals are often developed in

Sections 101, 102(1), and 105 of NEPA provide the statute's substantive mandate. Section 101 specifies goals for the federal government, making it national policy "to create and maintain conditions under which man and nature can exist in productive harmony."[9] In section 102(1), Congress declared 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 policies set forth in this Act . . . ."[10] Section 105 makes the policies and goals set forth in the Act, principally in the declaration of national environmental policy in section 101, "supplementary to those set forth in existing authorizations of Federal agencies."[11] Through section 105, NEPA added environmental protection and restoration to the underlying charter authority of every federal agency.

Section 102(2)(F) could also be considered to be a directive to act, as it requires all federal agencies to "lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. . . ."[12] This provision could hardly have been more prescient forty years ago, nor could it be more timely today.

Section 102(2) provides the statutory underpinning of the procedural mandate. With the possible exception of section 102(2)(F), as noted above, the other provisions of section 102(2) are directed toward producing good information about the environment, so that agencies can act on what they have learned. NEPA identifies fundamental criteria for developing good information. Most notably, section 102(2)(C) requires a "detailed statement" on the alternatives and environmental impacts of proposed major federal actions significantly affecting the quality of the environment, now known as an "environmental impact statement"

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a more participatory way with advice from other agencies, Indian tribes, businesses, communities, and interested parties (often called "stakeholders"). Because agencies and applicants for permits have given better attention to environmental factors and often work with affected parties from the outset, fewer outright environmentally-destructive projects are proposed. A proposal's impacts may still be significant, severe, or simply important. Consequently, emphasis has shifted in many cases to mitigation measures that address the remaining impacts of a proposal. The role of mitigation measures and their efficacy has therefore become increasingly central to NEPA compliance, and the failure to address them may be fatal to the review of a proposed action. As noted in the introduction to this Article, Judge Fletcher's decisions on procedural adequacy relative to mitigation measures mark an important and timely contribution to NEPA jurisprudence and have helped to dispel false polarities and diffuse misplaced debates over substance and procedure under NEPA.

9. 42 U.S.C. § 4331 (2006).

10. *Id*. § 4332(1).

11. *Id*. § 4335.

12. *Id*. § 4332(2)(F).

(EIS).[13] This statement was meant to be both an accountability measure to assure agencies developed the necessary information, and an "action-forcing" mechanism, on the theory that good information will lead to better, more informed decisions and actions.[14]

Both the EIS and the environmental assessment (EA) discussed below were intended as accountability and transparency measures, to document that agencies followed NEPA's injunctions to give appropriate consideration to environmental values in their planning and decisions.[15] These environmental values are articulated in the national environmental policy set forth in section 101 of NEPA.[16] These policies include:

- fulfilling the responsibilities of each generation as a trustee of the environmental for succeeding generations;
- attaining the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; and
- preserving important historical, cultural and natural aspects of our national heritage, and maintaining, wherever possible, an environment which supports diversity, and a variety of individual choice.

In today's terms, this policy is called "sustainability" and includes taking actions today that will also preserve or enhance resources and options for future generations.

B. The Executive Branch Acts to Implement NEPA's Original Intent

The above primer provides a brief background on the meaning of "substance" and "procedure" under NEPA. The roles and interplay among the legislative, executive, and judicial branches of the federal government are equally important to understand judicial review under

13. *Id*. § 4332(2)(C).

14. FREDERICK R. ANDERSON, NEPA IN THE COURTS 2–4 (1973); *see also* Lynton K. Caldwell, *Implementing NEPA: A Non-Technical Political Task*, *in* ENVIRONMENTAL POLICY AND NEPA, *supra* note 5, at 40–41; 4 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.01[3] (2009); Lynton K. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL. L. REP. 50,030, 50,033 (1976) [hereinafter Caldwell, *Retrospect and Prospect*] ("The impact statement was required to force the agencies to take the substantive provisions of the Act seriously, and to consider the environmental policy directives of the Congress in the formulation of agency plans and procedures."); Nicholas Yost & Gary Widman, *The "Action-Forcing" Requirements of NEPA and Ongoing Actions of the Federal Government*, 19 ENVTL. L. REP. 10,435, 10,436–37 (2004) (explaining how NEPA's "action-forcing" provisions ensure that federal agencies "act according to the letter and spirit of the statute").

15. 42 U.S.C. § 4332(2)(B).

16. *Id*. § 4331.

NEPA. In this regard, NEPA's origins are relevant.[17]

Despite urban legend to the contrary, NEPA's drafters on the Senate committee staff were aware of the potentially powerful tool created through the statute's EIS requirement.[18] In contrast, most of the members of Congress sponsoring NEPA expected the statute's legacy to be a high-sounding statement of noncontroversial principles and the establishment of a permanent White House presence to raise newly-articulated national environmental policy goals to the highest levels in government.

Prime sponsors of NEPA from both the Senate and the House believed that the lasting legacy and biggest "environmental impact" of NEPA would be the establishment of the White House Council on Environmental Quality (CEQ) with a lead environmental advisor to the President. As experienced Washington insiders in a time of a strong presidency, they understood the power that a top White House official with an adequate staff can have in shaping policy and accomplishing change.

CEQ was modeled after the National Security Council and the Council of Economic Advisors in the Executive Office of the President (the extended White House family, which includes other powerful offices such as the Office of Management and Budget).[19] Senator Edmund S. Muskie even deferred to Senator Henry M. Jackson on the prime sponsorship of NEPA in the Senate, because Senator Muskie was satisfied with the compromise that he would be the prime sponsor of the companion measure to NEPA, the Environmental Quality Improvement Act,[20] which provided staff to CEQ, as he felt would be the lasting contribution of NEPA.

The Congressional sponsors saw NEPA first and foremost as a *government management* statute, directing the federal agencies to change the way they did business and to protect, restore, and enhance environmental quality in carrying out their missions.[21] As with Theodore

17. For a more extensive treatment, see LYNTON K. CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE 22–47 (1998).

18. Caldwell, *Retrospect and Prospect*, *supra* note 14, at 50,032 ("Contrary to some journalistic conjecture, the action-forcing provisions were not added to the NEPA as a last-minute afterthought. The need for language to make the Act operational was recognized early in the drafting stage.").

19. *See* Caldwell, *supra* note 17, at 37–40; Weiner, *supra* note 2, at 10,675–76. Additional illuminating legislative history on CEQ and Congressional focus on this aspect of the evolving NEPA legislation can be found in the original bill reports and floor debate, many of which have been compiled and analyzed in GRAD, *supra* note 14, § 9.01[4], and summarized in § 9.01[4][h].

20. 42 U.S.C. §§ 4371–75 (2006).

21. Caldwell, *Retrospect and Prospect*, *supra* note 14, at 50,033 ("The impact statement was

Roosevelt's vision for the U.S. Forest Service and many New Deal and Great Society reforms, NEPA's sponsors saw the federal government as providing a model, proving to the private sector that environmental quality was integral to, and compatible with, economic and social well-being nationally and internationally.[22]

President Nixon quickly issued an Executive Order directing agencies to comply with NEPA and authorizing CEQ to oversee its implementation.[23] CEQ promptly issued guidelines to agencies to prepare EISs.[24]

Perhaps most significantly, these guidelines required agencies to prepare "draft" EISs, officially opening up agency planning on major projects and plans affecting the environment and natural resources for public review for the first time.[25] Few people realize that review and participation by the public and by Indian tribes was not then—and still is not—in the NEPA statute itself.

CEQ created a second powerful tool, the environmental assessment (EA), for situations where proposals did not have big impacts, but would still affect the environment. The EA requirement was equally far-reaching, not only because it requires examination of "alternatives" but because it applies to thousands of federal actions annually, compared to

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required to force the agencies to take the substantive provisions of [NEPA] seriously, and to consider the environmental policy directives of the Congress in the formulation of agency plans and procedures.").

22. *See* Weiner, *supra* note 2, at 10,676. This parallel is ironic because of the number of cases on which Judge Fletcher has sat challenging whether the U.S. Forest Service was meeting its environmental stewardship obligations. *See infra* Part II.

23. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970). Executive Order 11,514 had a significant amendment when President Carter issued Executive Order 11,991, directing CEQ to issue binding government-wide NEPA regulations. 42 Fed. Reg. 26,967 (May 24, 1977). Building on Executive Order 11,514, President Obama expanded CEQ's role in environmental sustainability under Executive Order 13,514, working with the Office of Management and Budget. 74 Fed. Reg. 52,117 (Oct. 5, 2009). One can expect that each agency's senior sustainability officer designated under Executive Order 13,514 will in time have responsibility for the agency's progress in meeting NEPA's goals.

24. CEQ issued interim NEPA Guidelines in 1971, final NEPA Guidelines in 1973, and final NEPA Rules in 1978. *See* RODGERS, *supra* note 3, § 9.2; Weiner, *supra* note 5, at 64–65. Chapter One of ANDERSON, *supra* note 14, has an excellent summary of the legislative background on NEPA (its discussion of the executive branch's oversight of NEPA and CEQ is outdated, however). GRAD, *supra* note 14, § 9.01, contains a good update on CEQ. This article and subsequent case law (including many cases cited in this article) note CEQ's regulatory and oversight role, which has become well-established over the past forty years.

In keeping with the full disclosure required by NEPA, the author joined CEQ in 1976 to write the NEPA Rules and is a principal author of the current government-wide CEQ NEPA Rules.

25. 40 C.F.R. § 1503.1(a) (2008).

the small number of EISs that are prepared.[26]

NEPA, through the NEPA rules, is among the most democratic of laws. It does not proscribe or prescribe conduct (hence the rap that it's not substantive). Instead, it sets performance goals and requires clear thinking by agencies and encourages civil debate by experts and citizens. NEPA depends on and promotes democracy. The government is not omniscient—the public has a right to know, and the voices of individuals with good ideas must be heard.

When one looks at Judge Fletcher's jurisprudence in all areas of the law, and her respect for the democratic process and the individual who faces abuses of power, as reflected in all of the articles in this special issue of the *Washington Law Review*, one can see why the Judge and NEPA are the perfect match.

C. NEPA's Early Cases Review Substantive and Procedural Compliance

The early NEPA cases lay the foundation for this tribute to Judge Fletcher. When federal agencies began preparing their procedures to implement NEPA and their first EAs and EISs, many were cursory or were justifications of planned projects.

It was unclear at this early point in its history whether NEPA had any teeth. The statute does not contain an explicit enforcement or judicial review provision. CEQ was new, relatively small, and had its hands full with a host of domestic and global environmental initiatives. As the White House family's environmental staff, CEQ's clout depends on the President's interest and support. Relying heavily on the advice of his chief Domestic Policy advisor John Ehrlichman, a former Seattle environmental and land use lawyer, President Nixon embraced the politics of the environment, but it was not a personal priority for him.

Would the federal bureaucracy gain the upper hand and turn NEPA into an empty exercise, one more piece of paperwork before proceeding as planned?

The first cases changed the course of history, here and abroad, by giving NEPA teeth. *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*[27] was the first landmark opinion interpreting NEPA, and remains perhaps the most famous NEPA case. The D.C. Circuit Court decision upheld a challenge by a citizen group, confirming the right both to judicial review and to public enforcement under NEPA.

26. *See* RODGERS, *supra* note 3, § 9.5.

27. 449 F.2d 1109, 1114 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

The court rejected the Atomic Energy Commission's NEPA procedures, overturning the agency's action on the basis of NEPA through the Administrative Procedure Act (APA),[28] and establishing that NEPA was not a vague policy statement but had enforceable mandatory requirements. No longer did NEPA compliance depend solely on CEQ oversight or internal executive branch politics. D.C. Circuit Court Judge Skelly Wright declared that Congress did not intend the Act to be "a paper tiger."[29]

In doing so, the courts confronted the fundamental issue of substance versus procedure.

Calvert Cliffs set precedent by walking the line between the two, in a time-honored interpretation of the APA and judicial review of agency action. NEPA's procedural provisions require strict compliance. The court's "hard look" at "strict procedural compliance" employs a "rule of reason" so that "reasonably foreseeable" environmental consequences are examined, not "remote and speculative" impacts.[30] The court wrote: "Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."[31]

Calvert Cliffs noted, with regard to how an agency applies the substantive provisions of section 101, that NEPA does not mandate a "particular substantive result,"[32] but this did not mean section 101 was irrelevant. The court acknowledged its ability to review or alter the agencies' choice of the course of action after meeting NEPA procedural requirements was limited. *Calvert Cliffs* followed long-standing APA case law that a court cannot simply substitute its judgment for the agency, but could review and reverse agency action that was arbitrary and capricious under the statute.[33]

The D.C. Circuit understood the "think" and "act" connection in NEPA, and concluded that agency action would be arbitrary and reversible if the "thinking" didn't include the values NEPA requires to be considered:

> We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process

28. 5 U.S.C. §§ 701–706 (2006).

29. *Calvert Cliffs*, 449 F.2d at 1114.

30. *See* GRAD, *supra* note 14, § 9.03[3][a]; DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 3.3, 3.7, 9.19 (2d ed. 1992).

31. *Calvert Cliffs*, 449 F.2d. at 1114.

32. *Id*. at 1112.

33. *Id*. at 1115.

> and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.[34]

Later in the decade, in a successful challenge to the adequacy of NEPA compliance on the Gillham Dam, the Eighth Circuit went further to state:

> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits. Whether we look to common law or the Administrative Procedure Act, absent "legislative guidance as to reviewability, an administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing." Here, important legal rights are affected. NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.[35]

This was the high water mark of NEPA substantive review, and has led to confusion and a classic polarization that has plagued NEPA's interpretation ever since, as discussed below, which Judge Fletcher's opinions have sought to elucidate and overcome.

D. The Supremes Weigh in and Back off on NEPA's Substantive Mandate

At this point in the late 1970s, the first NEPA cases began to reach the U.S. Supreme Court. In a series of cases from 1976 to 1980, beginning with *Kleppe v. Sierra Club*,[36] the Supreme Court emphasized that a reviewing court should not substitute its judgment for that of an agency and also should not interject itself within the area of discretion of

34. *Id.*

35. Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 470 F.2d 289, 299 (8th Cir. 1978) (internal citation omitted).

36. 427 U.S. 390 (1976).

the executive on the choice of alternatives.[37]

Two years after *Kleppe*, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*.[38] In rejecting the D.C. Circuit's decision that it was reasonable to study energy conservation alternatives to the construction of a new nuclear plant, Justice Rehnquist expanded on the substitution of judgment on the merits to describe NEPA's mandate as "essentially procedural,"[39] which forever changed the perception of NEPA and the force of judicial review:

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached. *And a single alleged oversight on a peripheral issue*, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.[40]

Later, in *Tennessee Valley Authority v. Hill*,[41] the Court stopped construction of the Tellico Dam because of the failure of the Interior Department to comply with Endangered Species Act protections for the snail darter, a small fish. In contrasting the Endangered Species Act substantive prohibition on "take" of endangered species to NEPA's provisions, the Court repeated the *Vermont Yankee* epithet in a side comment: "[T]he two statutes serve different purposes. NEPA essentially imposes a procedural requirement on agencies."[42]

Finally, in *Strycker's Bay Neighborhood Council v. Karlen*,[43] the Supreme Court rejected a Second Circuit decision that required the U.S. Department of Housing and Urban Development to examine alternative

37. *See, e.g.*, *id*. at 410 n.21.

38. 435 U.S. 519 (1978).

39. *Id*. *at* 558.

40. *Id*. (emphasis added) (internal citations omitted).

41. 437 U.S. 153 (1978).

42. *Id*. at 188 n.34.

43. 444 U.S. 223 (1980).

sites for a housing project in order to avoid or mitigate the impacts of crowding low income housing into a concentrated urban area. The Second Circuit rejected the agency's objection to taking two more years to study the proposed project.[44] In a per curiam decision, the Supreme Court ruled that the lower court was substituting its judgment for that of the agency.[45] Justice Marshall wrote an eloquent dissent, distinguishing between directing the agency where to locate the housing—which was nowhere in the Court of Appeals decision—and allowing review of the agency's decision to proceed with the project without analyzing alternative sites:

> In the present case, the Court of Appeals did not "substitute its judgment for that of the agency as to the environmental consequences of its actions" . . . .
>
> The issue before the Court of Appeals, therefore, was whether HUD was free under NEPA to reject an alternative acknowledged to be environmentally preferable solely on the ground that any change in sites would cause delay. This was hardly a "peripheral issue" in the case. Whether NEPA, which sets forth "significant substantive goals," permits a projected 2-year time difference to be controlling over environmental superiority is by no means clear. Resolution of the issue, however, is certainly within the normal scope of review of agency action to determine if it is arbitrary, capricious, or an abuse of discretion.[46]

The burgeoning idea that the courts could decide whether an agency gave insufficient weight to environmental values even under a narrow standard was effectively quashed by this series of decisions by the Supreme Court. Justice Rehnquist's overbroad but superficially appealing assertion, that the judges with whom he disagreed were simply overturning decisions on the merits and substituting their preferences for the agency's, carried the day. Notably, the Court has not overruled *Calvert Cliffs* or many of the other seminal NEPA cases.

The culmination of this line of cases came in the twin Supreme Court decisions from the Ninth Circuit and Pacific Northwest, the *Robertson*

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44. Karlen v. Harris, 590 F.2d 39, 45 (2d Cir. 1978).

45. *Strycker's Bay*, 444 U.S. at 227. Justice Marshall's dissent includes a footnote in which he cites to the record, observing that even executive branch officials understood they could be called to task for failing to give appropriate consideration to environmental values, as required by NEPA: "The Secretary concedes that if an agency gave little or no weight to environmental values its decision might be arbitrary or capricious." *Id*. at 231 n.* (Marshall, J. dissenting).

46. *Id*. at 229–31 (Marshall, J. dissenting) (citation omitted).

and *Marsh* cases.[47] Although the *Marsh* line of cases requires mitigation to be analyzed, the Court stated in *Robertson*: "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan."[48] The Supreme Court continued to cast NEPA as procedural, a recital that spread like wildfire through the lower courts.

In summary, the Court's NEPA jurisprudence has generally been to circumscribe NEPA for a number of reasons. Chief among them seem to be: (1) NEPA cases require detailed attention to the record to be fairly adjudicated; in this regard, they seem to have an uncanny relationship to death penalty, criminal, and immigration cases, not surprisingly areas of Judge Fletcher's major contributions; (2) NEPA is an overarching statute that "overlays" or injects discretion in any governmental action, discretion which is theoretically reviewable and thus increases access to the courts and potential court workload; (3) there have been relatively few Supreme Court justices with a strong environmental appreciation; and (4) almost since NEPA's enactment, the Supreme Court has generally become more conservative with regard to access to the courts and judicial review of executive branch action.

E. Getting the Terms of the Substance v. Procedure *Debate Straight*

For many, particularly in the environmental public interest sector and academia, NEPA has "substance" only if a court can reverse the agency's decision as violating section 101 of NEPA. For others, particularly many federal agencies that have learned "to play the game," NEPA is a process and paper exercise, where the role of judicial review is limited to determining whether an agency followed the proper steps in the process, regardless of the quality of its analysis.[49]

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47. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989). Judge Fletcher wrote the Ninth Circuit's opinion in the *Marsh* case, which was part of a long series of cases. *See infra* note 67.

48. *Robertson*, 490 U.S. at 333.

49. A noteworthy result of the Supreme Court reviewing one of Judge Fletcher's *Marsh* decisions is that the Supreme Court charged the lower courts with a careful review of the record, not simply acceptance of conclusory documents by the agency:

> [I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information.

Marsh, 490 U.S. at 378.

There is another dimension of *Substance v. Procedure* that should be clarified, as some states assert their state NEPAs are "substantive" in contrast to NEPA. One of the biggest issues for the state NEPAs was whether public and private actions could be conditioned or denied based on

Both of these views of NEPA's "substantive" authority miss the point. The Congress and the Supreme Court are unlikely to reverse history, change NEPA or the APA, and allow the courts to substitute their judgment for informed agency decisions on the merits using broad language of section 101[50] as the yardstick. Agency decisions on projects, programs, plans and policies are an executive branch prerogative, subject to congressional direction and limited judicial review. The greatest strength of the NEPA process is its reliance on democracy: by opening up an agency process to public participation and agency review, people can change the course of their government's actions.

But there is a relationship between substance and procedure in NEPA judicial review that those who would polarize the issue of *Substance v. Procedure* have missed, but which the late Justice Thurgood Marshall, the late Judges Skelly Wright and Harold Leventhal, and Judge Betty Fletcher, among others, have not.

In brief, there are advocates for allowing a court to reverse an agency decision on the merits as violating the broad standards in section 101 (i.e., what the Supreme Court has denounced as the court substituting its judgment for the agency under the statute as it presently exists).[51] At the other end of the spectrum, there are advocates for allowing courts to defer to virtually any agency consideration of environmental factors, without scrutinizing the *quality* of the agency's analysis.

At the center, a court would reverse and remand an agency decision if the agency did not give appropriate consideration to the environmental values articulated in NEPA; that is, if the agency disregarded information, including unquantified environmental values, that should have been considered, or if the agency acts without considering environmental consequences. This is a procedural determination within the ambit of traditional judicial review of whether administration action is arbitrary and capricious. Judge Fletcher's NEPA jurisprudence

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environmental impacts. For many states, this is "substantive." This was never an issue with NEPA, for which this type of "substantive" authority is fully accepted by the courts. *See supra* note 14 and accompanying text. Instead, "substantive" in the federal context refers to a court reversing an agency decision for noncompliance with the policies of NEPA set forth in section 101 of the Act. *See* Weiner, *supra* note 2, at 10,677.

50. *See supra* note 16 and accompanying text.

51. Recall that judicial review occurs under the APA, as NEPA does not contain judicial review provisions. Congress could amend NEPA to allow judicial review of compliance with section 101 or, more narrowly, to provide expressly for judicial review of actual compliance with mitigation commitments (not simply currently available procedural review of whether the reasonably foreseeable effects of alternatives, including proposed mitigation measures, have been adequately analyzed).

generally falls within this center.

II. JUDGE FLETCHER'S LEGACY: EFFECTIVENESS OF MITIGATION MEASURES

Judge Fletcher's contribution—namely, reinvigorating NEPA's substantive mandate by strictly enforcing NEPA's procedural mandate under the "rule of reason," while remaining respectful of the limits of judicial review—is reflected in the following four cases, one for each decade of her tenure on the bench.[52] To make the development of this jurisprudence easier to follow, all of these examples involve management of public forest lands, but the legal doctrines apply to any governmental actions involving mitigation measures.

The first case, *Save Our Ecosystems v. Clark*,[53] involved a challenge to annual herbicide spraying on public lands in Oregon by the Bureau of Land Management and the U.S. Forest Service under their respective local management plans. Some of these herbicides contained dioxin, and according to the record, soon after spraying commenced, serious health problems were reported "including spontaneous abortions, birth defects in humans and animals, and various other illnesses."[54]

The Forest Service's defense was that the herbicides were registered and approved for use by the U.S. Environmental Protection Agency (EPA) under another law, so the Forest Service did not have a duty to do further analysis of the environmental effects of the herbicides. In short,

52. The following cases will be highlighted as examples in this article: *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1997). In addition, brief mention will be made of *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485 (9th Cir. 1995). and *Natural Resources Defense Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir.), *rev'd*, 555 U.S. __, 129 S. Ct. 365 (2008). Both *Marsh* and *Winter* illustrate the principles discussed in the this Article; however, these two cases have such complicated procedural histories—with multiple rulings spanning years of district court, circuit court, and Supreme Court review—that a brief article cannot do them justice. In the *Winter* case, involving the impact on whales of sonar use in Navy exercises (where Judge Fletcher's decision was ultimately reversed and remanded by the Supreme Court), all three separate opinions accepted the premise that the Ninth Circuit appropriately focused on mitigation measures in reviewing the Navy's proposed action. *See Winter*, 129 S.Ct. at 375 (majority) (holding that district court erred by not reconsidering injunction in light of Navy's voluntary acceptance of four mitigation measures); *id*. at 386 (Breyer, J. concurring) ("I would remand so the District Court could, pursuant to the Court of Appeals' direction, set forth mitigation conditions that will protect the marine wildlife while also enabling the Navy to carry out its exercises."); *id*. at 391 n.2 (Ginsburg, J. concurring) (noting with approval Ninth Circuit's "detailed analysis of the record" with regard to imposition of mitigation measures).

53. 747 F.2d 1240 (9th Cir. 1984).

54. *Id*. at 1243.

the use of a registered herbicide avoids or otherwise mitigates potential adverse environmental impacts.

Judge Fletcher's opinion affirmed the lower court decision that the Forest Service was required to study the effects of applying the herbicide in the area it proposes to spray. In other words, it's not the Forest Service's job to register the herbicide, but it is the Forest Service's job to know and to control how and where the herbicide is used. The decision notes the Forest Service could consider EPA or chemical company data or undertake its own research, or do both, but either way, the Forest Service would need to provide an adequate analysis of the effects of its spraying program in the targeted area.

This decision reflects the early stage of Judge Fletcher's NEPA "jurisprudence of transparency" to hold the government accountable for promises that federal actions will not harm the environment. Without such accountability, NEPA would be a "paper tiger," to use Judge Skelly Wright's phrase.

In *Blue Mountains Diversity Project v. Blackwood*,[55] environmental groups sought to enjoin thirty million board-feet of timber salvage sales in an area of the Umatilla National Forest in Oregon that had been burned by wildfires until the U.S. Forest Service prepared an EIS on the proposed logging. The Forest Service had prepared an EA and "finding of no significant impact" (EA/FONSI).

The potential for soil erosion and the resulting flow of sediment into streams are common issues with large-scale logging operations, both from the road building and logging operations.[56] The court found that the EA/FONSI gave "cursory and inconsistent treatment" to the sedimentation issue, with the Forest Service asserting that the erosion and sedimentation would be small compared to that caused by the fire.[57]

Most importantly, the Forest Service said that use of "best

55. 161 F.3d 1208 (9th Cir. 1998).

56. While some sedimentation naturally replenishes creek and streambeds, too much sediment causes a number of serious problems, including impairing or destroying fish spawning areas and other habitat. Much of this habitat is now critical to salmon and other fish runs that have become endangered, in part because of these historical human activities. The long-term controversy of timber operations in the Pacific Northwest, as well as in other areas of the nation and the world, is focused on this issue, and most habitat conservation plans focus on a wide range of actions to restore streams and prevent these impacts. These processes are well-documented in numerous reports dating from President Theodore Roosevelt's administration to the present. *See, e.g.*, U.S. Nat'l Marine Fisheries Serv. & U.S. Fish and Wildlife Serv., *Final EIS for the Proposed Issuance of Multiple Species Incidental Take Permits or 4(d) Rules for the Washington State Forest Practices* § 3.8 (2006), *available at* http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesHCP/Pages/fp_hcp_feis.aspx (discussing impact of sediment on aquatic life).

57. *Blue Mountain Diversity Project*, 161 F.3d at 1213.

management practices" would mitigate the potential impact for salvage logging of a large burned area. True to form, Judge Fletcher's decision reflects a careful reading of the record on appeal. It turns out the Forest Service was relying on best management practices based on observations of *unburned* areas.[58]

Judge Fletcher's opinion plainly stated that the court found nothing in the EA/FONSI to support a conclusion that this mitigation measure will be adequate in a *severely burned area* where increased erosion has already occurred.[59] Here is a brief, but full-fledged manifestation of using procedural requirements to achieve substantive environmental goals, within the role of limited judicial review and precisely as intended by NEPA's "action-forcing" procedures.

Judge Fletcher and her colleagues did not substitute their judgment for the Forest Service's on what mitigation measures, if any, should be employed. However, they did not find in the record of the NEPA analysis a "hard look" at whether mitigation measures based on unburned forests would be effective to control impacts in a severely burned forest. This direct logic and well-placed procedural rigor put the focus back on NEPA's substantive goals of trusteeship and sustainability—of finding and using alternatives that do not degrade and help to restore the environment.[60] NEPA, as noted earlier in this Article, intended federal agencies to be laboratories and models of environmental stewardship for the private sector.

The next case, from Judge Fletcher's third decade on the bench, is interesting because the Forest Service proposed an action—a permit for commercial logging and burning in old growth forest stands in the Lolo National Forest in Idaho—that was itself cast as a measure to mitigate the effects of a large forest fire. In *Ecology Center v. Austin*,[61] the Forest Service described its proposal as rehabilitative treatment of old growth

58. *Id*. at 1214.

59. *Id*. Pointing out the incongruity of applying mitigation measures based on unburned forests was not the only gem in Judge Fletcher's careful record review and opinion. Sedimentation is often measured by placing boxes in streams to measure the amount and/or rate of sedimentation. In reviewing the adequacy of the studies by the Forest Service—which asserted that sedimentation was not expected to be a problem and, as noted above, was using a mitigation measure based on unburned forests—the opinion notes, with perhaps a touch of ironic humor: "We find no documentation of the estimated sediment that would result from the logging and accompanying road-building or the impacts of increased sediment on fisheries habitat. *The Forest Service's only attempt to measure sedimentation failed when its data collection box overloaded with sediment*." *Id.* at 1213 (emphasis added).

60. Without Judge Fletcher's legendary attention to the record, one might easily imagine an unfounded charge that some activist judge was substituting her judgment for the agency's.

61. 430 F.3d 1057 (9th Cir. 2005).

and potential old growth forest stands. The treatment would consist of thinning the forest by commercial logging and burning. The objective was to improve the habitat by, among other things, leaving the best trees in place.

The court took a hard look at the agency's logic for promising that the mitigation measures would result in a healthier forest and improved habitat. The decision concluded that the Forest Service had not tested this theory or monitored other forests where these "treatment" methods had been used. Given the uncertainty about the effectiveness of the proposed mitigation, the court concluded the environmental impact needed more study (under NEPA) and caused unacceptable harm (under the forest management laws):

> This is not a case in which the Forest Service is asking for the opportunity to verify its theory of the benefits of old-growth treatment. Rather, the Service is asking us to grant it the license to continue treating old-growth forests while excluding it from ever having to verify that such treatment is not harmful.[62]

One other late 1990s case bears mention because Judge Fletcher's opinion for the court so clearly states the full measure of her contribution to a doctrine of accountability for mitigation. As always, her opinion is written in the details of the case before the court, but the doctrine is fully developed and articulated. In *Neighbors of Cuddy Mountain v. U.S. Forest Service*,[63] several groups challenged a timber sale in the Grade/Dukes area of Cuddy Mountain in the Payette National Forest in Idaho. The Forest Service EIS concluded there would be increased sedimentation in three creeks, but did not propose any mitigation measures for those creeks. Instead, the Forest Service discussion of mitigation measures noted that the impacts would be compensated by improvements in other drainages. Citing other Supreme Court and Ninth Circuit precedents, Judge Fletcher's opinion notes that "mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA" and goes on to explain:

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62. *Id*. at 1064. Regarded as an excellent writer, Judge Fletcher is not known for rhetorical flourishes. Her *Ecology Center* opinion contains a rare exception to make a point (recognizing the split infinitive was intentional):

> Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.

Id.

63. 137 F.3d 1372 (9th Cir. 1997).

> While acknowledging that the Grade/Dukes sale would negatively impact the redband trout by increasing sedimentation levels, the Forest Service *did not discuss which (or whether) mitigating measures might decrease the increased sedimentation* in the three creeks affected by the timber sale. In fact, we read the EIS as suggesting that the Forest Service *did not even consider mitigating measures for the creeks actually affected* by the sale, apparently because the Forest Service believes that mitigating measures elsewhere in Payette could "compensate" for the harms caused to the three creeks in the Grade/Dukes area. It is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of *how effective the mitigation measures would be if adopted*, or given a reasoned explanation as to why such an estimate is not possible. The Forest Service's own experts suggest that the mitigation measures suggested by the Forest Service "are not mitigation and are so general that it would be impossible to determine where, how, and when they would be used and how effective they would be."
>
> The Forest Service's broad generalizations and vague references to mitigation measures in relation to the streams affected by the Grade/Dukes project *do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness*, that the Forest Service is required to provide.[64]

Judge Fletcher has nailed it: empty promises to "do right" by the environment do not comply with NEPA. In her careful and logical opinions, she has shown how courts can appropriately use their review of NEPA procedural compliance to keep focused on the substance.

This review would be remiss if it did not recognize one other area of Judge Fletcher's significant impact on NEPA jurisprudence: cumulative effects. Cumulative impacts (or effects) refer to the additive or synergistic environmental consequence of multiple actions occurring in the same area or affecting the same resource. The Ninth Circuit has long been a leading court on cumulative impact cases, in part because of the large ecosystems and the developing metropolitan areas in the circuit. Key cases have dealt with issues ranging from watersheds[65] to highway systems.[66]

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64. *Id*. at 1381 (emphasis added) (citation omitted).

65. Pres. Our Island v. U.S. Army Corps of Eng'rs, No. C08-1353RSM, 2009 WL 2511953 (W.D. Wash., Apr. 13, 2009).

66. City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997).

Judge Fletcher has often reminded federal agencies of the need to look beyond their own actions and understand the effect their action is having in combination with other activities their own agency or other people are taking.[67] She well understands the principle of the "tragedy of the commons"—where common resources, such as land, water, air, fish and wildlife, are decimated by the incremental actions of many people over time. Even forty years after the first Earth Day and enactment of most of our current environmental laws, the fundamental problems with our air and water quality at home, and with the earth's oceans and atmosphere, largely result from cumulative impacts.

The issues in the cases above are not limited to the forestlands of the Oregon and Idaho, nor is the resulting NEPA jurisprudence. NEPA was enacted to change the way the U.S. Government did business, so that every federal agency would be an environmental leader. That goal is as relevant today, as the world faces the challenges of climate change, as it was in 1970 when the U.S. Circuit Courts of Appeals first gave "teeth" to NEPA.

CONCLUSION: JUDGE FLETCHER'S LEGACY OF SUBSTANTIVE FOCUS WITHIN JUDICIAL DEFERENCE

These things matter. NEPA, these cases, and these abstract-sounding principles have real-life consequences for people and our environment. It's the substance that counts.[68]

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67. The *Marsh* line of cases highlights Judge Fletcher's leading opinions on the requirement to consider cumulative impacts, which were also addressed in several of the cases discussed in this Article, including *Neighbors of Cuddy Mountain*, *supra* notes 63–64, and *Blue Mountains Diversity Project*, *supra* notes 55–59. In short, the *Marsh* cases involved a series of proposals relating to dams in the Rogue River Basin in Oregon. Congress authorized a three-dam project in 1962. The Corps issued an EIS in the early 1970s and began construction. The Corps's EISs and decisions on the preparation of supplemental EISs were challenged through the 1970s, 80s, and 90s, including one case which reached the U.S. Supreme Court in 1989—*Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989). Most of the litigation was focused on the partially constructed Elk Creek Project, upstream of a wild and scenic river portion of the river. In a 1995 remand to the district court, Judge Fletcher wrote the majority opinion that found the Corps's second supplemental EIS still did not adequately evaluate the cumulative impacts of the Corps's proposal on fish along with the other dams in the basin. Or. Natural Res. Council v. Marsh, 52 F.3d 1485 (9th Cir. 1995).

68. The author acknowledges the comments in this paragraph were made by Kathy Fletcher at the University of Washington Symposium: *A Tribute to the Honorable Betty Binns Fletcher*. In 1991, Kathy Fletcher founded, and currently serves as executive director of People For Puget Sound, which advocates for restoration and protection of the Puget Sound, one of the nation's great estuaries. Ms. Fletcher, a biologist by background, has co-taught at the University of Washington School of Law with Professor William H. Rodgers. Ms. Fletcher is a NEPA expert in her own right, formerly as staff scientist for the Environmental Defense Fund in Colorado in the 1970s and Assistant Director of the White House Domestic Policy Staff from 1976–1978, when the CEQ

Whether we increase fuel efficiency standards, subject whales to sonar, log temperate rainforests, run a highway through a neighborhood, or dam a stream with a salmon or trout run, people's lives will change. Our air, water, and land will be more or less able to sustain us and fellow species. The premise of NEPA is not to retreat to an idealized past, but that we do a better job living with nature for the future.

In her tenure on the court, Judge Fletcher has made an extraordinary contribution to preserving and revitalizing NEPA in an original and rigorous way. She is the ultimate strict constructionist on NEPA, which succinctly states: "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . . ."[69]

Judge Fletcher, building on the tradition of her early circuit court predecessors on NEPA, developed a jurisprudence that has placed the focus on NEPA's substantive provisions within the constraints established by the post-Warren Supreme Court. What she has done—as simple and logical as it sounds—is hold agencies accountable for their claims that they will not cause environmental harm.

She opines there must be a sufficient and articulated basis for a mitigation measure to be effective, or the environmental study is not meeting its required procedural purpose of full disclosure to the public and informing decisionmakers before they act.[70] She insists public officials answer the question: If you are not well-informed about whether environmental harm will occur, how can you have given the proposal a "hard look"?

If "hard look" and "strict compliance" are required procedurally (even if a particular substantive result is not mandated, and the court cannot substitute its view for the executive agency's on the course of action), then NEPA's requirement to analyze environmental consequences and alternatives that avoid or otherwise mitigate those consequences—in short, "looking before we leap" and preserving options for future

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NEPA Rules were developed and issued. As Chair of the Washington State's Puget Sound Water Quality Authority in the 1980s (the predecessor agency to the state's current Puget Sound Partnership), she used the SEPA, Washington State's version of NEPA, in innovative fashion to produce a combined national estuary restoration plan and EIS. As noted earlier, and as a matter of full disclosure, the author is married to Ms. Fletcher, who is Judge Fletcher's daughter.

69. 42 U.S.C. § 4332(1) (2006).

70. The Supreme Court has made clear the agency could still decide to cause the environmental harm, see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), but the agency's impact analysis cannot hide behind sloppy mitigation claims.

generations (the gist of "sustainability")—remains a compelling tool in a democracy with an independent judiciary.

It *is* possible to give NEPA force while staying within the precedents of the U.S. Supreme Court.

Perhaps we should name it the "Fletcher Doctrine."

This approach is not unlike Judge Fletcher's jurisprudence is other areas, whether immigration, death penalty, or human rights. It is practical, rather than ideological. As with other areas of the law where Judge Fletcher has made substantial contributions, her decisions demonstrate a profound consistency in protecting individuals and the environment from the heavy hand of government.[71]

Judge Fletcher is a worthy successor to a worthy tradition.[72] She has been reversed from time to time, but majority opinions respect the care she has given to her decisions and the courage of her principles. In this regard, she is in good company. We are reminded of Thurgood Marshall's dissent in *Strycker's Bay*, discussed above, where he concludes:

> The question whether HUD can make delay the paramount concern over environmental superiority is essentially a restatement of the question whether HUD in considering the environmental consequences of its proposed action gave those consequences a "hard look," which is exactly the proper

71. This bears a certain resemblance to libertarian perspectives. This author believes the glib characterization of Judge Betty Fletcher as a liberal (a label she does wear with pride) is obviously superficial, as it was to her former client in private practice, Justice William O. Douglas. A more sophisticated assessment would look to the Western populist tradition, of which she has written and spoken, which has at its core respect for the individual and for nature, a philosophy that defies conventional liberal/conservative labels.

72. Judge Fletcher continues a tradition of our nation's great environmental jurists. Her former client, Supreme Court Justice William O. Douglas, was one of the first judges both to look carefully at the agency record under NEPA, not simply to accept agency assertions, and to give substantive deference to CEQ. *See* Warm Springs Dam v. Gribble, 417 U.S. 1301 (1974). The full Supreme Court followed suit in the *Marsh* and *Kleppe* cases. *See supra* notes 49, 37.

Judges Skelly Wright and Harold Leventhal on the D.C. Circuit provided similar NEPA jurisprudence. As Judge Wright noted in *Calvert Cliffs*: "[I]f the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." 449 F.2d 1109, 1115 (D.C. Cir. 1971). In the mid-1970s, Judge Leventhal did not think examining the alternative of energy conservation when considering a new nuclear power plant was an "alleged oversight" on a "peripheral issue." Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 685 F.2d 459 (1982), *rev'd*, 462 U.S. 87 (1983). Nearly a decade into the twenty-first century, when climate change has finally been recognized as a serious matter, Judge Fletcher helped rectify the misdirection of *Vermont Yankee* by requiring a more rigorous analysis of alternatives for vehicle fuel efficiency standards in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008).

question for the reviewing court to ask.[73]

Like Justice Thurgood Marshall's knowledge of housing in Washington, D.C.'s inner city, Judge Fletcher's knowledge of the Columbia River—where her husband's family homesteaded generations earlier—provides context for her opinion. That being said, it is not Judge Fletcher's personal views or heritage that decide the case, but attention to the record itself.

If we do not heal the earth with more deliberate speed, perhaps the concluding words of Judge Fletcher's dissent in *Northwest Environmental Advocates*,[74] like Justice Marshall's in *Stryker's Bay*, may inspire future courts:

> Fundamentally, the majority takes an ostrich's head-in-the-sand approach to reviewing the agency's analysis, settling for the Corps' explanation without undertaking the required review of its decision making. It is true, we are not permitted to substitute our judgment for the reasoned decision of the agency. Neither, however, are we permitted to rubber-stamp the agency's decision of what factors must be considered and what factors need not be considered without taking a detailed look at whether the agency's reasoning is sound. Here, it is not.
>
> The "hard look" here went awry. The Corps, as it must, acknowledged profound consequences from erosion if large quantities of sand are removed from the littoral system. Anyone familiar with the Washington coastline has seen the devastation from past erosion (consequences the Corps admits were caused by its own past bad practices). The Corps acknowledges that it has designated a deep-water disposal site to hold huge quantities of dredge spoils, but has no plan of mitigation if that site is used for its intended purpose. Nor does the Corps analyze when and how much erosion is likely to occur—only that it will be profound and devastating. Its analysis of increased toxicity that may result from dredging is completely inadequate, as is its analysis of possible changes in salinity. Last, but certainty not least, the economic analysis is highly suspect.
>
> My bottom line is that the Corps has substantially more work to do. Hence my dissent.[75]

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73. 444 U.S. 231, 231 (1980) (internal citation omitted).

74. Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125 (9th Cir. 2006).

75. *Id*. *at* 1162 (Fletcher, J. dissenting). An interesting parallel to contemplate in this regard is the judicial evolution on climate change, now understood as a serious matter, from Judge Wald's minority opinion in *City of Los Angeles v. National Highway Traffic Safety Administration*, 912

Judge Fletcher is legendary for the high standard to which she holds herself and others. Some colleagues think it too high. The environmental degradation of the earth and of many human communities suggests otherwise.

In the end, Judge Fletcher holds United States government officials accountable when making momentous decisions affecting people and nature—accountable to prepare and fully disclose the required studies, so the democratic process of civic and civil debate can occur; accountable to search for better alternatives; accountable to any promises they make that their actions will not harm environmental quality for present and future generations.

This is the jurisprudence Judge Fletcher has bequeathed to the United States, and to those around the world who look to the United States and NEPA for leadership on environmental stewardship.

F.2d 478 (D.C. Cir. 1990), to Judge Fletcher's majority opinion on fuel efficiency standards in *Center for Biological Diversity*, as discussed in William H. Rodgers Jr., *NEPA's Insatiable Optimism*, 39 ENVTL. L. REP. 10,618, 10,620 (2009).