

## ANALYSIS PARALYSIS: RETHINKING THE COURT'S ROLE IN EVALUATING EIS REASONABLE ALTERNATIVES

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*When a federal agency proposes to undertake a “major federal action,” the National Environmental Protection Act (NEPA) requires the agency, as part of an overall Environmental Impact Statement (EIS), to engage in an analysis of reasonable alternatives to that action. Just what constitutes a major federal action or a proper alternatives analysis, however, is the subject of debate. Should the objectives of third-party, nonfederal proponents influence which alternatives are considered? What kinds of alternatives are reasonable? Is the major federal action the approval of a project or the project itself? This Note analyzes the different ways courts have approached these issues, focusing on statutory, environmental, efficiency, and common sense considerations. Ultimately, the author suggests that to fully realize NEPA’s goals of public participation and environmentally focused decision making, courts need to reconceptualize their own analysis of reasonable alternatives. The author posits that courts need to work collaboratively with federal agencies and project proponents by adopting a good faith standard of review for alternatives, rejecting the idea that the “purpose and need” statement of an EIS should guide the scope of alternatives, and recognizing a more limited scope for alternatives when nonfederal third parties propose a project.*

### I. INTRODUCTION

Building a landfill is messy business.

Twenty-one years ago, the owner of the “Eagle Mountain” iron-ore mine, Kaiser, filed an application to exchange land with the Bureau of Land Management (BLM) in order to facilitate its construction of a landfill.<sup>1</sup> Kaiser’s plot consisted of 9149 acres in “remote” Riverside County, about two hundred miles east of Los Angeles.<sup>2</sup> The plot included “three large open pit mines, a town site, and a fifty-two mile rail line.”<sup>3</sup> The company hoped to obtain federal lands that encircled the depleted

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1. Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt., 606 F.3d 1058, 1062 (9th Cir. 2010); *Eagle Mountain Landfill Project*, KAISER VENTURES 1 [hereinafter *Eagle Mountain Landfill*], [http://www.kaiserventures.com/p\\_waste.htm](http://www.kaiserventures.com/p_waste.htm) (last visited Jan. 26, 2012).

2. *Eagle Mountain Landfill*, *supra* note 1.

3. *Id.*

mines, sixty percent of which were classified as mountainous.<sup>4</sup> In return, Kaiser offered 2846 acres of flat desert land designated as a critical habitat for the desert tortoise and desert pupfish to become a part of the California Desert Conservation Area, which is a short distance from the border of Joshua Tree Natural Park.<sup>5</sup>

The “Eagle Mountain” landfill was to be the biggest landfill in the United States.<sup>6</sup> It would have accepted “municipal, non-hazardous, solid waste from seven Southern California counties.”<sup>7</sup> To meet a “critical” landfill capacity shortfall, the landfill planned to receive 20,000 tons of garbage per day, six days a week, for 117 years.<sup>8</sup> Planners projected it to draw between \$210 and \$280 million in revenue to the county during the first twenty years of its operation, supporting or saving 1354 jobs annually.<sup>9</sup> Had the project received approval, it would have been the first landfill to comply with newly passed Environmental Protection Agency (EPA) guidelines.<sup>10</sup>

A group of eminent scientists and engineers from major California universities said of the “Eagle Mountain” landfill project: “Given the favorable site conditions, sophisticated waste containment systems, and elaborate monitoring systems, the proposed Eagle Mountain landfill could well become one of the world’s safest landfills and a model for others to emulate.”<sup>11</sup>

Twenty years, \$50 million, and 50,000 pages of litigation record later, the Ninth Circuit vacated the Eagle Mountain land swap, prompting the dissenter in *National Parks & Conservation Ass’n v. Bureau of Land Management* to ask, “What sane person would want to . . . acquire property for a landfill?”<sup>12</sup> The majority reasoned that BLM had drawn too narrowly the “purpose and need” statement of its Environmental Impact Statement (EIS), which consists of short declarative sentences describing the primary objectives of the agency; as a result, BLM failed to adequately discuss a full range of “reasonable alternatives” to approving the landfill project.<sup>13</sup> In other words, BLM should have investigated the envi-

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4. *Nat’l Parks*, 606 F.3d at 1075 (Trott, J., dissenting).

5. *Id.* at 1075, 1083.

6. *Id.* at 1062 (majority opinion).

7. *Id.* at 1076 (Trott, J., dissenting).

8. *Id.* at 1062 (majority opinion); *id.* at 1079 (Trott, J., dissenting). Southern California disposes of over 80,000 tons of waste per day, and the long-term capacity of municipal waste disposal capacity throughout the region is expected to decline over the next five to ten years. *Eagle Mountain Landfill*, *supra* note 1 (“Riverside County, and other Southern California counties, currently need environmentally safe waste disposal alternatives for existing landfills known to be leaking or reaching maximum capacity.”).

9. *Nat’l Parks*, 606 F.3d at 1081 (Trott, J., dissenting) (quoting a statement made by the BLM).

10. *Id.* at 1075.

11. *Id.* at 1077–78 (emphasis omitted) (quoting a statement from a Technical Advisory Panel composed of these scientists and engineers).

12. *Id.* at 1075.

13. *Id.* at 1071–72 (faulting the “purpose and need” statement for including—alongside one BLM goal—three private objectives of Kaiser); *see also* National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(2)(C)(iii) (2006). *National Parks* dealt with a variety of other NEPA and

ronmental impact of alternate projects that would reach some, but not all, of the agency's goals.<sup>14</sup> The court suggested BLM had given too much weight to the objectives of Kaiser—the project's private proponent, designer, and financier—thereby limiting the scope of alternatives BLM considered when deciding to approve the land swap.<sup>15</sup> The panel did not suggest any particular “reasonable” alternative absent from the EIS that rendered it inadequate, only that they were certain the process was faulty and could not withstand scrutiny.<sup>16</sup>

Before the Ninth Circuit, BLM and Kaiser stressed the intense public stake in the project, the extensive mitigation efforts that had preceded approval, and that the alternatives considered were within the proper scope of the agency's objectives alongside its dominant partner.<sup>17</sup> Kaiser and the National Parks Service had worked together for years to create “a comprehensive, long-term monitoring and mitigation program, which . . . is specifically tailored to detect and to address any unforeseen impacts on [Joshua Tree National Park].”<sup>18</sup> But, as when the proponent of a major project is not a federal agency itself, the *National Parks* court demonstrated how the National Environmental Policy Act's (NEPA) “reasonable alternatives” requirement can be used to frustrate the objectives of the proponent, the cooperating agencies, and local interests alike.<sup>19</sup>

This Note describes the disagreement and confusion among federal circuit courts as to an appropriate measure of “reasonable alternatives,” especially when the proponent is not a federal actor, as in *National Parks*.<sup>20</sup> It critiques the formulation that all circuits use the “unreasonably narrow purpose and need statement” approach, as an impotent and outdated judicial mechanism for resolving the problem.<sup>21</sup> Part II provides a general background of NEPA, the alternatives requirement, and the role of the court. Part III analyzes the various approaches adopted by circuit courts to help define the scope of “reasonable alternatives” in relation to the purpose and need statement and sheds light on the inconsistent results caused by the present circuit split. Part III also analyzes and challenges the theoretical underpinnings of NEPA's present alternatives analysis. Part IV suggests that courts abandon their common “un-

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Federal Land and Policy Management Act (FLPMA) issues which are not the focus of this Note. See generally *Nat'l Parks*, 606 F.3d at 1058. For a recent critique of all these issues central to the Ninth Circuit's holding in *National Parks*, including inter alia “highest and best use” and “eutrophication,” see generally Aaron Sanders, Note, *Where Are We Going to Put All of This Junk? The Ninth Circuit Dismisses an Attempt to Construct a Large Landfill in Southern California*, 18 MO. ENVTL. L. & POL'Y REV. 83 (2010).

14. *Nat'l Parks*, 606 F.3d at 1072.

15. *Id.* at 1071–72; see also 40 C.F.R. § 1502.13 (2010).

16. *Nat'l Parks*, 606 F.3d at 1071–72.

17. See *id.* at 1077 (Trott, J., dissenting).

18. *Id.* at 1077 (quoting the Interior Board of Land Appeals).

19. See *infra* Part IV.C; see also 42 U.S.C. § 4332(2)(C)(iii) (2006).

20. See *infra* Part III.B.2–3.

21. See *infra* Part IV.B.

reasonably narrow” analysis of the agency’s purpose and need statement. In its place, the Note suggests courts adopt a “consensus” approach, which is highly deferential to an agency’s need to collaborate with important stakeholders and minimize or avoid environmental impacts without the threat of litigation over its rejection of distracting, infeasible alternatives. The purpose of this approach is to allow courts to integrate collaborative decision-making principles into their enforcement of the alternatives analysis without undermining NEPA’s generalized goals.

## II. BACKGROUND

This Part first provides an overview of NEPA from the viewpoint of its drafters and supporters as well as a descriptive view of the scoping process and alternatives analysis. Second, this Part provides an overview of NEPA’s weaknesses. Finally, it summarizes the approach courts have taken in reviewing the decisions of federal agencies in their implementation of the alternatives analysis.

### A. *NEPA: The Green Magna Carta*

Since President Richard Nixon signed NEPA into law on January 1, 1970, the Act has been described as the “Magna Carta” of environmental legislation.<sup>22</sup> The Act imposes substantial obligations on the government, particularly federal agencies, to act as stewards of the nation’s natural resources. This section provides a brief background of NEPA’s goals as well as an overview of the procedural obligations of federal agencies. This Section also summarizes the basic subject of this Note, the “reasonable alternatives” analysis requirement.

#### 1. *The Purpose and Procedures of NEPA*

As stated in the Act, NEPA’s general purpose is “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>23</sup> Furthermore, Congress enacted NEPA with the intent to establish a national environmental pol-

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22. COUNCIL ON ENVTL. QUALITY, A CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 2 (2007) [hereinafter CITIZEN’S GUIDE], [http://ceq/hss.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://ceq/hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf).

23. 42 U.S.C. § 4331(a) (2006). NEPA’s sponsor, Senator Jackson, described the bill: [NEPA] is the most important and far-reaching environmental and conservation measure ever enacted by the Congress . . . .

... [This] statement of environmental policy . . . establishes priorities and gives expression to our national goals and aspirations . . . .

... [It] is 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. . . . 115 CONG. REC. 40,416 (1969).

icy by defining a set of procedures necessary to fulfill the Act.<sup>24</sup> Subsequently, the Supreme Court has interpreted the overall purpose of NEPA as an effort to “inject environmental considerations into [a] federal agency’s decisionmaking process.”<sup>25</sup> And, more specifically, the “twin aims” of NEPA are not only to force government agencies to “consider every significant aspect of the environmental impact of a proposed action,” but also to inform the public of the potential environmental impacts of agency decisions.<sup>26</sup>

The hope for NEPA is that the Act’s mandated disclosures will shed light on the decisions of federal agencies and how those decisions impact the environment.<sup>27</sup> The Council on Environmental Quality (CEQ) “coordinates [f]ederal environmental efforts” among the various federal agencies under the direction of the White House.<sup>28</sup> CEQ describes NEPA’s primary objective in terms of “encourag[ing] meaningful public input and involvement in the process of evaluating the environmental impacts of proposed federal actions.”<sup>29</sup> Accountability to and involvement by the interested public are the means by which NEPA attempts to ensure “productive harmony” between man and nature.<sup>30</sup> Professor Robert Dreher of Georgetown University Law Center, former Deputy General Counsel of the EPA, suggests “NEPA has succeeded in expanding public engagement in government decision-making, improving the quality of agency decisions and fulfilling principles of democratic governance that are central to our society.”<sup>31</sup>

NEPA procedural mandates force agencies to comprehensively, scientifically, and systematically analyze potential environmental conflicts.<sup>32</sup> The cornerstone of these procedural requirements is the preparation of

24. CITIZEN’S GUIDE, *supra* note 22.

25. *Weinberger v. Catholic Action of Haw./Peach Educ. Project*, 454 U.S. 139, 143 (1981).

26. *Balt. Gas & Elec. Corp. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)); *see also* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“[NEPA] guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”).

27. *See, e.g., Robertson*, 490 U.S. at 349.

28. *See* COUNCIL ON ENVTL. QUALITY, <http://www.whitehouse.gov/administration/eop/ceq/about> (last visited Jan. 26, 2012).

29. COUNCIL ON ENVTL. QUALITY, *COLLABORATION IN NEPA: A HANDBOOK FOR NEPA PRACTITIONERS 1* (2007) [hereinafter *CEQ COLLABORATION HANDBOOK*], [http://ceq.hss.doe.gov/ntf/Collaboration\\_in\\_NEPA\\_Oct\\_2007.pdf](http://ceq.hss.doe.gov/ntf/Collaboration_in_NEPA_Oct_2007.pdf). The CEQ notes that although NEPA was enacted in 1970, these goals have struggled to be realized. *Id.*

30. 42 U.S.C. § 4331(a).

31. ROBERT G. DREHER, *NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 6* (2005), [http://www.law.georgetown.edu/gelpi/research\\_archive/nepa/NEPAUnderSiegeFinal.pdf](http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPAUnderSiegeFinal.pdf).

32. 42 U.S.C. § 4332 (containing the procedural mandates to agencies); *cf.* Roger C. Cramton & Richard K. Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 514–16 (1973). “In many respects, NEPA resembles a constitutional charter. It states a general policy in lofty terms, outlines a fragmentary procedure for implementing that policy, and leaves questions of detail to the good sense of those who must live with and interpret its requirements.” *Id.* at 512–13 (footnote omitted).

an EIS.<sup>33</sup> By statute, “major [f]ederal actions significantly affecting the quality of the human environment” trigger the preparation of an EIS.<sup>34</sup> Such major federal actions might include new or continuing construction projects or the adoption of agency rules, regulations, and policies.<sup>35</sup> When a private entity, state, or local actor, and not a federal agency, proposes an action for agency approval, a major federal action is also implicated.<sup>36</sup> The CEQ defines major federal action to include the *projects* approved by federal agencies but then describes the federal action as the *approval* of specific projects.<sup>37</sup>

Once the decision to prepare an EIS has been made, the respective federal agency must publish a Notice of Intent (NOI), which describes the proposed action and potential alternatives available to the agency.<sup>38</sup> The agency then proceeds into a “scoping process” by which the breadth of relevant issues is outlined, including involvement by various levels of government, interested private parties, and organizations.<sup>39</sup>

Next, the lead agency or a contractor will prepare a draft EIS and accept information from other parties, including any nonfederal applicants.<sup>40</sup> Dinah Bear, former general counsel for the CEQ, suggests that “[i]n preparing EISs, agencies should focus on significant environmental issues and alternatives and reduce paperwork and the accumulation of extraneous background data.”<sup>41</sup> The complete requirements of the EIS are set out in CEQ regulations<sup>42</sup> and do not need full attention here. Generally, however, the EIS must include a purpose and need statement, alternatives including the proposed action (pursuant to section 102(2)(C) of the Act), the affected environment, and environmental consequences.<sup>43</sup> After a period of public comment and review of not less than forty-

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33. Thomas E. Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENVTL. AFF. L. REV. 63, 64 (1980).

34. 42 U.S.C. § 4332(2)(C).

35. See 40 C.F.R. § 1508.18(b) (2010). “Federal actions tend to fall within one of the following categories: (1) Adoption of official policy . . . (2) Adoption of formal plans . . . (3) Adoption of programs . . . [and] (4) Approval of specific projects . . .” *Id.*

36. See *id.* Some disagreement arises over what “federal” actions are implicated by the proposed nonfederal actions—the federal actions or the proposed action itself. See *infra* Part III.B.

37. See 40 C.F.R. § 1508.18(a), (b)(4).

38. See *id.* § 1508.22.

39. Dinah Bear, *NEPA at 19: A Primer on an “Old” Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10064 (1989).

40. See, e.g., *id.* at 10065.

41. *Id.* at 10063 (emphasis omitted).

42. See generally 40 C.F.R. § 1502.

43. See *id.* § 1502.10.

five days<sup>44</sup>—to which the agency must respond<sup>45</sup>—the agency files the final EIS with the EPA.<sup>46</sup>

After the decision has been made as to any proposal, the agency prepares and files a record of decision (ROD).<sup>47</sup> The ROD describes the decision the agency made, specifies which alternatives were considered in making the decision, and identifies which alternatives it considered most environmentally preferable.<sup>48</sup> Also, the ROD must state whether “all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”<sup>49</sup> These mitigations might include avoiding, minimizing, rectifying, reducing, eliminating, or compensating for the environmental impacts.<sup>50</sup>

## 2. *Alternatives Analysis*

Among the numerous procedural requirements that make up the EIS, NEPA requires that “all agencies of the [f]ederal [g]overnment shall . . . include in every recommendation or report on proposals for . . . major [f]ederal actions significantly affecting the quality of the human environment, a detailed statement [of] . . . alternatives to the proposed action . . . .”<sup>51</sup> “Common sense,” the Supreme Court once noted, “teaches us that [a] ‘detailed statement of alternatives’ cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”<sup>52</sup>

CEQ regulations characterize this alternatives analysis as the “heart of the [EIS].”<sup>53</sup> Agencies are required to “[r]igorously explore and objectively evaluate all *reasonable* alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”<sup>54</sup> Two alternatives are expressly mandated by CEQ regulations: the reasonable alternatives to the proposed action and the “no-action” alternative.<sup>55</sup> The statute simply calls for “alternatives to

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44. See *id.* § 1506.10(c). All parties who commented on the draft EIS are to receive a copy of the final EIS, and no decision may be made concerning the proposed action before the later of ninety days after the publication of the notice of the draft EIS or thirty days after the publication of the notice of the final EIS, with an exception for agencies with formal appeals processes “where a real opportunity exists to alter the decision . . . .” *Id.* § 1506.10(b).

45. *Id.* § 1503.4 (2010).

46. *Id.* § 1506.10(c).

47. *Id.* § 1505.2.

48. *Id.*

49. *Id.*; see also PAUL J. CULHANE ET AL., FORECASTS AND ENVIRONMENTAL DECISIONMAKING—THE CONTENT AND PREDICTIVE ACCURACY OF ENVIRONMENTAL IMPACT STATEMENTS 254 (1987) (“Despite some general cynicism about the veracity of government promises, agency managers prove to be quite responsible in carrying out promised mitigations.”).

50. 40 C.F.R. § 1508.20.

51. 42 U.S.C. § 4332(2)(c)(iii) (2006).

52. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978).

53. See 40 C.F.R. § 1502.14.

54. *Id.* (emphasis added).

55. *Id.* The “no-action” alternative requires the agency to describe what would happen were the agency to take no action in response to the proposal. CITIZEN’S GUIDE, *supra* note 22, at 17.

the proposed action.”<sup>56</sup> Beyond that, no other statutory clarity is given, and as the Supreme Court has recognized, “the term ‘alternatives’ is not self-defining.”<sup>57</sup> After forty years, the meaning is still unclear.

The EIS’s “purpose and need” statement is traditionally seen as an essential component of alternatives analysis because it guides the scope of reasonable alternatives.<sup>58</sup> Here, the agency outlines its objectives in carrying out any number of major federal actions, whether they are granting a permit, instituting a management plan, or authorizing a land swap. As the NEPA handbook indicates, “The development of alternatives can be conceptually challenging and laden with value judgment and assumptions, either unspoken or unrecognized.”<sup>59</sup> Providing little guidance to the lower courts in this area, the Supreme Court has said, “We think . . . the concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.”<sup>60</sup>

### B. NEPA: The Paper Dragon

As important as it is to note the purposes NEPA is intended to serve, it is equally important to note what NEPA is not intended to do. The Supreme Court has repeatedly stressed that NEPA does not mandate any particular substantive outcome for a proposed action.<sup>61</sup> NEPA’s regulations require public notice, public scoping, public review, and public comment, but they do not require the agency to listen.<sup>62</sup> For all its extensive analysis and public disclosure requirements, NEPA demands no results.<sup>63</sup> Of course, its drafters assumed that an environmentally conscious, well-informed, and open process would produce more environ-

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56. 42 U.S.C. § 4332(C)(iii).

57. *Vt. Yankee*, 435 U.S. at 551.

58. *See, e.g.*, Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1030–31 (10th Cir. 2002). This Note rejects this premise. *See infra* Part IV.B.

59. CEQ COLLABORATION HANDBOOK, *supra* note 29, at 21.

60. *Vt. Yankee*, 435 U.S. at 552–53. The Court, however, stressed that the alternatives analysis “must be bounded by some notion of feasibility.” *Id.* at 551. *See also* James Allen, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RESOURCES & ENVTL. L. 287, 298–99 (2005).

61. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

62. *See* discussion and sources cited *supra* Part II.A.1.

63. *Robertson*, 490 U.S. at 350 (“Although [NEPA’s] procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”). *Accord Vt. Yankee*, 435 U.S. at 558 (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”).



mentally conscious results,<sup>64</sup> but that result is far from certain.<sup>65</sup> As for the “reasonable alternatives” analysis, decision makers are welcome, as the law stands, to select alternatives that are more environmentally *harmful* if they so choose.<sup>66</sup>

For all its glittering generalities, NEPA has spawned more than a few critics. While some academics refer to NEPA as “the ‘Magna Carta’ of U.S. environmental policy,”<sup>67</sup> others—most often those asked to meet its requirements—see it as no more than a paper dragon.<sup>68</sup> Some scholars have bravely observed that “rather than encouraging dialogue and a reflexive examination of citizen preferences, the EIS process breeds distrust and cynicism about government, encouraging even more selfishness and strategic behavior on behalf of participants.”<sup>69</sup> Notably, NEPA has created an entire industry of environmental litigators and consultants to handle the procedural requirements that some believe are toothless,<sup>70</sup> time consuming, and even counterproductive.<sup>71</sup>

The CEQ has recognized that:

[F]requently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, . . . [and] the EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making.<sup>72</sup>

Citizen suits, long recognized as the mechanism that keeps NEPA from becoming a “dead letter,”<sup>73</sup> are often guided by interest groups seeking immediate benefits for themselves rather than the public benefits of such

64. See 40 C.F.R. § 1500.1 (2010) (“[I]t is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

65. See generally Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (arguing that greater participation has diminishing returns and can be highly detrimental to effective agency decision making).

66. See *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980).

67. See, e.g., DREHER, *supra* note 30, at 1.

68. See, e.g., Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277, 277 (1990).

69. Rossi, *supra* note 65, at 240.

70. One commentator ranks NEPA at the bottom of environmental laws with alternatives analyses for its substantive impact. See Oliver A. Houck, *Of BATS, Birds and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403, 444 (1994); see also Blumm & Brown, *supra* note 65, at 277–78 (“A number of studies indicate that agencies can evade NEPA’s spirit and letter with impunity.”).

71. Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931, 931–32 (2003) (recognizing the legitimacy of the arguments that “the paperwork done to respond to the threat of litigation has thwarted land managers’ ability to be good stewards of the public’s land” and that reasonable alternatives requirements are “not only time-consuming, but could even be counterproductive”).

72. COUNCIL ON ENVTL. QUALITY, *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* 7 (1997), <http://ceq.hss.doe.gov/nepa/nepa25fn.pdf>.

73. See DREHER, *supra* note 31, at 15.

actions.<sup>74</sup> The product of protracted litigation might be thousands of dollars in attorneys' fees, but when the dispute is over paperwork, such actions are likely to see few, if any, "discernible environmental benefits."<sup>75</sup> And recognizing the ever-present threat of NEPA litigation by stakeholders, agencies have sought to produce "litigation-proof" documents by addressing every conceivable issue instead of working with stakeholders to find solutions to local and national environmental concerns.<sup>76</sup>

"Alternatives analysis" is highly susceptible to the criticism that the process is purely academic because no substantive enforcement mechanism exists.<sup>77</sup> Citizen suits may only challenge an agency's NEPA process, not its substantive decisions.<sup>78</sup> In-depth consideration of alternatives might well be a waste of time because decision makers are welcome to choose the proposed project no matter how environmentally attractive a considered alternative might be (at least under NEPA).<sup>79</sup> Also, because agencies are able to consider theoretical alternatives in hindsight, they may be tempted to set up superficial or "strawman" alternatives to satisfy the letter of the law.<sup>80</sup> The agency might even manipulate its purpose and need statement so as to extricate itself from the task of considering alternatives not tailored to achieving that predetermined path<sup>81</sup> or "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)."<sup>82</sup> Furthermore, the value of this time-consuming process is being seriously questioned amid calls to "streamline" NEPA for the benefit of a struggling economy.<sup>83</sup>

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74. See Rossi, *supra* note 65, at 219 (citing Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 107, 110 (Michael S. Greve & Fred L. Smith, Jr., eds., 1992)).

75. See, e.g., *id.*

76. DREHER, *supra* note 31, at 23.

77. Cf. Houck, *supra* note 70, at 444 (ranking NEPA's alternatives analysis last for its lack of substantive impact).

78. See *supra* notes 64–65 and accompanying text.

79. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980). *But see* Bear, *supra* note 71, at 940 (acknowledging but ultimately rejecting this criticism).

80. See, e.g., Bear, *supra* note 71, at 940.

81. This manipulation is only possible when courts allow the purpose and need statement to guide the scope of reasonable alternatives—in other words, permitting an agency to exclude consideration of alternatives because they fail to meet the purpose and need of the federal action. For this reason, the approach advocated by this Note strips the purpose and need statement of its judicial force. See discussion *infra* Part IV.B.

82. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) ("The federal courts cannot condone an agency's frustration of [c]ongressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.").

83. Congress recently responded to similar calls in the American Recovery and Reinvestment Act, adding NEPA section 1609. The new section calls on federal agencies handling Recovery Act projects to "ensur[e] that applicable environmental reviews under [NEPA] are completed on an expeditious basis and that the shortest existing applicable process under [NEPA] shall be utilized." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1608(b), 123 Stat. 115, 304 (2009).

### C. *The Court's Role: A "Hard" Look*

Naturally, litigation (or the threat thereof) is the most powerful enforcement mechanism of the NEPA process. Because conforming to NEPA procedure is not discretionary, intervenors can petition federal courts to enjoin federal actions out of compliance with the Act.<sup>84</sup> While the court cannot modify the agency action, it may order the agency to prepare a new EIS—no small task<sup>85</sup>—when the original is found wanting.<sup>86</sup> Importantly, the Supreme Court has warned lower courts that judicial review of NEPA compliance ensures only a “fully informed and well-considered decision, not necessarily a decision the [judiciary] would have reached had they been members of the decisionmaking unit of the agency.”<sup>87</sup>

Review of an EIS by federal courts occurs under the requirements of the Administrative Procedure Act (APA).<sup>88</sup> Under the APA, an agency’s compliance is reviewed under the highly deferential “arbitrary and capricious” standard (sometimes referred to as the “hard look” standard).<sup>89</sup> An agency needs only to follow a “rule of reason” in preparation of the EIS and in its consideration of alternatives.<sup>90</sup> Such a standard has been defended as appropriate because analysis of project complexities that go into the preparation of an EIS “require[] a high level of technical expertise”<sup>91</sup>—something the courts obviously lack.

At least in theory, “the role of a court in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.”<sup>92</sup> As the Supreme Court firmly stated, “Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.”<sup>93</sup> Following this Supreme Court directive to varying degrees, courts have claimed to maintain the proposition that “the

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84. See, e.g., *Strycker's Bay*, 444 U.S. at 224.

85. The Final EIS (FEIS) in *National Parks* was 1600 pages long. Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1078 (9th Cir. 2010).

86. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 370–73 (1989).

87. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

88. 40 C.F.R. § 1508.18 (2010); see also Administrative Procedure Act, 5 U.S.C. § 706 (2006).

89. 5 U.S.C. § 706. For an in-depth analysis and critique of court deference to agency rule and decision making, see generally Donald W. Stever, Jr., *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35 (1983). According to Stever, courts variously apply the deference standard as a “hard look,” “quick look,” or “no look” judicial review. *Id.* at 45.

90. See, e.g., *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978).

91. *Marsh*, 470 U.S. at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). *Kleppe* counsels that courts should “defer to the informed discretion of the responsible federal agencies.” 427 U.S. at 412. See also David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 330–31, 334–35 (1979) (arguing that deference to agency discretion is appropriate in some cases, such as when there is extensive agency involvement and experience).

92. *Vt. Yankee*, 435 U.S. at 555.

93. *Id.* (quoting *Kleppe*, 427 U.S. at 410 n.21).

agency's expertise on how to measure environmental impacts is entitled to deference."<sup>94</sup>

Agencies enjoy considerable discretion to define the purpose and need of a project. They need not consider "remote and speculative" alternatives,<sup>95</sup> and the agency's "purpose and need" statement presumptively governs which alternatives are reasonable to study.<sup>96</sup> Despite differences as to how a proponent's goals might be integrated into the purpose and need statement,<sup>97</sup> courts restate without reconsideration the general rule that they "will not allow an agency to define the objectives so narrowly as to preclude a reasonable consideration of alternatives."<sup>98</sup>

When the proponent of federal action is a private, state, or municipal actor, this guidance raises two new questions that courts continuously struggle to answer. First: what is meant by alternatives to "major *federal* action"?<sup>99</sup> Does this mean consideration of alternatives to the third-party proponent's proposal or the alternative courses of action for the federal actor? Second: to what extent can the proponent's objectives guide the agency's "purpose and need" statement, thereby defining the scope of the alternatives?<sup>100</sup> These questions are a focus of this Note.<sup>101</sup>

### III. ANALYSIS: JUDICIAL TREATMENT OF REASONABLE ALTERNATIVES

Just as the NEPA handbook to practitioners suggests that the alternatives analysis "can be conceptually challenging and laden with value judgment and assumptions,"<sup>102</sup> it should come as no surprise that the range of judicial approaches rests on a spectrum—ranging from a critical analysis of a broad range of alternatives to a highly deferential and narrow approach to judicial review.<sup>103</sup>

94. *Alliance for Legal Action v. FAA*, 69 F. App'x 617, 623 (4th Cir. 2003); *accord Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289–90 (4th Cir. 1999); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1129–30 (8th Cir. 1999).

95. *Vt. Yankee*, 435 U.S. at 551 (quoting *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837–38 (D.C. Cir. 1972)).

96. *See, e.g., Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) ("[W]hen the purpose is to add terrain in order to respond to specific qualitative needs at the ski area, it is appropriate to dismiss . . . opportunities that would not advance those objectives." In light of the defined purpose and need for the expansion, which we have upheld as reasonable, we conclude that the Forest Service provided a reasonable explanation for declining to further consider [an alternative]." (quoting the Forest Service)). *But see* *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) ("[A]n alternative partially satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a 'reasonable alternative.'").

97. *See infra* Part III.B.2.

98. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). This Note challenges the efficacy of this rule. *See infra* Part IV.B.

99. *See infra* notes 173–88 and accompanying text.

100. *See, e.g., Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1071–72 (9th Cir. 2010) (faulting BLM for allowing the project proponent's objective to define the scope of alternatives); *Dombeck*, 185 F.3d at 1175 ("Agencies . . . are precluded from completely ignoring a private applicant's objectives.").

101. *See infra* Parts III.B.2, IV.C.

102. CEQ COLLABORATION HANDBOOK, *supra* note 29, at 21.

103. *Compare infra* Part III.A.1, with *infra* Part III.B.1.

Some courts have adopted a very broad approach, demanding expansive investigation of alternatives.<sup>104</sup> These courts have a strong confidence in the efficacy of a full range of alternatives and often fault agencies for adopting the objectives of a third-party proponent.<sup>105</sup> The broad approach reflects an intense mistrust of project proponents, especially private ones, who courts see as not properly incentivized to consider environmental needs.<sup>106</sup>

Courts adopting a more narrow approach focus their attention on the feasibility and practicality of “alternatives analysis” and the deference owed to agency decision makers.<sup>107</sup> They see the project sponsor as the key partner in defining a project’s primary objectives and its “purpose and need,” from which reasonable alternatives to the proposal are derived.<sup>108</sup> At least one court has suggested that a reasonable alternative to a “major federal action” refers only to the alternative agency course of action, not alternatives to the applicant’s proposal.<sup>109</sup> In other words, the question is not which other proposals might the proponent put forth, but which alternative actions might the agency take in response to the proposal before it. The following analysis proceeds in five sections. Sections A, B, and C set forth the three dominant approaches to reasonable alternatives analysis: the broad, narrow, and sliding-scale approaches. Section D addresses the theoretical underpinnings of the comprehensive rationality model that accompanies the alternatives analysis. Finally, Section E analyzes the practical limits of participation and deliberation as applied to the alternatives analysis.

### A. *The Broad Approach*

The “broad approach” to reasonable alternatives analysis demands that agencies consider a wide variety of alternatives within the EIS for a given proposal. This approach is best exemplified by the Seventh Circuit’s opinion in *Van Abbema v. Fornell*.<sup>110</sup> After describing that opinion and its progeny, this Section analyzes the implications of such an approach.

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104. See generally *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664 (7th Cir. 1997); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986); Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232 (1992).

105. See, e.g., *Van Abbema*, 807 F.2d at 642 (scolding the agency for “blind[ly] rel[ying] on material prepared by the applicant in the face of specific challenges raised by opponents”).

106. See, e.g., *id.* at 642–43.

107. Foremost of these is *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991). See also *Alliance for Legal Action v. FAA*, 69 F. App’x 617, 622 (4th Cir. 2003); *City of Bridgeton v. FAA*, 212 F.3d 448, 455 (8th Cir. 2000).

108. See, e.g., *Citizen’s Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (“Where the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor.”).

109. *Citizens Against Burlington*, 938 F.2d at 199 (emphasis omitted) (discussed *infra* Part III.B).

110. 807 F.2d at 633.

### I. Van Abbema v. Fornell

The Seventh Circuit has adopted the most popular approach among environmentalist scholars.<sup>111</sup> *Van Abbema v. Fornell* involved a challenge to a permit issued to a private party, Fornell, by the U.S. Army Corps of Engineers (the Corps) to build a facility that would “transload” coal on the Mississippi River in Warsaw, Illinois.<sup>112</sup> The permit would have allowed Paul Fornell to build a truck route through three nature reserves, but because it was found that the facility would not have “significant” environmental impacts, only an Environmental Assessment (EA) was prepared.<sup>113</sup>

Intervenors in *Van Abbema* argued that the Corps had ignored a potentially viable alternative site, which already existed in Quincy, Illinois. But the applicant, Fornell, did not own the suggested location and possibly could not gain access to it.<sup>114</sup> It is safe to assume that the Corps and the applicant both believed that any feasible alternative to Fornell’s proposal would include placing the project on property owned or within reach of the applicant and that other alternatives fell within the “no-action” alternative. Nevertheless, the court held that the Corps had failed the “alternatives analysis” by not further investigating the potential alternative site in Quincy for the proposed facilities.<sup>115</sup>

The Seventh Circuit held that NEPA requires “an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.”<sup>116</sup> The court in *Van Abbema* determined that the *general goal* of the Corps’ approval of the applicant’s proposed facility was “to deliver coal from mine to utility.”<sup>117</sup> The temporary facility at Quincy was able to meet this general goal.<sup>118</sup> It was from this general goal that the Corps should have analyzed reasonable alternatives, not those that the applicant wanted or was even capable of instituting.<sup>119</sup> Revealing its deep concern that an applicant might call the shots on what amounts to a reasonable alternative, the court went on to say, “The fact that this applicant does not now own an alternative site is only marginally relevant (if it

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111. See, e.g., Lackey, *supra* note 104, at 1268–69.

112. 807 F.2d at 634.

113. *Id.* at 634–35. The EA requires a less extensive analysis and disclosure than the EIS and is subject to a different set of rules. See 40 C.F.R. § 1508.9 (2010). Although an EIS was not required in this case, this did not change the court’s “alternatives analysis.” *Van Abbema*, 807 F.2d at 638–39. Other courts, however, have made such a distinction. See *infra* Part III.C (discussing a sliding-scale approach to alternatives analysis whereby the significance of environmental impacts affects the range of alternatives a court would require of an agency).

114. *Van Abbema*, 807 F.2d at 638.

115. *Id.* at 640.

116. *Id.* at 638 (emphasis omitted).

117. *Id.*

118. *Id.* at 638–39.

119. *Id.* at 638.

is relevant at all) to whether feasible alternatives exist to the applicant's proposal."<sup>120</sup>

*Van Abbema* is a prime example of the distrust that leads courts to adopt a broad approach to alternatives analysis for private applicants. The *Van Abbema* court scolded the Corps for incorporating “nearly verbatim” the applicant's data that suggested that sustaining the existing facility in Quincy was not economically viable.<sup>121</sup> In reversing the agency's decision, the court characterized the Corps' action as “blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents.”<sup>122</sup> Indeed, the Seventh Circuit was vindicated in that the materials relied upon were, in fact, faulty.<sup>123</sup> More importantly, the court imposed a duty on the agency to step back from the applicant's proposal and address “reasonable alternatives” that achieve the *general goal* of the proposal.<sup>124</sup>

Of course, the obvious trouble with *Van Abbema* is that a rather creative intervenor could think of hundreds—if not thousands—of ways to achieve the general goal of “deliver[ing] coal from mine to utility.”<sup>125</sup> Defining the goal of the project so generally made the singular alternate suggestion of moving the project to the existing site in Quincy an easy question.<sup>126</sup> Impliedly, the intervenors must have suggested that the Corps incorporate some of Fornell's needs, or they would have suggested any number of other alternatives that the Corps failed to analyze. Clearly the Corps' goal was not required to be so broad as “deliver[ing] coal from mine to utility.” What is not clear is which of Fornell's objectives (other than location) the Corps should have been allowed to consider in drafting its own purpose and need statement. The court's approach seems to expect the Corps to analyze alternatives as if the agency itself was the project's proponent. This fails, however, to recognize the one particularly different role the agency plays in private projects versus public projects. In the latter, the agency has the ability to seek construction bids from multiple parties and consider their merits before choosing a particular option.<sup>127</sup> The Corps was asked to respond to one proposal for a facility in Warsaw. If *this* applicant's proposal really cannot be sustained in Quincy, then no project takes place. From the agency perspec-

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120. *Id.*

121. *Id.* at 641.

122. *Id.* at 642; accord *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997). In a proposal to supply users from one water source, the agency was not permitted to accept without criticism the self-serving definition of purpose advanced by the proponent and needed to consider separate solutions. *Id.* at 669. The project's “real purpose” was to supply each user with more water. *Id.*

123. *Van Abbema*, 807 F.2d at 641 (describing how certain erroneous mileage figures translated into the Corps' inaccurate statements of transportation cost savings).

124. *Id.* at 638. *But see* *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (faulting the *Van Abbema* court for failing to explain why and how a court is to distinguish between specific goals from more general ones).

125. *Van Abbema*, 807 F.2d at 638.

126. *See id.*

127. *Cf. infra* Part IV.C (explaining alternatives for nonfederal sponsors).

tive, this is “no action.” In such a situation, analysis of an alternate facility location becomes purely academic.

This rather liberal approach to alternatives analysis has led some courts to part ways with the fundamental premise that the purpose and need statement necessarily defines the scope of reasonable alternatives.<sup>128</sup> These courts have suggested that even an “incomplete solution”<sup>129</sup> may warrant agency investigation of the option as a reasonable alternative. In *North Buckhead Civic Ass’n v. Skinner*, the Eleventh Circuit suggested that “an alternative *partially* satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a ‘reasonable alternative.’”<sup>130</sup> Instead of tying the amorphous concept of “reasonable alternatives” to the purpose and need statement of the proposal, the *Skinner* court seemed to suggest that an agency might have to consider not just alternate proposals in its EIS but also alternate objectives.<sup>131</sup>

Some courts have taken the broad approach to extremes, going as far as enjoining agency actions that had not fully considered the possibility of Congress changing the law in a way that might transform an otherwise remote alternative into a “reasonable alternative.”<sup>132</sup> Apparently surprised that an agency might object to the heavy burden of predicting what Congress might do, one Washington district court said, “An agency’s refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA’s intent to provide options for both agencies and Congress.”<sup>133</sup>

In *Muckleshoot Indian Tribe v. U.S. Forest Service*, the Ninth Circuit invalidated a land exchange between the Forest Service and a timber company.<sup>134</sup> Taking seriously the CEQ regulation suggesting agencies “[i]nclude reasonable alternatives not within [their] jurisdiction,”<sup>135</sup> the panel held that the Forest Service, in considering alternatives to the exchange, should have considered requesting funds from the Land and Water Conservation Fund so that the federal government could simply buy the land outright.<sup>136</sup> Even assuming the company would have sold under

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128. This Note suggests adopting a similar viewpoint inasmuch as the “purpose and need” statement should not be the guiding force for the scope of reasonable alternatives except with the opposite effect—in other words, sharply narrowing the role of the court as the enforcer of the alternatives analysis. *See infra* Part IV.B.

129. *See, e.g.,* *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (holding that an agency may not “disregard alternatives merely because they do not offer a complete solution to the problem”).

130. *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (emphasis added). The *Skinner* court did not find such a “partial purpose-fulfilling” alternative in that case but found the intervenor’s argument “well taken.” *Id.*

131. *See id.*

132. *See, e.g.,* *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1154 (W.D. Wash. 2002).

133. *Id.*

134. 177 F.3d 800, 814 (9th Cir. 1999).

135. 40 C.F.R. § 1502.14(c) (2010).

136. *Muckleshoot*, 177 F.3d at 814.



such conditions, the requested funds were likely unavailable for such a purpose.<sup>137</sup> Although the *Muckleshoot* court acknowledged it was asking the Forest Service to consider pursuing “admittedly speculative funds,” the court also admitted it was “troubled by [the Forest Service’s] selective willingness to rely upon the availability of funding sources beyond the Forest Service’s direct control.”<sup>138</sup>

The Ninth Circuit has since moved away from the extreme view in *Muckleshoot* by suggesting that it is only in “very rare circumstances” that an agency will need to consider alternatives requiring congressional action.<sup>139</sup> At the very least, the court seemed to be suggesting that reasonable alternatives should be grounded in the present funding capacity of the agency and not speculative of an act of Congress.<sup>140</sup>

## 2. *Implications of the Broad Approach*

The broad approach has some clear advantages. Most importantly, demanding broad consideration of alternatives prevents what should be decisional factors like the size of the project, its cost, or precise location from being integrated into the purpose and need statement of a project.<sup>141</sup> Integration of the proponent’s wants and desires into the statement makes elimination of incongruent (yet potentially feasible) alternatives a simple task. When this practice is obvious to the reviewing court, the purpose and need statement will be deemed “unreasonably narrow” and the EIS rejected.<sup>142</sup> The most clear violation under the broad approach would be the inclusion of quantitative goals of the applicant, which—if the project’s purpose strictly limits the scope of alternatives—precludes consideration of alternatives that fail to meet the desired number assigned by the agency.<sup>143</sup> Inasmuch as this tactic proves successful, it puts the NEPA analysis in a position of decision justification rather than a mechanism of decision making. In effect, the outcome has been preselected to the exclusion of any feasible alternative since the purpose and need statement fulfills its own prophecy.<sup>144</sup>

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137. *Id.*

138. *Id.*; accord *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (“The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch.”).

139. See *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 n.2 (9th Cir. 1986)).

140. See *id.* at 1208–09.

141. See, e.g., *Allen*, *supra* note 60, at 311.

142. See, e.g., *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010).

143. See *Allen*, *supra* note 60, at 312 (classifying a quantitative purpose as a “danger signal”).

144. *Id.* at 311–12. But see *Alliance for Legal Action v. FAA*, 69 F. App’x 617, 623 (4th Cir. 2003) (allowing the FAA’s purpose and need statement to include the quantitative needs of FedEx for 9000-foot runways).

By inviting courts to redefine a goal at a higher level of abstraction like “to deliver coal from mine to utility,”<sup>145</sup> the judge becomes the last line of defense against purpose and need statements so narrowly drawn that the proposed action becomes a foregone conclusion.<sup>146</sup> Consideration of alternatives outside the project’s stated goal might also be reasonable because it “may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact.”<sup>147</sup> Without this judicial power to reconsider the scope of agency goals, agencies would be incentivized to include as many distinct features of a preferred project in the purpose and need statement as possible to effectively limit the scope of alternatives they need to consider and discuss. But the difficulty for a court reconceptualizing the purpose and need of a proposal comes in identifying where general goals end and decisional factors or even private wants begin.<sup>148</sup>

Approaching an alternative and then dismissing it because it fails to meet a particular “need” or “purpose” is equivalent to concluding that the qualities of the preferred proposal were more valued than the advantages of any alternative.<sup>149</sup> This ultimate determination is well within the discretion of the agency after *Vermont Yankee*,<sup>150</sup> but building those preformed value judgments into the purpose and need statement shields the agency’s decision-making *process* from the public. Conversely, NEPA procedures are intended to inform the public about the environmentally significant choices agencies make and the value tradeoffs that they entail, whether they be cost effectiveness, safety, or growth.<sup>151</sup> Arguably, such a narrow construction of purposes and needs undermines the statute’s objective by sending the public a message that, despite the possible environmental impact of a proposal, “the agency had no other choice.”<sup>152</sup>

While advocating an analytically rigorous NEPA process, strict enforcement of NEPA’s alternatives requirement might still be impossible as agencies—limited by time, resources, and their own agenda—seek to circumvent the lengthy process.<sup>153</sup> One ardent supporter of alternatives analysis points out that even the strictest enforcement by courts may not

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145. *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

146. *See, e.g., Nat’l Parks*, 606 F.3d at 1072 (“BLM may not circumvent [alternatives analysis] by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives . . .”).

147. *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990); *cf. infra* Part IV.B (suggesting that the purpose and need should not guide the alternatives analysis).

148. For an attempt to distinguish these ideas, see Allen, *supra* note 60, at 311–15.

149. *See* discussion *infra* Part IV.B (suggesting that rejecting an alternative because it fails to meet a goal is a poor proxy for other value judgments).

150. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Counsel, Inc.*, 435 U.S. 519 (1978); *see also supra* note 60.

151. *See* cases cited *supra* note 26.

152. Allen, *supra* note 60, at 311.

153. *See infra* Part III.D–E.

be able to solve the problem created when “agencies engage in only the most superficial of processes to probe . . . for real alternatives and then simply fabricate some number of alternatives so they will appear to have mechanically met the requirement to examine alternatives.”<sup>154</sup> Agencies are not alone in this desire to skirt around NEPA. Even some environmental advocacy groups and individual environmentalists (usually staunch advocates of NEPA procedures) have resisted the applicability of NEPA alternatives analysis to proposed actions, like land exchanges, when they are the product of a beneficial collaborative effort between environmental and growth interests.<sup>155</sup>

Even a mechanical, yet legally enforceable NEPA process, however, has been defended because it forces decision makers to at least take note of alternate solutions that were available and explain to the interested public the value judgments that went into making a decision.<sup>156</sup> At least in theory, the compulsory exercise of exploring ideas not your own changes thinking over time. Hindsight, these academics argue, proves the truth of this theory, and anecdotal evidence suggests that at times agencies have found the alternatives analysis quite beneficial.<sup>157</sup> However, no one has systematically evaluated the effectiveness of the alternatives analysis,<sup>158</sup> so this is still open for debate.

### B. *The Narrow Approach*

A narrower approach to reasonable alternatives has developed in the appellate courts. This approach grants significantly more latitude to the agency to state its objectives and thereby define the scope of reasonable alternatives it considers. This Section discusses the narrow approach, with the D.C. Circuit’s formulation in *Citizens Against Burlington v. Busey* as the guiding case.<sup>159</sup> Further, it distinguishes *Citizens Against Burlington* from *Van Abbema* and discusses the implications of the narrow approach.

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154. Bear, *supra* note 71, at 940.

155. *Id.* at 940 n.34; *see also infra* Part IV.A (discussing how collaborative efforts might become bogged down by consideration of polarizing or unpopular alternatives).

156. *See, e.g.*, Bear, *supra* note 71, at 940.

157. For a range of anecdotes relating to the purported success of the alternatives analysis, see DREHER, *supra* note 31, at 4–7. *See also* Bear, *supra* note 71, at 940–41. Bear provides the testimony of Secretary of Energy James Watkins to the House Armed Services Committee regarding his decision to defer selection of a tritium production technology: “Thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country . . . .” *Id.* (internal quotation marks omitted).

158. Bear, *supra* note 71, at 940.

159. 938 F.2d 190 (D.C. Cir. 1991).

### I. Citizens Against Burlington v. Busey

If *Van Abbema* is the golden child of environmentalists and academics alike, *Citizens Against Burlington v. Busey* is the black sheep of the family.<sup>160</sup> From the viewpoint of these critics, *Citizens Against Burlington* effectively gutted the alternatives requirement by allowing the project proponent to dictate the scope of reasonable alternatives.<sup>161</sup> Critics say the court was swept away by the “projected economic bonanza” of the proposed project, thereby undermining the legal force of the NEPA procedure.<sup>162</sup>

In 1988, the city of Toledo and managers of the Toledo Express Airport (Port Authority) were interested in making Toledo a cargo hub.<sup>163</sup> They hoped the expansion of its airport would generate new jobs and boost the local economy.<sup>164</sup> The Port Authority helped to attract Burlington Air Express to the location with a variety of public and private funding mechanisms to finance renovation and expansion of the airport.<sup>165</sup> Burlington, an air cargo company that operated out of Fort Wayne, considered seventeen sites—including remaining in Fort Wayne—before settling on Toledo as the home for its new cargo hub.<sup>166</sup>

Before the D.C. Circuit, Citizens Against Burlington (Citizens), a group of neighbors who either lived close to the proposed site or used the nearby Oak Openings Preserve Metropark, challenged the EIS presented by the Federal Aviation Administration (FAA).<sup>167</sup> The FAA, Citizens argued, prepared its EIS in response to the proposed expansion by the Port Authority without in-depth consideration of the other locations Burlington had already excluded in its own private economic analysis.<sup>168</sup> The EIS did briefly address a number of alternatives to the proposal,<sup>169</sup> but dispensed with them because they did not meet the needs of Burlington or the Port Authority.<sup>170</sup> Instead, the agency studied only two possible alternatives: approval of the Port Authority’s expansion and no ac-

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160. See generally Lackey, *supra* note 104 for a full critique of *Citizens Against Burlington*. Criticisms of *Citizens Against Burlington* abound, but most follow a similar pattern to that of Lackey. See, e.g., Clay Hartmann, *NEPA: Business As Usual: The Weakness of the National Environmental Policy Act*, 59 J. AIR L. & COM. 709, 745–50 (1994).

161. See generally sources cited *supra* note 160.

162. Lackey, *supra* note 104, at 1265.

163. *Citizens Against Burlington*, 938 F.2d at 192.

164. *Id.*

165. *Id.* Burlington was also attracted to the area by a quality work force, “zoning advantages,” and its good location. *Id.*

166. *Id.*

167. *Id.* at 192–93.

168. *Id.* at 198–99.

169. Five alternatives were noted in the EIS: (1) “approving the Port Authority’s plan for expanding Toledo Express;” (2) “approving other geometric configurations for expanding Toledo Express;” (3) “approving other ways of channeling airplane traffic at Toledo Express;” (4) “no action;” (5) “approving plans for other airports both in the Toledo metropolitan area and out of it, including Baer Field in Fort Wayne.” *Id.* at 197.

170. *Id.* at 198.

tion.<sup>171</sup> After approving the final EIS, FAA indicated its preferred alternative was the Port Authority's plan.<sup>172</sup>

Specifically citing *Van Abbema v. Fornell*, Citizens argued that the "general goal" of the Port Authority's proposal was "to build a permanent cargo hub for Burlington."<sup>173</sup> Because Fort Wayne's Baer Field was a feasible location and would "accomplish this general goal just as well as Toledo," it was a "reasonable alternative" that the FAA failed to analyze in depth.<sup>174</sup> Therefore, under the broad *Van Abbema* approach, the EIS was out of compliance with NEPA, and a new or supplemental statement was warranted.<sup>175</sup> The court, however, refused to adopt the *Van Abbema* reasoning or Citizens' restatement of the general goal.<sup>176</sup>

The court in *Citizens Against Burlington* held that the EIS prepared by the FAA was sufficient under NEPA and went on to attack the Seventh Circuit's opinion in *Van Abbema*.<sup>177</sup> Judge (now Justice) Thomas faulted the *Van Abbema* court for misinterpreting the plain language of NEPA by requiring an analysis of "feasible alternatives . . . to the applicant's proposal."<sup>178</sup> Judge Thomas said, "NEPA plainly refers to alternatives to the 'major federal actions significantly affecting the quality of the human environment' and not to alternatives to the applicant's proposal."<sup>179</sup> Drawing the same distinction endorsed in this Note, the court's interpretation means that the alternatives analysis takes on a different character when the agency is asked merely to respond to a third-party proposal (e.g., granting a permit or approving a land swap) as opposed to when it acts as the proponent of a federal project, plan, or policy.<sup>180</sup> "Where the [f]ederal government acts, not as a proprietor, but to approve and support a project being sponsored by a local government or private applicant, the federal agency is necessarily more limited."<sup>181</sup>

The court in *Citizens Against Burlington* went on to further criticize *Van Abbema*'s "general goal" formulation as unworkable and outside the scope of judicial review.<sup>182</sup> According to the majority, NEPA does not require an agency to distinguish between the general and specific goals of a proposal; rather, an agency need only consider alternatives to

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171. *Id.* at 197.

172. *Id.* at 197-98.

173. *Id.* at 198.

174. *Id.* at 199.

175. *Id.*

176. *Id.*

177. *Id.* at 199, 206 (faulting the *Van Abbema* court for failing to explain why and how a court is to distinguish between specific goals from more general ones and holding that the FAA had, for the most part, complied with all necessary regulations and statutes).

178. *Id.* at 199 (emphasis added) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)).

179. *Id.* (quoting 42 U.S.C. § 4332(2)(C) (2006)).

180. *See id.* at 197 (quoting approvingly of reasoning contained in the FAA's EIS); *see also* discussion *infra* Part IV.C (suggesting a narrower approach to alternatives analysis when the proponent is a nonfederal actor).

181. *Citizens Against Burlington*, 938 F.2d at 197 (quoting the FAA's EIS).

182. *Id.* at 199.

*its own* action.<sup>183</sup> Stated differently, “Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.”<sup>184</sup> The court concluded, “*Someone* has to define the purpose of the agency action,” but it should not be the reviewing court but rather the agency itself under the guidance of its individual Congressional mandate.<sup>185</sup> Responding to the coalition’s *Van Abbema*-based approach, Judge Thomas wrote:

Citizens’ view would require the FAA to canvass the business choices that Burlington faced when it considered leaving Fort Wayne. But the agency has neither the expertise nor the proper incentive structure to do so (it has no shareholders who would suffer from mistaken judgments). And while Congress clearly wanted NEPA to extend federal agencies’ range of vision to environmental concerns, it did not . . . aim at agencies’ acquiring the skills of successful entrepreneurs. NEPA is supposed to make agencies more sensitive—but only, by definition, to matters environmental.<sup>186</sup>

*Citizens Against Burlington*’s plain language criticism of *Van Abbema* could be reduced to nothing more than semantics. At least arguably, the *Van Abbema* court was simply imprecise in its language when it suggested alternatives to the “applicant’s proposal” instead of alternatives available to the federal actor. Indeed, CEQ regulations are internally inconsistent on the definition of “major federal action.”<sup>187</sup> Major federal actions are defined to include the projects submitted for approval to federal agencies but also as the approval itself of those specific projects.<sup>188</sup>

Despite the semantic distinction between the project itself as the federal action and the agency’s approval being the federal action, the result, as far as alternatives analysis is concerned, may very well be the same. An alternative to the proposed action might just as easily be stated from the perspective of the federal actor instead of the applicant. For example, in *Citizens Against Burlington*, alternatives were stated from the perspective of the FAA.<sup>189</sup> One such alternative was “*approving* plans for other airports both in the Toledo metropolitan area and out of it, including Baer Field in Fort Wayne.”<sup>190</sup> Of course, such a proposal had no real-world advocate, so the FAA dismissed it.<sup>191</sup> This leads to the

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183. *Id.*

184. *Id.*

185. *Id.* (emphasis in original). The court took note of Congress’s findings that “airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent.” *Id.* at 197 n.5 (citations omitted).

186. *Id.* at 197 n.6.

187. See *supra* note 37 and accompanying text.

188. *Id.*

189. See *Citizens Against Burlington*, 938 F.2d at 197.

190. *Id.* (emphasis added).

191. See *id.* at 197–98 (discussing the rejection of three alternatives).

second, more important, contention with *Van Abbema*: the role of the nonfederal proponent in defining the scope of alternatives.

2. *Distinguishing Van Abbema and Citizens Against Burlington—  
The Role of the Proponent*

The *Van Abbema* and *Citizens Against Burlington* courts would agree that NEPA prohibits the agency from drawing an “unreasonably narrow” purpose and need statement so as to exclude otherwise feasible alternatives for the sake of satisfying the wants and wishes of a proponent.<sup>192</sup> The real distinction between *Van Abbema* and *Citizens Against Burlington* is the degree to which the proponent’s objectives are allowed to dictate the scope of reasonable alternatives. *Van Abbema* and its progeny express an intense skepticism of a project’s “self-serving” proponent,<sup>193</sup> whereas the court in *Citizens Against Burlington* saw the proponent as the dominant partner in shaping the scope of reasonable alternatives.<sup>194</sup> For the *Burlington* court, the skepticism should be aimed not at the proponent but at the reviewing court.<sup>195</sup>

Other courts have embraced this approach and suggested that when an agency acts as a nonproprietor of a “major federal action,” the scope of reasonable alternatives is naturally limited therein.<sup>196</sup> In *Alliance for Legal Action v. FAA*, the Fourth Circuit recognized this contextual distinction, saying that when the proponent is from outside the agency, the “project sponsor’s goals play a large role in determining how the purpose and need is stated.”<sup>197</sup>

Similar to *Burlington*, the *Alliance* court considered the FAA’s purpose and need statement in an airport expansion project where the EIS stated the purpose and need was “to build a cargo hub at [the airport] with parallel, widely spaced, 9000-foot runways.”<sup>198</sup> The Alliance for Legal Action (ALA) argued that the statement was defined too narrowly because the 9000-foot runway reflected what the project’s sponsor, the Airport Authority (and its dominant partner, FedEx), wanted.<sup>199</sup> Indeed,

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192. See *id.* at 196; *Van Abbema*, 807 F.2d at 639.

193. See *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997).

194. *Citizens Against Burlington*, 938 F.2d at 197–98. The court approved of the FAA’s reasoning for limiting its analysis of alternatives. *Id.* at 197 (“The scope of alternatives considered by the sponsoring [f]ederal agency, where the [f]ederal government acts as a proprietor, is wide ranging and comprehensive. Where the [f]ederal government acts, not as a proprietor, . . . the [f]ederal agency is necessarily more limited.”).

195. See *id.* at 194 (warning reviewing courts not to “coax agency decisionmakers to reach certain results”).

196. See *e.g.*, *La. Wildlife Fed’n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (“[I]t would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.”); *cf.* *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (holding that the court is not at liberty to restate the purpose in terms of a broad social interest).

197. 69 F. App’x 617, 622 (4th Cir. 2003) (citing *Citizens Against Burlington*, 938 F.2d at 196).

198. *Id.*

199. *Id.* ALA argued that the FAA defined the purpose and need of the proposal to fit the wants of FedEx and that the FAA “should have started with a broader statement that reflected the general

this is precisely the kind of quantitative private “want” that advocates of a broad approach say should be invalid when incorporated into the purpose and need statement.<sup>200</sup> Thus, the agency was led to consider in its EIS only those alternatives that met FedEx’s needs.<sup>201</sup>

Considering the context in which the FAA was approving (or rejecting) the Airport Authority’s proposal, the court maintained that the NEPA requirements had been met.<sup>202</sup> Including FedEx’s needs in defining the purpose of the proposal was wholly reasonable in light of the FAA [c]ongressional mandate to “facilitate the construction of cargo hubs.”<sup>203</sup> The court took special note that FedEx’s goals and Congress’s goal for the FAA coincided, making it reasonable for the FAA “to draw on the expertise of the project sponsors and to reflect their goals.”<sup>204</sup> In other words, addressing the needs of private proponents like FedEx in approving such projects advanced the agency’s objectives of “facilitating the construction of efficient cargo hubs.”<sup>205</sup> In fact, it might be impossible to meet such an objective by any other means.

While purporting to reconcile *Van Abbema* with *Citizens Against Burlington*, the Tenth Circuit effectively adopted the narrow approach it had used in *Colorado Environmental Coalition v. Dombek* when it said, “Agencies . . . are precluded from completely ignoring a private applicant’s objectives.”<sup>206</sup> The *Dombek* court “reconciled” the decisions by suggesting that agencies cannot ignore the private applicant’s objectives, but they must not define their *own* objective so narrowly as to render any alternatives to the proposed plan incompatible.<sup>207</sup> Unfortunately, this restatement of the general rule followed in both cases does little to close the gap between *Van Abbema* and *Citizens Against Burlington* on the spectrum of agency deference.<sup>208</sup>

In *Dombek*, the Colorado Environmental Coalition (the Coalition) challenged a plan approved by the Forest Service to expand Vail’s existing ski area within White River National Forest.<sup>209</sup> The purpose and need statement included the Forest Service’s goal of “providing high quality recreation experiences for visitors to the National Forest, specifi-

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goal of building a cargo hub to serve the mid-Atlantic region. A broader statement would have prompted consideration of a wider variety of alternatives.” *Id.*

200. See, e.g., *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (rejecting a purpose and need statement that set out three private objectives along with one BLM goal).

201. *Alliance for Legal Action*, 69 F. App’x at 622.

202. *Id.* at 622–24.

203. *Id.* at 622 (citing 49 U.S.C. § 47101(a)(4), (7) (2006)).

204. *Id.*

205. *Id.*

206. 185 F.3d 1162, 1175 (10th Cir. 1999) (suggesting that “these authorities [are not] mutually exclusive or conflicting”).

207. *Id.* at 1174–75.

208. The *Dombek* court concluded that, taken together, *Van Abbema* and *Citizens Against Burlington* “instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.” *Id.* at 1175.

209. *Id.* at 1165, 1167.



cally within the Vail Ski Area . . . .”<sup>210</sup> The Forest Service refused to analyze further an alternative sponsored by the Coalition because it would not “substantially increase’ intermediate ski terrain” as compared to other alternatives.<sup>211</sup> The *Dombeck* court concurred with the Forest Service when it reasoned “[w]hen the purpose is to add terrain in order to respond to specific qualitative needs at the ski area, it is appropriate to dismiss from consideration ski trail development opportunities that would not advance those objectives.”<sup>212</sup>

In stark contrast to *Van Abbema*, the court in *Dombeck* did not find the purpose and need statement unreasonably narrow because it happened to integrate the private goals of the Vail ski resort to the exclusion of alternative locations, sizes, or different activities.<sup>213</sup> Nor did the court venture to reconceptualize the general goal of the ski project to something like “expanding the availability of skiable terrain in the White River National Park” or “expanding the availability of *recreation*” in the area. At an even higher level of generalization, the court could have restated the goal as “providing greater access to Colorado’s Forest Service managed land.”<sup>214</sup> Instead, the court found the purpose and need statement was reasonable in light of the overlap between Vail’s goals of winter recreation development and those of the White River Forest Plan.<sup>215</sup>

*Dombeck* nicely illustrates the naturally limited role the agency assumes in accepting or rejecting a private proposal. The three alternatives considered (not including the statutorily mandated “no-action” alternative) varied in the amount of skiable terrain on the Vail resort and amenities available and, “consequently, in the type and degree of environmental impacts each would impose.”<sup>216</sup> Inasmuch as these “alternatives” depart from the original proposal only to minimize the impacts of the expanded Vail ski resort, they might better be characterized as modification measures.<sup>217</sup>

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210. *Id.* at 1175 n.15.

211. *Id.* at 1176.

212. *Id.* (alteration in original).

213. *See id.* at 1175 (rejecting the argument that the Forest Service had “blindly adopted Vail’s articulated purpose and need”). In many respects, the Forest Service did adopt Vail’s “wants,” and an opposite result could have easily been reached under a *Van Abbema*-like approach to the alternatives analysis. *See id.* at 1175–76.

214. Of course, such a construction is unworkably broad for any meaningful consideration of alternatives.

215. *Dombeck*, 185 F.3d at 1175.

216. *Id.* at 1176.

217. *See* 40 C.F.R. § 1508.20(a), (b) (2010) (defining mitigation efforts).

### 3. *Implications for a Narrow Approach*

Critics of *Citizens Against Burlington* and its progeny point to the 1980 guidelines prepared by the CEQ, which attempted to define the scope of alternatives that an agency must analyze in the EIS.<sup>218</sup> The CEQ solicited questions from federal agencies concerning NEPA and then responded to the forty most frequently asked questions.<sup>219</sup> While reinforcing the *Vermont Yankee* holding that “[r]easonable alternatives include those that are practical or feasible,” CEQ answers in *Forty Questions* seem closer to the holding in *Van Abbema* when they say the “emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.”<sup>220</sup> When agencies have asked just how many alternatives they should consider to comply with NEPA, the answer has been: “how ever many reasonable alternatives that meet the purpose and need of the proposed action are identified.”<sup>221</sup>

Demonstrating the impracticality of a broad definition of alternatives independent of the applicant’s proposal, Judge Thomas, in *Citizens Against Burlington*, provided an illuminating hypothetical based on the facts of *Vermont Yankee*.<sup>222</sup> Suppose a utility company applies to the Nuclear Regulatory Commission for permission to build a reactor in Vermont.<sup>223</sup> “Free-floating ‘alternatives’ to the proposal for federal action might conceivably include everything from licensing a reactor in Pecos, Texas, to promoting imports of hydropower from Quebec.”<sup>224</sup> Judge Thomas concluded that if the Commission had to extensively discuss such limitless alternatives, its statement would be reduced to “frivolous boilerplate,” or it might reject the permit outright.<sup>225</sup> Such theoretical projects that lack any real-life proponent are, for all practical purposes, “no-action” alternatives.

Courts adopting the narrower approach to reasonable alternatives have distinguished between federal and nonfederal applicants, and critics have focused their attention on this distinction.<sup>226</sup> No statute or NEPA regulation expressly makes such a distinction, yet the *Citizens Against Burlington* court found the plain language of the statute presupposes

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218. Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,026–27 (Mar. 23, 1981) [hereinafter *Forty Questions*].

219. *Id.* at 18,026.

220. *Id.* at 18,027 (emphasis omitted).

221. Bear, *supra* note 71, at 938 n.29.

222. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

223. *Id.*

224. *Id.*

225. *Id.* (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978)).

226. See, e.g., Lackey, *supra* note 104, at 1269 (“The distinction between applicants is not supported by any statute, regulation, or judicial precedent and is unworkable.”).

such a distinction.<sup>227</sup> The focus of NEPA alternatives analysis rests on the potential actions available to the agency, not the proponent.<sup>228</sup> Therefore, when the proponent *is* the federal agency, the alternatives analysis broadens naturally because the proposal itself becomes the subject of alternatives analysis.<sup>229</sup> Of course, the agency could investigate the environmental impacts of other proposals, but if they are not being asked to approve an application for an alternate proposal, such an endeavor is purely academic or the equivalent of the “no-action” alternative.<sup>230</sup>

The narrow approach in *Citizens Against Burlington* has been the target of strong criticism for allowing the interests of the proponent to dictate the consideration of alternatives. “[B]ecause an applicant is unlikely to choose alternatives based exclusively on environmental concerns,” one critic has pointed out, “the practical effect of the D.C. Circuit’s decision is that the entire intent of NEPA, to ‘inject environmental considerations into the federal agency’s decisionmaking process,’ has been undermined.”<sup>231</sup> This criticism fails to consider, however, that agencies are required to analyze their *own* alternative courses of action, including to reject the project altogether, whether the applicant suggests alternatives solely based on environmental concerns or not. It further fails to recognize the potential for a more practical analysis of alternatives that might be able to join the negotiable interests of the agency, the proponent, and stakeholders alike.<sup>232</sup>

### C. *The Sliding-Scale Approach*

Still others, somewhat caught up in the confusion, have suggested various ways to find a middle-ground between the broad and narrow approaches.<sup>233</sup> One popular approach is briefly discussed here: the so-called “sliding-scale” approach.<sup>234</sup>

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227. *Citizens Against Burlington*, 938 F.2d at 199 (“NEPA plainly refers to alternatives to the ‘major [f]ederal actions significantly affecting the quality of the human environment,’ and not to alternatives to the applicant’s proposal.”); *see also supra* Part III.B.1.

228. *Id.*

229. *E.g.*, Forty Questions, *supra* note 218, at 18,027 (“[A] proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest.”).

230. *See infra* Part IV.C.

231. Lackey, *supra* note 104, at 1273 (footnote omitted). *See also* Hartmann, *supra* note 160, at 734 (characterizing *Citizens Against Burlington* as a “well visited case on the issue of business interests overcoming an agency’s NEPA responsibility” (footnote omitted)).

232. *See infra* Part IV.A.

233. *See, e.g.*, *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 207–10 (D.C. Cir. 1991) (Buckley, J., dissenting) (suggesting that an agency’s goals may be guided by the economic objectives of its “dominant partner,” but that the agency should not unquestionably accept the assertions of the partner that the proposed project is the only economically feasible one).

234. *See, e.g.*, *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 960 (7th Cir. 2003); *Cent. S.D. Coop. Grazing Dist. v. Sec’y of the U.S. Dep’t of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001); *Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir. 1994); *River Rd. Alliance, Inc. v. Corps of Eng’rs of U.S. Army*, 764 F.2d 445, 452 (7th Cir. 1985).

In *Save Our Cumberland Mountains v. Kempthorne*,<sup>235</sup> the Sixth Circuit took up a challenged application for a permit by the National Coal Corporation to engage in a strip-mining operation in Tennessee.<sup>236</sup> The Office of Surface Mining and Reclamation (the Office) determined that because of extensive mitigation efforts to counter near-term impacts caused by the mining operation, the Office need only draft an EA instead of a full EIS for the proposal.<sup>237</sup> On appeal, the Sixth Circuit found no issue with this determination but instead questioned the agency's contention that it need only consider the impacts of three alternative courses of action: granting the permit, denying the permit, and a "no-action" alternative.<sup>238</sup> At the very least, the court held, the agency should have considered a "modification" alternative, "whether to the size of the area being mined, to the types of mining being contemplated or to the mitigation measures for the mining operation."<sup>239</sup> The court was even willing to accept an agency rejection of the "modification" alternative in the EA, if only it had rationally explained the decision as neither feasible nor necessary in light of mitigation measures the proponent had adopted.<sup>240</sup>

*Kempthorne* is important for its endorsement of the "sliding-scale" formulation for evaluation of reasonable alternatives.<sup>241</sup> As the court explains, "[W]hen an agency permissibly identifies few if any environmental consequences of a project, it correspondingly has fewer reasons to consider environmentally sensitive alternatives to the project . . ."<sup>242</sup> This approach has been described as a proportionality test, where the significance of the environmental impact tracks the range of reasonable alternatives that a court would expect.<sup>243</sup>

The "sliding-scale" approach adds little to our understanding of the scope of alternatives when the agency makes a "significant-impacts" determination triggering the EIS.<sup>244</sup> Although projects with "significant-impacts" will also vary in magnitude, presumably a *full* range of alternatives must always be analyzed where an EIS is to be prepared.<sup>245</sup> Which alternatives a full range includes remains the primary question. This is not to say that the "significant-impacts" determination is an arbitrary place to draw a line between greater and lesser judicial scrutiny, only that it is of limited usefulness for projects requiring an EIS. In this context,

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235. 453 F.3d 334 (6th Cir. 2006).

236. *Id.* at 336–37.

237. *Id.*

238. *Id.* at 343 (referring to such a formulation as a "false trichotomy").

239. *Id.* at 345.

240. *Id.*

241. *Id.* at 343.

242. *Id.*

243. *See, e.g.,* *City of New Haven v. Chandler*, 446 F. Supp 925, 933–35 (D. Conn. 1978) (recognizing the possibility that "the agency's duty to consider alternatives . . . must be looked at in relation to the nature of the proposed project, including its estimated environmental impact").

244. *See* 42 U.S.C. § 4332(2)(C) (2006).

245. *See, e.g.,* *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) ("[A]n agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.").

the sliding-scale approach collapses the reasonable alternatives analysis into the “significant-impacts” analysis,<sup>246</sup> providing even greater incentive for an agency to try to avoid the significant-impacts via mitigation procedures.

*D. Questioning NEPA’s “Comprehensive Rationality” Model*

The broad approach to reasonable alternatives reflects an endorsement by courts of the “comprehensive rationality” model of decision making<sup>247</sup> as the dominant mandate of NEPA. By halting agency action that has failed to consider a “reasonable alternative,” courts assume the role of ensuring that the best of all available options does not go unconsidered *before* agency action.

Comprehensive rationality proceeds in four steps: the decision maker (1) specifies the goals he or she wishes to attain or problems to solve, (2) identifies all possible methods of reaching those goals or solving those problems, (3) evaluates the effectiveness of each method at meeting the goals or providing a solution, and (4) he or she selects that alternative which comes closest to the desired outcome or solving the problem.<sup>248</sup> In other words, the rational decision maker has “perfect information” about alternative courses of conduct and their respective consequences when he or she decides a course of action.<sup>249</sup> The decision maker simply chooses the action with the best mix of goal realization and cost minimization.<sup>250</sup>

Indeed, this rational process mirrors the stages of the NEPA procedural requirements: production of a purpose and need statement, consideration of all alternatives to the proposal (including “no action”), evaluation of such alternatives, and selection of a preferred alternative.<sup>251</sup> The Seventh Circuit made this point ever clearer when it said every alternatives analysis should proceed by asking three questions: “First, what is the purpose of the proposed project (major federal action)? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative?”<sup>252</sup>

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246. Significant environmental impacts can be countered with mitigation efforts to such an extent that it removes the necessity of an EIS—i.e., a mitigated Finding of No Significant Impact (FONSI). *See, e.g., O’Reilly, Jr. v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 228–31 (5th Cir. 2007).

247. For further discussion of these decision-making models, see Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396–400 (1981) (elaborating on two dominant models: “incrementalism” and “comprehensive rationality”). *See also* Rossi, *supra* note 65 (discussing participation in agency decision making generally).

248. CULHANE ET AL., *supra* note 49, at 2–3; HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 67 (1976); Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 81 (1959).

249. CULHANE ET AL., *supra* note 49, at 2–3.

250. *Id.* at 3.

251. *See supra* Part II.A.1–2.

252. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 668 (7th Cir. 1997).

The model of comprehensive rationality, however, does not necessarily comport with the way decisions are actually made. As one administrative law scholar notes:

Only a superhuman decisionmaker could faithfully adhere to the ideal of comprehensive rationality. He would have to be able to identify goals unambiguously, which would sometimes require reconciliation of numerous competing objectives. He would need a Jovian imagination to conceive of every possible means to attain his goals. Finally, he would have to anticipate the precise consequences of adopting each alternative and to invent a metric that permits comparison among them.<sup>253</sup>

Incrementalist theorists challenge the comprehensive model as a viable theory for administrators because human decision makers generally cannot meet the informational demands of comprehensive rationality.<sup>254</sup> Political scientist, sociologist, and economist Herbert Simon also argued, “[C]omprehensiveness is not cost-effective in normal organizational decision making since the marginal utility of the ‘best’ decision is usually less than the marginal cost of a comprehensive search for it.”<sup>255</sup>

Scarce resources, time horizons, and human staff with limited imaginations and imperfect information always limit agency decision making and make the ideal of comprehensive rationality impossible.<sup>256</sup> Decision makers have practical, nonacademic problems that must be solved: roads need to be built, trash needs a place to be dumped, and planes need a place to land. Furthermore, the participants, both public and private, in policy making often have vastly different views of which goals should be optimized by a given course of action.<sup>257</sup> To resolve disagreement among stakeholders, incrementalists posit, decision makers “must try to arrive at a consensus that different participants can agree on for different reasons, a process . . . describe[d] as ‘partisan mutual adjustment.’”<sup>258</sup> Ultimately, the deliberation must come to an end.<sup>259</sup> As famous Norwegian philosopher and political theorist Jon Elster wrote, “One can discuss only for so long, and then one has to make a decision, even if strong differences of opinion should remain.”<sup>260</sup>

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253. Diver, *supra* note 247, at 396.

254. See, e.g., SIMON, *supra* note 248, at 80–84.

255. CULHANE ET AL., *supra* note 49, at 3 (describing the contribution of Herbert Simon).

256. See, e.g., *id.*; Lindblom, *supra* note 248, at 80, 84.

257. CULHANE ET AL., *supra* note 49, at 3 (describing the contribution of Charles Lindblom); see also Lindblom, *supra* note 248, at 81–83.

258. CULHANE ET AL., *supra* note 49, at 3–4.

259. Rossi, *supra* note 65, at 213.

260. JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 38 (1983).

*E. Where Participation and Deliberation Collide*

NEPA processes promote objectives in agency decision making that are not always consistent: vast public participation and concentrated deliberation by decision makers. In recent years, Congress,<sup>261</sup> agency personnel,<sup>262</sup> and academics<sup>263</sup> alike have recognized the incompatibility of these objectives. Agency personnel in particular are beginning to seriously challenge the efficacy of a strict approach to “reasonable alternatives.” Two letters received by the NEPA Task Force put it this way:

NEPA’s culture polarizes decision-making and fails to support the development of good projects. Much of today’s concerns for streamlining of environmental permitting focuses on the complexity of project permits and the tangled course of meeting their substantive and procedural preconditions. These are important problems. But we believe another issue deserves more attention than it has received. This is the question of whether “alternatives analysis,” in the shape it now takes in NEPA, creates a context for discussion and problem-solving that maximizes the polarization of opinion, the staking out of positions, and the exclusion of iteration and compromise in problem-solving. Is it possible that part of the frustration at delay and gridlock that now animates NEPA’s critics grows from the analytic mechanism of “alternatives” in which project examination now finds itself mired?<sup>264</sup>

And from the Deputy Chief of the Forest Service:

The requirement that alternatives to proposed actions and their effects be documented in an environmental impact statement and environmental assessment prior to a decision does not facilitate a collaborative process between agencies or with other interests. . . . Documenting and circulating . . . alternatives in a draft and final document for public comment fosters an assumption that the decision maker has a range of options to choose from and various interests can weigh in and comment on the alternatives they support. There is no incentive built into the NEPA process to work toward a single solution that accommodates multiple interests.<sup>265</sup>

While not sharing these sentiments, Dinah Bear has suggested that the days when the virtue of alternatives analysis goes unchallenged are over.<sup>266</sup>

Much to the chagrin of environmentalists and some scholars, Congress has, in recent years, recognized how court enforcement of the al-

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261. See *infra* notes 269–70 and accompanying text.

262. See *infra* notes 265–66 and accompanying text.

263. See, e.g., Rossi, *supra* note 65.

264. Letter from Douglas B. MacDonald, Sec’y of Transp., Wash. State Dep’t of Transp., to James L. Connaughton, Chairman, Council on Env’tl. Quality, NEPA Task Force 2 (Sept. 23, 2002), [http://ceq.hss.doe.gov/ntf/comments/pdfs/ceq\\_551.pdf](http://ceq.hss.doe.gov/ntf/comments/pdfs/ceq_551.pdf) (emphasis omitted).

265. Letter from Tom L. Thompson, Deputy Chief for Nat’l Forest Sys., U.S.D.A. Forest Serv., to NEPA Task Force 2 (Aug. 28, 2002), [http://ceq.hss.doe.gov/ntf/comments/pdfs/ceq\\_110.pdf](http://ceq.hss.doe.gov/ntf/comments/pdfs/ceq_110.pdf).

266. Bear, *supra* note 71, at 938.

ternatives analysis has frustrated collaboration and consensus-building efforts and worked to curb judicial review.<sup>267</sup> For example, The Healthy Forests Restoration Act of 2003 grants full discretion to the secretary of the interior to dispose of any alternative beyond the three required by statute, which are the proposed action, the “no-action” alternative, and an additional alternative that meets the purpose and need of the project.<sup>268</sup> In another George W. Bush-era piece of legislation, The Century of Aviation Reauthorization Act actually prohibits the FAA from considering alternatives to certain airport capacity enhancement projects unless the secretary of transportation has deemed them reasonable.<sup>269</sup>

Even the CEQ has suggested that “[i]f agencies desire broader agreement in identifying the preferred alternative, engaging in effective collaboration . . . is absolutely essential.”<sup>270</sup> This Note suggests that courts should respond in-kind, reconsidering how NEPA can serve as a modern tool of consensus building and problem solving, rather than allowing self-interested parties to derail collaborative efforts with litigation over the number of alternatives considered.<sup>271</sup>

Professor Dreher flatly rejects the collaboration concern saying, “NEPA is based on the sound premise that . . . conflicts are best resolved through an inclusive, analytically rigorous process, not an artificially-constrained search for consensus.”<sup>272</sup> Dreher’s argument reflects the knee-jerk response to arguments grounded in the practical limits of decision makers—i.e., more participation will cure the “myopia” of agency heads.<sup>273</sup> This argument fails, however, to account for the practical impacts of increased participation. Participation and deliberation only complement each other in administrative decision making to a certain point before participation has destructive effects on deliberation, overwhelming the capacity of agencies to focus in-depth on specific problems.<sup>274</sup> In his critique of increased direct participation, Professor Jim Rossi demonstrates that “increases in information facilitated by more participation may lead to information overload, encouraging poor analysis, [and a] superficial examination of alternatives.”<sup>275</sup> It is not difficult to see how more participation, and for that matter, more information makes decision making increasingly difficult and cumbersome—the more alter-

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267. See, e.g., DREHER *supra* note 31, at 10–11.

268. See 16 U.S.C. § 6514(c) (2006).

269. See 49 U.S.C. § 47171(k) (2006).

270. CEQ COLLABORATION HANDBOOK, *supra* note 29, at 21.

271. See *id.* at 20 (“[W]hen dealing with project proposals from the private sector, an agency may work collaboratively with private sector applicants, regulatory agencies and other interested parties to ensure that the public interest as well as the applicant’s role and needs[] are taken into account when developing the purpose and need statement.”).

272. DREHER, *supra* note 31, at 17.

273. See Diver, *supra* note 247, at 424.

274. See Rossi, *supra* note 65, at 213–16 (arguing that increased participation can strip agencies of their ability to effectively set priorities and reduce their responsiveness to political oversight institutions).

275. *Id.* at 216.



natives that must be considered, the less time and serious attention that can be given to a genuine analysis of each. Only in an ideal world of unlimited resources are NEPA procedures not “artificially constrained” by a search for consensus.

#### IV. RESOLUTION

Given the ability and incentive to evade NEPA processes<sup>276</sup> and the impossibility of perfect adherence to the model of comprehensive rationality,<sup>277</sup> courts must reconsider their enforcement role within the bounds of NEPA’s language. Courts seem to have forgotten that NEPA’s plain statutory language does not expressly require strict adherence to a rational comprehensive model. Nowhere in the statute is there a requirement that an agency identify *all* alternatives; it must identify only “alternatives to the proposed action.”<sup>278</sup> “It does not require consideration of all consequences, only ‘the environmental impacts of the proposed action.’”<sup>279</sup>

In fairness to critics of efforts to curb alternatives analysis in the name of collaboration, no coherent effort has been made to articulate a judicial approach that incorporates consensus building into NEPA review short of eliminating the alternatives requirement altogether.<sup>280</sup> This Note hopes to accomplish this by identifying three principles that should guide challenges to the EIS based on an inadequate consideration of alternatives: first, adoption of a “good-faith” standard of review for considered alternatives; second, rejection of the purpose and need statement as the guiding force in the scope of alternatives; and third, recognizing the inherently limited scope of alternatives in the case of nonfederal sponsors.

##### A. *A “Good Faith” and Collaborative Standard to Judicial Review of Reasonable Alternatives*

Incorporating the general concept of consensus building and collaborative decision making into the alternatives analysis must start with a reformulation or at least a clarification of the standard of judicial review. Lower courts have variously referred to the deferential standard of review as “arbitrary and capricious,” a “hard look,” or a “rule of reason,” and sometimes all are found in the same opinion.<sup>281</sup> The best formula-

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276. See *supra* text accompanying notes 76–82.

277. See *supra* Part III.D.

278. 42 U.S.C. § 4332 (2006); CULHANE ET AL., *supra* note 49, at 7.

279. See sources cited *supra* note 278.

280. Cf. DREHER, *supra* note 31, at 16–18 (describing efforts in collaborative decision making as either too “vague” or incompatible with present NEPA processes).

281. See, e.g., *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444–45 (10th Cir. 1992); see also discussion *supra* Part II.C.

tion, as stated by the Tenth Circuit in *City of Aurora v. Hunt*,<sup>282</sup> states that NEPA does not require an agency to analyze “alternatives it has in *good faith* rejected as too remote, speculative, or . . . impractical or ineffective.”<sup>283</sup> A good-faith requirement to comply with NEPA dispenses with mistrust and cynicism of agency decision makers and ensures NEPA remains procedural rather than allowing judges’ preferences or opinions of particular projects to control decision making.<sup>284</sup>

The collaborative standard adds one important item to this list of general reasons why an alternative need not be considered: that is, the inclusion of a certain alternative undermines consensus-building efforts. For example, an agency might reject in-depth consideration of alternatives unlikely to garner sufficient political support or that otherwise polarize stakeholders. An agency is also free, under this approach, to reject alternatives that detract from environmentally friendly compromise efforts.<sup>285</sup>

Rejection of an alternative because of its distracting effect on the discourse and focus of the agency becomes increasingly compelling as the necessity for a project increases. Judge Trott, in *National Parks*, highlighted a glaring oversight in the court’s “reasonable alternatives” analysis for its failure to consider that a project’s success might be crucial to the local community.<sup>286</sup> When a region suffers from a “critical” shortage of landfill space, it is certainly not *bad faith* to strictly limit the scope of alternatives to those that “build a landfill” or even build a landfill on particular land with particular capacities. The greater the public need and urgency, the less likely a court could find an agency acted in bad faith in rejecting suggested alternatives. Under these and similar circumstances, an alternative may itself be “reasonable,” but the search for or consideration of the alternative might be wholly unreasonable.

Although highly deferential, the collaborative approach does not give agencies carte blanche to reject suggested alternatives outright when circumstances warrant their consideration. The good-faith standard of review remains the principle check on agencies. Evidence of bad faith might include committing resource outlays to the preferred alternative to the prejudice of all other alternatives,<sup>287</sup> failing to include any kind of “modification alternative” to the proposed action in the EIS,<sup>288</sup> or arbitrarily excluding particular stakeholders from the collaborative effort.

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282. 749 F.2d 1457 (10th Cir. 1984).

283. *Id.* at 1467 (emphasis added).

284. *Cf. All Indian Pueblo Council*, 975 F.2d at 1445 (citing *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977)) (explaining NEPA’s procedural limits and warning courts not to “second-guess the experts” in policy matters).

285. The collaborative efforts that lead to the litigation in *National Parks* provide a good example. See *infra* note 287 and accompanying text.

286. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1082–83 (9th Cir. 2010) (Trott, J., dissenting).

287. 40 C.F.R. § 1502.2(f) (2010).

288. *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 344–45 (6th Cir. 2006).

Furthermore, agencies should be faulted for not fully explaining the trade-offs and value judgments that went into excluding an alternative from consideration.<sup>289</sup>

To be in line with the U.S. Supreme Court's admonition that NEPA procedural challenges "should not be a game or a forum to engage in unjustified obstructionism,"<sup>290</sup> citizen challenges to an EIS under a collaborative approach would need to allege that a specific alternative was rejected by agency decision makers in bad faith. Unlike the intervenors' claim in *National Parks*, a general allegation that the alternatives considered were too narrowly drawn to the purpose and needs of the project proponent would be insufficient to halt agency action.<sup>291</sup> Otherwise, it is unclear how an agency could build consensus around a solution when it is subject to a challenge for failing to consider those alternatives that were never before it. In other words, an agency must be given an opportunity to explain the reasons why it rejected an alternative before plaintiffs in citizen suits could claim they rejected it in bad faith.<sup>292</sup>

Indeed, *National Parks* was a great—albeit missed—opportunity for the court to recognize the collaborative efforts of the agency as a justification for its exclusion of competing alternatives. The land swap that sought BLM approval was itself a product of collaborative efforts between Kaiser and the National Park Service, which sought to minimize impacts to Joshua Tree National Park while providing land to protect an important habitat for the desert tortoise and desert pupfish (threatened and endangered species).<sup>293</sup> The Conservation Association was right to point out that "there was no consideration of alternative landfill sites on other BLM-managed" land.<sup>294</sup> But this was for good reason. Extensive collaborative efforts had been made to formulate *this* complicated land exchange for the benefit of the local environment, regional landfill needs, and Kaiser's business interests.<sup>295</sup> Under a collaborative approach, BLM would have been welcome to argue that theoretical alternatives derailed those collaborative efforts. The burden would have been on the plaintiff to show why this explanation was not genuine.

Unfortunately, BLM cloaked the true reasons it declined to consider non-Kaiser land exchange alternatives with a restatement of its purpose and need statement.<sup>296</sup> BLM argued that "[d]esert landfill proposals

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289. Only here does the collaborative approach add to the agency's burden because the agency would no longer be able to reference its purpose and need statement as an objective reason to reject a proposal. See *infra* Part IV.B. Instead, the EIS should honestly set forth the particular value judgments that went into rejection of a suggested alternative.

290. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

291. See *supra* notes 1–11 and accompanying text.

292. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764–65 (2004).

293. *Nat'l Parks*, 606 F.3d at 1082–83.

294. Answering Brief of Appellee Nat'l Parks Conservation Assoc. at 47, *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2009) (No. 05-56814), 2007 WL 1511786.

295. See *Nat'l Parks*, 606 F.3d at 1082–83.

296. Answering Brief of Appellee Nat'l Parks Conservation Association, *supra* note 294, at 45–50.

sponsored by others are not true alternatives because *they do not meet several basic objectives of the Project*, including development of an economically beneficial Class III landfill proposal site in the County of Riverside and reclamation of Kaiser's abandoned iron ore mine."<sup>297</sup> BLM did not, however, explain specifically why considering the suggested alternatives would be impractical, purely theoretical, or otherwise might detract from more valuable collaborative solutions. Obviously, BLM thought the negotiated land exchange was a better overall solution and that considering vastly different suggestions would derail the negotiated land exchange. But, at a minimum, NEPA requires a full and honest disclosure of the value judgments and tradeoffs that prevented the agency from fully considering an alternative.<sup>298</sup> For this reason, BLM's EIS would have failed for bad faith even under this deferential collaborative approach.<sup>299</sup>

*B. Rejection of the Artificial Constraints  
of the Purpose and Need Statement*

As this Note has demonstrated, although circuits disagree on the required scope of alternatives that must be considered, they agree that as a general principle agencies may not define their goals so narrowly as to exclude alternatives.<sup>300</sup> One need only compare *Van Abbema* with *Citizens Against Burlington* to see that the malleability of the "unreasonably narrow purpose and need statement" approach produces vastly different outcomes.<sup>301</sup> Though purportedly following the same general approach, these differing outcomes might more accurately reflect judges' environmental policy preferences rather than honest appraisals of NEPA process.

The integration of good faith collaboration as a consideration in the alternatives analysis requires, in fairness, exclusion of the purpose and need statement as a reasonable justification for rejecting suggested alternatives. Of course, simple logic tells us that "[t]he goals of an action delimit the universe of the action's reasonable alternatives."<sup>302</sup> When an agency rejects a proposed alternative action, however, by suggesting that the alternative fails to meet the stated "purpose and need" of a project, the court's analysis necessarily collapses into whether the purpose and need statement has been too narrowly drawn and unreasonably excludes

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297. *Id.* at 48 (emphasis added).

298. See generally 42 U.S.C. § 4332(C) (2006); see also *infra* Part IV.B.

299. The collaborative approach does not allow an agency to dismiss otherwise reasonable alternatives by reference to purpose and needs of the project; instead, it directs them to explain the particular value judgments that precluded consideration. See *infra* Part IV.B.

300. See *supra* Part III.A–C.

301. See *supra* Part III.B.2.

302. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991); accord *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001) (stating that "[a]lternatives that do not accomplish the purpose of an action are not reasonable" and need not be studied in detail by the agency (citation omitted)).

the alternative from consideration. This is mindlessly circular. Remark- ing that an alternative was rejected because it failed to meet the purpose and need of a project serves only as a proxy for other value judgments that went into defining that goal. When this tactic proves successful, the public learns little about the genuine reasons for the exclusion of alterna- tives.

Instead of suggesting that an alternative fails to fully meet the pur- pose and need of a project, an agency must be required to openly and honestly enumerate the particular value judgments that went into ad- dressing only a limited number of alternatives or preferring to analyze only a particular set. In other words, removing the shield of the “pur- pose and need” statement invites honesty by agencies as to how and why they make the decisions they do that affect our environment—the most realizable goal of the NEPA alternatives analysis.<sup>303</sup> This approach al- lows the court to remain deferential to the policy decisions of agency heads while forcing them to air to the public their rationales for rejecting competing alternative courses of action.

*C. A Limited Scope of Alternatives in the Case of Nonfederal Sponsors*

A contextual distinction between alternatives analysis in federal proposals and those in nonfederal proposals makes sense because federal projects are the product of congressional mandate to the agency, while nonfederal projects are not. Though many nonfederal endeavors require agency approval because of their environmental impacts, the scope of their proposals is limited to a narrow set of economic and local objectives and circumstances, not broad social interests.<sup>304</sup> The agency has no power to strong-arm FedEx into using a 7000-foot runway or force Burling- ton Air Express to stay in Toledo. Not making the distinction transforms every private or local endeavor requiring federal approval into a federal project.<sup>305</sup> Certainly, state and private projects do not become “federal” projects by virtue of their required approval by federal agencies.

Inasmuch as they are politically accountable, federal agencies are more capable and have an incentive to propose and actually implement environmentally superior alternatives to their own projects, as opposed to those proposed by nonfederal actors.<sup>306</sup> When an agency proposes ac-

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303. *Cf. Simmons v. U.S. Army*, 120 F.3d 664, 666 (7th Cir. 1997) (“Officials must think through the consequences of—and alternatives to—their contemplated acts; and citizens get a chance to hear and consider the rationales the officials offer.” (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989))).

304. *Cf. City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (stating that an agency is not required “to make a broad social interest the exclusive ‘purpose and need’” when responding to an applicant’s proposal).

305. Such a project would have but one likely outcome—the one proposed by the nonfederal actor—and an infinite number of purely theoretical alternatives.

306. *Cf. Citizens Against Burlington*, 938 F.2d at 197 n.6 (“[T]he agency has neither the expertise nor the proper incentive structure to [rethink the business choices of the proponent] (it has no share- holders who would suffer from mistaken judgments).”).

tion on its own, it acts in a more democratic capacity and is able to respond realistically to a broad range of suggested alternatives and alternative objectives. But for all the potential alternatives imaginable under a good faith, collaborative approach within the scope of a nonfederal sponsor's proposal, the only alternatives *actually* available to the federal actor are whether to accept or reject the proposal.<sup>307</sup>

Recognizing this natural distinction, the courts in *Citizens Against Burlington* and in *Alliance for Legal Action* took note that the choices actually available to agencies are very limited. Except where an agency might receive mutually exclusive *proposals* (not alternatives to a given proposal), the only options available to an agency when faced with a third-party proposal are rejection or acceptance.<sup>308</sup> An agency could theoretically expend the resources to advance and investigate alternatives to the proposed action, but this would be the equivalent of rejecting the proposal or "no action." Limiting the scope of alternatives to facilitate consensus building, however, means rejecting alternatives that are purely theoretical; thus this academic exercise would be unnecessary.

On the other hand, the prerogative to reject the proposal gives an agency the added option to insist upon modification of the proposal to reduce its environmental impacts or a modification alternative. At the very least, collaborative efforts should be able to produce at least one modification alternative.<sup>309</sup> But pure alternatives, unconnected to the primary proposal, are likely to be theoretical and more accurately characterized as a "no-action" alternative.<sup>310</sup> Under a collaborative approach, such alternatives can almost always be properly excluded as a distraction from present problem solving and consensus building. Therefore, the burden of proving bad faith on the part of the agency to consider alternatives is higher for nonfederal projects under the collaborative approach, and a court would be hard-pressed to find bad faith on the part of an agency when the EIS fully considers the proposal, a "modification proposal," and the "no-action" alternative.<sup>311</sup>

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307. The analysis changes somewhat if the agency is actually faced with competing (nonhypothetical) proposals. Assuming the proposals are mutually exclusive, an agency would certainly be required to address both proposals in the alternatives analysis under both the broad and narrow standard.

308. The analysis changes somewhat if the agency is actually faced with competing (nonhypothetical) proposals. Assuming the proposals are mutually exclusive, an agency would certainly be required to address both proposals as alternatives the proposed action.

309. See *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345–47 (6th Cir. 2006) (stating that, at a minimum, an agency should consider modification along with the proposal and a "no action" alternative).

310. A simple example might be to suggest as alternatives to granting a permit to build a coal plant in West Virginia that an agency approve a proposal build windmills in the Midwest or approve a grant to develop new technologies, which might someday make the coal plant obsolete.

311. See 40 C.F.R. § 1502.14 (2010).

## V. CONCLUSION

Despite four decades of case development and academic commentary, the debate over NEPA alternatives analysis continues. The agency, the project applicant, and the local community are frequently the victims of delay. Agencies are often left without adequate guidance in preparing an EIS, frustrating their policy objectives. Applicants' economic interests are drowned out by years of waiting and wading through expensive litigation. And, most disturbing, the local community may never reap the benefits of a socially and economically valuable projects. Courts should remember that the degree to which the alternatives analysis has any real substantive effect on the deliberation of decision makers is correlated to the feasibility of the alternative and the attention it is given, not to the number of alternatives considered.

Although it might go largely unmentioned, implicit in each and every purpose and need statement is the necessity to build consensus around a solution such that other needs of the project can be efficiently met within the bounds of time, money, and information about the future. As the social need for a project increases, so does the need for collaboration and consensus. Strict enforcement of the alternatives analysis in court, however, rewards stakeholder holdout and obstructionism.<sup>312</sup> Furthermore, when an agency cannot reject alternatives that merely distract from the present agenda or tend to create division among collaborative interests, the resulting increased participation creates an incentive for decision makers to sacrifice an in-depth deliberation of important environmental impacts for a superficial consideration of a multitude of remote alternatives.<sup>313</sup> This does serious harm to NEPA's integrity and relegates the process to an insurance policy against litigation.

Allowing agencies to posit collaborative needs as a justification for exclusion of an alternative does not mean a court must substitute any particular model of decision making or even reject comprehensive rationality in an analysis of alternatives. Instead, acceptance of "consensus building" as a prudential consideration translates into recognition of the natural limits that constrain agency decision makers. Where courts adopt a narrow deferential review of agency action, with the goal of collaboration in alternatives analysis, they help facilitate "excellent action" instead of just "excellent paperwork."<sup>314</sup>

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312. See Rossi, *supra* note 65, at 216–19.

313. Cf. *id.* at 216 (“[Decision makers] may lose the ability to meet and discuss items critically without backlash from the public, forcing superficial, cooled, or disingenuous discussion.”).

314. 40 C.F.R. § 1500.1(c).

