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## The Birds, the Bees, and Equitable Relief: Limitations and Restrictions on Judicial Relief Under NEPA, Through the Lens of *Lakes and Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759 (8th Cir. 2019)

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THE BIRDS, THE BEES, AND EQUITABLE RELIEF:  
LIMITATIONS AND RESTRICTIONS ON JUDICIAL  
RELIEF UNDER NEPA, THROUGH THE LENS OF  
*LAKES AND PARKS ALL. OF MINNEAPOLIS v. FED.  
TRANSIT ADMIN.*, 928 F.3D 759 (8TH CIR. 2019)

WESLEY B. HAZEN\*

## *I. Introduction*

Mahatma Gandhi once proclaimed “[e]arth provides enough to satisfy every man’s needs, but not every man’s greed.”<sup>1</sup> With a population of approximately 330 million people<sup>2</sup>, a profound change to not only the natural resources of the United States but also the country’s natural landscape is inevitable. In January 1970, President Nixon signed the National Environmental Policy Act (“NEPA”) into law to “require federal agencies to assess the environmental effects of their proposed actions prior to making decisions.”<sup>3</sup> This landmark piece of legislation has guided man’s interactions with nature in the United States over the past fifty years. Early on however, a split arose amongst the circuits as to what remedies the

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\* I would like to express my profound gratitude to the ONE-J Editorial Board for their guidance on this Note and especially to my faculty advisor, Professor M. Alexander Pearl, for helping me find clarity in the writing process.

1. Goodreads, <https://www.goodreads.com/quotes/30431-earth-provides-enough-to-satisfy-every-man-s-needs-but-not> (last visited January 18, 2021).

2. U.S. and World Population Clock, <https://www.census.gov/popclock/> (last visited on Jan. 15, 2021).

3. EPA, *What is the National Environmental Policy Act?*, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Oct. 16, 2020).

courts may offer through judicial review to provide private individuals with relief over violations of the NEPA process by federal agencies.

In 2019, through *Lakes and Parks Alliance of Minneapolis* (“LPA”),<sup>4</sup> the Eighth Circuit followed not only circuit precedent but also cited judicial precedent in a majority of circuits to hold that prior to a “final agency action”<sup>5</sup> there is “no [ ] adequate remedy in court.”<sup>6</sup> Although this largely forecloses any cause of action against pre-mature, non-final federal agency actions that would “significantly affect[ ] the quality of the human environment,”<sup>7</sup> and conflicts with the Fourth Circuit’s holding in *Limehouse*,<sup>8</sup> it is overall the most optimal interpretation of rights under NEPA. That is, until adequate legislation is passed to promote additional substantive protections where NEPA is inapplicable and where other environmental statutes do not apply. Although the majority view in *Lakes and Parks* has its flaws, such as lack of substantive protection and potential conflict with other circuit opinions, the Eighth Circuit overall ruled correctly and has maintained the status quo of the NEPA process as well as the delicate industrial and environmental balance we hold as a nation.

## II. NEPA and the APA: How they work together

Aside from standing, two primary statutory Acts are at play in the *LPA* case at the center of this article. NEPA, which lays out the procedural steps federal agencies are required to follow in carrying out “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>9</sup> The Administrative Procedure Act (“APA”) then acts as the vehicle which directs the process federal agencies utilize to pass regulations and also the procedure allowing courts to, plausibly, provide remedial measures to individuals who have faced “legal wrongs” due to agency action.<sup>10</sup>

### A. Standing in a NEPA action

To begin, in order to have “standing” to bring suit in federal court, parties bringing a cause of action must commonly meet three elements set

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4. *Lakes and Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759 (8th Cir. 2019).

5. *Id.* at 762.

6. *Id.*

7. *Id.* at 761.

8. *South Carolina Wildlife Fed’n v. Limehouse*, 549 F.3d 324 (4th Cir. 2008).

9. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72 (2004).

10. *See* 5 U.S.C. §§ 702, 704 (West 2020).

out in Article III of the Constitution.<sup>11</sup> First a party must suffer an “injury in fact” . . . which is (a) concrete and particularized . . . and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical’.”<sup>12</sup> “Second[ ] there must be a causal [and traceable] connection between the conduct . . . [and] the injury.”<sup>13</sup> Third the injury complained of must be likely “redress[able] by a favorable decision.”<sup>14</sup> Once standing is established, the real dynamic interplay between NEPA and the APA begins.

*B. NEPA: A guiding light to striking a balance between mankind and nature*

NEPA requires specific procedures take place for certain federal actions to occur, these procedures “require federal agencies to assess their environmental effects.”<sup>15</sup> Agencies typically begin by drafting an “Environmental Assessment” (“EA”), which is a brief statement which the agency states, with supporting detail, whether the proposed action constitutes “major Federal action” and would require a more detailed report known as an Environmental Impact Statement (“EIS”).<sup>16</sup> If the agency determines that no EIS is necessary for their proposed action, i.e. it has not risen to a level of “major Federal action”, the agency must issue a report stating “why the proposed agency action will not have a significant impact on the human environment.”<sup>17</sup> This report is known as a “finding of no significant impact” (“FONSI”).<sup>18</sup> However, if the agency determines that the proposed action would constitute a “major Federal action”, which includes funding of projects by a federal agency,<sup>19</sup> an EIS is required.<sup>20</sup> The EIS report may be prepared by a state agency or official and presented to the federal agency for final approval.<sup>21</sup> This EIS report must include information on “the environmental effect of the proposed action,” “any adverse environmental effects . . .,” “alternatives to the proposed action,”

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11. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

12. *Id.*

13. *Id.*

14. *Id.* at 561.

15. *Id.*

16. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

17. *Id.* at 757–58.

18. *Id.*

19. 42 U.S.C. § 4332(D) (West 2020).

20. 42 U.S.C. § 4332(C) (West 2020).

21. 42 U.S.C. § 4332(D) (West 2020).

and details on “any irrevocable and irretrievable commitments of resources . . . in the proposed action.”<sup>22</sup>

Following the successful completion of an EIS by the state or federal agency seeking approval,<sup>23</sup> or in some instances a supplementary EIS, the federal agency from which the approval is sought shall issue a “Record of Decision” (“ROD”).<sup>24</sup> This ROD shall “[s]tate the decision”, “[i]dentify alternatives considered by the agency . . .”, and “[s]tate whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not.”<sup>25</sup> There are further guidelines on the implementation of the EIS and the ROD; however they are inapplicable to the issue at hand within this note. Due to NEPA being widely viewed as strictly a “procedural” act, with no substantive rights attached by Congress,<sup>26</sup> the only viable route to challenge violations is through the APA.<sup>27</sup> Upon issuance of the EIS or ROD, or in the alternative, upon completion of any “final agency action”, including a FONSI, a challenge may be made in court pursuant to the APA.<sup>28</sup>

### *C. The APA: A tool of process and procedure*

The Administrative Procedure Act was passed by Congress and signed into law by President Truman in June of 1946.<sup>29</sup> According to the Environmental Protection Agency, the APA “governs the process by which federal agencies develop and issue regulations.”<sup>30</sup> The APA allows claims by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”<sup>31</sup> This Act lays out very clearly when judicial review of an agency

22. 42 U.S.C. § 4332(C) (West 2020).

23. 42 U.S.C. §§ 4332 (C), (D) (West 2020).

24. 40 C.F.R. § 1505.2(a).

25. *Id.*

26. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

27. *See Lujan v. Nat. Wildlife Fed’n*, 497 U.S. 871 at 882; *See also Karst Envtl. Educ. and Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1293 (D.C. Cir. 2007).

28. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *See also Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 813 (8th Cir. 2006).

29. Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 *Fordham Envtl. L. Rev.* 207, 214 (2015).

30. Summary of the Administrative Procedure Act, [https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=The%20Administrative%20Procedure%20Act%20\(APA,on%20notices%20of%20proposed%20rulemaking](https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=The%20Administrative%20Procedure%20Act%20(APA,on%20notices%20of%20proposed%20rulemaking) (last visited Feb. 12, 2021).

31. *Norton*, 542 U.S. 55 at 61.

action, when no other “private right of action,” is appropriate.<sup>32</sup> Per the statutory language of the APA, “[a]gency action reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review.”<sup>33</sup> In that short phrase, Congress has directed that judicial review of agency action, under the APA, is only permissible when a final agency action has occurred. Under NEPA, “final agency action” is the issuance of an EIS, FEIS, FONSI, or a ROD.<sup>34</sup> Through these limited options, a vast majority of courts have formally allowed relief under NEPA to individuals claiming to have suffered a legal wrong at the hands of a federal agency on environmental matters. The APA allows federal courts to “hold unlawful and set aside agency action, findings, and conclusions”<sup>35</sup> that are found to fall into any one of six “arbitrary and capricious” standards of review.<sup>36</sup>

### *III. Eighth Circuit precedent and limited judicial review*

The Eighth Circuit’s primary argument is very concise and well supported, but not without some flaws. The Eighth Circuit’s precedent has long been entwined with that of the Supreme Court and has held that NEPA, as a procedural law, is largely only challengeable under an APA claim made by individuals claiming a legal wrong.<sup>37</sup> The APA makes it clear that courts only possess judicial review over “final agency action.”<sup>38</sup> Further, in order to hold an agency action unlawful or set it aside, the action must fall within one of the six “arbitrary and capricious” standards of review under the APA.<sup>39</sup> Eighth Circuit precedent dates back prior to and including the 2006 case, *Sierra Club v. U.S. Army Corps of Engineers*.<sup>40</sup> While discussing NEPA’s lack of express language providing for judicial review, the *Sierra Club* court continues the long-held view that unless express language within the statute provides substantive rights to individuals, procedural statutes, including NEPA, are only reviewable,

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32. *Id.* at 61–62.

33. 5 U.S.C. § 704 (West 2020).

34. *See Vermont Yankee*, 435 U.S. 529 at 527–28; *See also Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808 at 813.

35. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 375–76 (1989).

36. 5 U.S.C. § 706(2) (West 2020).

37. *See Marsh*, 490 U.S. 360 at 375–76; *See also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 90 (1983).

38. *Lakes and Parks*, 928 F.3d at 762 (citing 5 U.S.C. § 704).

39. 5 U.S.C. § 706(2) (West 2020).

40. *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808 (8th Cir. 2006).

largely, under the APA's framework.<sup>41</sup> Supporting this, the *Sierra Club* court cites *Bennett v. Spear*,<sup>42</sup> a 1997 Supreme Court case, which defined what constitutes a "final agency action", per 5 U.S.C. § 704 of the APA, as applicable through NEPA. Under the APA framework, "final agency action" is determined to have occurred when "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."<sup>43</sup>

The Eighth Circuit precedent also falls in line with the precedent established in the Fifth and Ninth Circuits.<sup>44</sup> All three circuits stem their reasoning through the language of the APA and precedent established by the Supreme Court. This precedent stems back to *Touche Ross & Co.*<sup>45</sup> and is further clarified in *Alexander v. Sandoval*.<sup>46</sup> *Touche* held that "the ultimate question of [private causes of action] is one of Congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."<sup>47</sup> *Alexander* further held that "private rights of action to enforce federal law must be created by Congress," the judiciary must "interpret the statute Congress has passed in determining whether it displays an intent to create not just a private right but also a private remedy."<sup>48</sup>

Put plainly, the judiciary should not read additional content into statutes enacted by congress to allow for a private right of action or private remedy when Congress has explicitly left one out of the legislation. The Eighth Circuit has held repeatedly that NEPA's text does not provide for any right of action.<sup>49</sup> Since there is no private right of action following from NEPA's procedural nature, under the APA, judicial review is limited strictly to "review of final agency action for which there is no other adequate remedy

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41. *Id.* at 813.

42. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

43. *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808 at 813.

44. *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438 (5th Cir. 1981); E.g., *San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091, 1097 (9th Cir. 2005).

45. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

46. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

47. *Touche Ross*, 442 U.S. at 578.

48. *Alexander*, 532 U.S. 275 at 286 (2001); *See Lakes and Parks*, 928 F.3d 759 at 762.

49. *Lakes and Parks*, 928 F.3d at 762; *See E.g.*, *Sierra Club v. Kimball*, 623 F.3d 549, 558–59 (8th Cir. 2010).

in court.”<sup>50</sup> This logical procession based upon Supreme Court precedent and founded in the APA’s treatment of review in procedural matters leads to the conclusion given in the *LPA* case. NEPA compliance is a procedural matter. There was no signal given in the statutory text that “Congress sought ‘to provide a remedy for private individuals who may be injured by a violation of NEPA.’”<sup>51</sup> By tracing the Eighth Circuit’s precedent not only through the very statutory language of NEPA and the APA, but to precedent of other circuits, and finally to Supreme Court holdings, the Eighth Circuit’s reasoning is quite strong in NEPA cases. Albeit it does not leave much room for instances where federal agencies abuse their discretion in a manner that does not rise to the high “arbitrary and capricious”<sup>52</sup> standard needed for a court to overturn agency action.

#### *IV. Fourth Circuit precedent, A glimmer of hope for private challenges*

Opposing the Eighth Circuit’s majority view that judicial review of agency action under NEPA is only appropriate through the APA when there is a “final agency action,” is that of the Fourth Circuit. The Fourth Circuit does agree however with one aspect of the majority view, that neither NEPA (nor the APA) “in its [text] provides a cause of action against state actors.”<sup>53</sup> However, the Fourth Circuit through the application of a form of “Pendent Jurisdiction” on claims against state actors will allow private claims to proceed without final agency action having occurred.<sup>54</sup> Dating back to 1972, in *Arlington Coalition on Transp. v. Volpe*, the Fourth Circuit has held:

that federal courts have ‘a form of pendent jurisdiction . . . based upon necessity’ over claims for injunctive relief brought against state actors in order to preserve the integrity of federal remedies . . . . Where ‘the challenged activities’ of state actors ‘would make a sham of the reconsideration required by federal law,’ federal courts may entertain suits against state actors ‘to

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50. *Lakes and Parks*, 928 F.3d at 762; See E.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808 at 813.

51. *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438 (5th Cir. 1981); See E.g., *Lakes and Parks*, 928 F.3d at 762.

52. See 5 U.S.C. § 706(2) (West 2020).

53. *Id.*

54. *Limehouse*, 549 F.3d at 330.



preserve federal question jurisdiction in the application of federal statutes.<sup>55</sup>

This form of “pendent jurisdiction” has been utilized in Fourth Circuit cases regarding NEPA, creating circuit precedent, where “there is standing to preserve the environmental status quo pending federal review.”<sup>56</sup> The Circuit has held “that NEPA does provide a cause of action for private plaintiffs challenging compliance with its provisions. The federal statute and our precedent permit suit against a state actor where a party seeks to preserve federal rights . . . pending the outcome of federal procedural review.”<sup>57</sup> Although there is precedent to allow private actions under non-final agency action to preserve a “status quo” of the environment, the precedent of this “status quo” component deserves further exploration.

Only two cases were located in the Fourth Circuit mentioning “environmental status quo.” The *Limehouse* case, and a U.S. District Court case, *Ohio Valley Environmental Coalition v. U.S. Army Corps. Of Engineers*.<sup>58</sup> The *Limehouse* case utilized two cases to support its finding that injunctive relief was plausible under NEPA to “preserve the environmental status quo.”

First, the *Limehouse* court referred to *Ely v. Velde*,<sup>59</sup> a Fourth Circuit decision from 1974. Although this case did discuss NEPA’s process and application, the court ultimately did not opt to enjoin the parties from continued action, it instead opted to allow the state to proceed with construction of their project without the use of federal funds, by utilizing state funds solely for the project, or if states opted to continue diversion of federal funds to other projects, they would need to return federal funds as opposed to retaining them.<sup>60</sup> Only in the instance where the state declines the recommended actions of the Fourth Circuit regarding the federal funds, should the district court enjoin the construction project as it violates both NEPA and other Acts.<sup>61</sup> There was no mention in *Ely* of protection of the environment per se prior to final agency action or preservation of a “status quo”, but rather a state’s options to either proceed under NEPA standards

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55. *Id.* (quoting *Arlington Coal. On Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972)).

56. *Limehouse*, 549 F.3d at 330.

57. *Id.* at 331.

58. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, No. 3:05-0784, Slip op. 9717766 (S.D.W.V. Apr. 20, 2007).

59. *Ely v. Velde*, 497 F.2d 252, 257 (4th Cir. 1974).

60. *Id.*

61. *Id.*

and other requirements of statutory acts to utilize federal funds or utilize state funds as the sole means of construction of a penal facility. Only in the absence of the state choosing one of the court's provided options, would an injunction be necessary. This case centered almost solely upon the funding context of a state project.

The *Limehouse* court then refers to a Ninth Circuit decision from 1976, *Sierra Club v. Hodel*.<sup>62</sup> *Hodel* centered primarily around a state agency's failure to complete an EIS following its entrance into a contract which could be constituted as a "major federal action", requiring completion of an EIS under NEPA.<sup>63</sup> *Hodel* appears more on point with the concept of "preserving the environmental status quo", as an injunction under NEPA was ordered.<sup>64</sup> However, there are significant differences as *Hodel* centers around a state actor failing to perform an EIS in compliance with NEPA standards. With no EIS completed, there naturally was no ROD issued by any federal agency. In instances where there is no compliance or inadequate compliance with NEPA's procedures and no showing of any of the "arbitrary and capricious" standards of 5 U.S.C. § 706(2), the courts have overwhelmingly either (1) remanded cases back to a lower court for further deliberation on compliance with NEPA's procedures as appropriate, whether by issuing an EA, EIS, or other "final agency action",<sup>65</sup> or (2) determined that the "agency action" was adequate under NEPA or did not fall under NEPA's subject matter.<sup>66</sup>

Although not discussed in the *Limehouse* case, but arguably more convincing of the plausibility of injunctive relief in NEPA cases, is the second case located in the Fourth Circuit to mention "environmental status quo"; *Ohio Valley Environmental Coalition* case.<sup>67</sup> In discussing the concept of "environmental status quo", the Fourth Circuit discusses its origin stemming from *Amoco Productions*, a 1987 Supreme Court Case, which very briefly touched upon a NEPA matter. In *Amoco Productions*, the Court, while discussing the plausibility of injunctive relief in environmental matters, held that "[e]nvironmental injury, by its nature, can

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62. *Sierra Club v. Hodel*, 544 F.2d 1036, 1037 (9th Cir. 1976).

63. *Id.* at 1037–38.

64. *Id.* at 1038.

65. *See Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1079 (9th Cir. 2002); *See also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 20-5197, 2021 WL 244862, at \*14 (D.C. Cir. Jan. 26, 2021).

66. *See Marsh*, 490 U.S. 360 at 385; *See also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 30–33 (2008).

67. *Ohio Valley*, Slip op. 9717766.

seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”<sup>68</sup> Although the *Amoco* case centered on private individuals seeking an injunction to prevent a corporation which held leases to drill for oil and gas on the Alaskan coast,<sup>69</sup> the rationale falls in line with the Fourth Circuit’s reasoning in *Limehouse*. To provide potential injunctive relief, even if only temporary, and to prevent any undue loss of the very thing at the core of NEPA’s purpose, the environment. By allowing the judiciary to provide equitable relief to individual plaintiff’s claiming to have been harmed by the actions of a federal agency, the Fourth Circuit’s precedent ensures that, in the aggregate, no adverse effects occur to the environment before a final agency action can occur in accordance with NEPA’s process. Unfortunately, aside from the dicta of the *Amoco* case, there is little to no strong evidence supporting the Fourth Circuit’s “pendent jurisdiction” in the face of other Supreme Court opinions and a vast majority of the other circuits agreeing that, as a procedural law, NEPA does not by itself afford a private right of action to individuals. Further, even through an APA claim, pursuant to the statutory language, judicial review is only appropriate following “final agency action”.<sup>70</sup> Following this process, however, there are only limited circumstances which a court may overrule a federal agency’s decision.<sup>71</sup>

*V. Lakes and Parks Alliance: Groundbreaking or treading  
in the water of precedent?*

Over the half-century since the passage of NEPA, a split developed throughout the circuit courts, specifically the Eighth Circuit and the Fourth Circuit. This split encompasses the issue of what actions may the judiciary take regarding agency action, specifically, action taken regarding NEPA. While it is settled that NEPA is a procedural law,<sup>72</sup> there remains a rift as to what judicial relief private parties may seek following a claimed violation of NEPA. The Fourth Circuit follows circuit precedent that “NEPA does provide a cause of action for private plaintiffs challenging compliance with

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68. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531 (1987).

69. *Id.* at 539–40.

70. See *Vermont Yankee*, 435 U.S. 529 at 527–28; See also *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808 at 813.

71. See 5 U.S.C. § 706(2) (West 2020).

72. *Vermont Yankee*, 435 U.S. at 558.

its provisions.”<sup>73</sup> Opposing this view, Eighth Circuit case precedent dictates that “jurisdiction is limited to judicial review under the [APA], which provides for review of final agency action for which there is no adequate remedy in court . . . [e]specially when the only defendant is a state agency.”<sup>74</sup> This long-standing split has led to one of the most recent NEPA decisions, in 2019. We begin by discussing the background and facts of the *Lakes and Parks* case.

In the fall of 2008, the Metropolitan Council (“the Council”), a regional transportation agency of the State of Minnesota, initiated plans to construct the Southwestern Light Rail Transit Project (“SWLRT”).<sup>75</sup> The rail was to run from downtown Minneapolis to the southwestern Twin Cities suburbs, connecting the two.<sup>76</sup> Due to partial funding through the Federal Transit Administration (“FTA”), the Council was required to have environmental review of the SWLRT.<sup>77</sup> These regulations required the FTA to craft an EIS accounting for “major Federal actions significantly effecting the quality of the human environment.”<sup>78</sup> Upon successful completion of the EIS, the FTA would provide “environmental clearance via a record of decision.”<sup>79</sup> Under Minnesota law<sup>80</sup> “the Council [was required] to seek the approval of each city and county along the SWLRT’s proposed route before continuing construction.”<sup>81</sup> By the time 2014 came around, the Council was initiating municipal consent to route the SWLRT through an area known as the Kenilworth Corridor.<sup>82</sup>

The Lakes and Parks Alliance of Minneapolis, is a nonprofit organization of residents in and around Minneapolis and the greater Twin Cities, including Kenilworth Corridor where the rail was scheduled to run.<sup>83</sup> Coinciding with the Council’s municipal consent stage to construct the SWLRT, the LPA began to claim that the Council’s review process for the rail was not in compliance with state or federal law.<sup>84</sup> In September of 2014, the LPA initiated their lawsuit against the Council and the FTA

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73. *Limehouse*, 549 F.3d at 331.

74. *Lakes and Parks*, 928 F.3d 759 at 762.

75. *Id.* at 761.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Minn. Stat. § 473.3994, subs. 2-3 (2020).

81. *Lakes and Parks*, 928 F.3d at 761.

82. *Id.*

83. *Id.*

84. *Id.* at 761–62.

alleging violations of NEPA, the Minnesota Environmental Policy Act, and the Minnesota municipal consent statutes.<sup>85</sup> This case was initiated prior to the issuance of an EIS, let alone an ROD through the FTA.<sup>86</sup> Despite the district court's dismissal of a majority of the LPA's claims, the district court denied the Council's motion to dismiss for lack of jurisdiction in order to "preserve a 'narrow' cause of action under NEPA to prevent the Council from taking action that could 'eviscerate' any federal remedy later available to the LPA."<sup>87</sup>

Ultimately, the district court granted the Council's motion for summary judgement.<sup>88</sup> Additionally, the district court granted the FTA's motion for summary judgement finding that "sovereign immunity barred the LPA's claim against the federal government."<sup>89</sup> The LPA appealed the summary judgement decision, maintaining their original claim, that the Council had violated NEPA and other federal laws. The Council cross-appealed on the decision of the district court to dismiss their motion to dismiss for lack of jurisdiction.<sup>90</sup> The question posed to the Eighth Circuit was relatively straightforward. Can courts review an agency action under the National Environmental Policy Act?

The Eighth Circuit answered this in the negative; at least in this case, ultimately reversing and remanding the case for dismissal on the Council's motion for lack of jurisdiction.<sup>91</sup> Because the FTA's motion to dismiss was granted by the district court based on "sovereign immunity", there no longer was a federal agency tied to the action, making a NEPA claim impracticable.<sup>92</sup> The Eighth Circuit found that the district court incorrectly applied Fourth Circuit precedent, based on *Limehouse*,<sup>93</sup> allowing for a cause of action without a federal agency present in the case. This was in direct opposition to Eighth Circuit precedent, which dictated when judicial review may be available.<sup>94</sup> Furthermore, the Council released the final EIS in May of 2016 and the FTA issued a ROD just two months later, in July 2016.<sup>95</sup> Therefore, the circuit court reversed and remanded the case

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85. *Id.* at 761.

86. *Id.*

87. *Id.* (citation omitted).

88. *Id.* at 760–61.

89. *Id.* at 761.

90. *Id.* at 760–61.

91. *Id.* at 763.

92. *Id.* at 761.

93. *Limehouse*, 549 F.3d 324.

94. *Lakes and Parks*, 928 F.3d at 762.

95. *Id.* at 761.

directing that there was “no live controversy for the court to resolve,” since the EIC process had been completed and a final ROD had been issued. This ultimately stripped the court of jurisdiction over the matter.<sup>96</sup>

Aside from precedent, the court also dove into independent considerations and issues present in the LPA’s suit and in the LPA’s reliance on the Fourth Circuit’s holding in the *Limehouse* case. In *Limehouse*, the Fourth Circuit followed widespread precedent closely, that under NEPA there is no judicial review of agency action unless there had been final action performed. In *Limehouse*; not only had there been a final EIS issued, but also a ROD by the federal agency involved.<sup>97</sup> This differed drastically from the *LPA* case which, as mentioned above, did not have an EIS or a ROD issued prior to the case being filed.<sup>98</sup> Additionally, there was the striking difference that in *Limehouse* there was still a federal agency, the Federal Highway Administration, as a party to the case.<sup>99</sup> In *LPA* however, there was no federal agency still attached to the case as a party following the district court’s granting of the FTA’s Motion to Dismiss due to sovereign immunity grounds.<sup>100</sup> Lastly, due to the LPA’s failure to appropriately challenge the dismissal of the FTA from the case alongside premature filing prior to a “final agency action,” there was no available challenge to the FTA’s issuance of a ROD. This ultimately left the action moot and no longer a “live” issue for the court to resolve, prompting lack of jurisdiction in the matter.<sup>101</sup>

#### *VI. The Other Eleven: Falling in line or setting trends?*

Naturally, the Eighth and Fourth Circuits are not the only circuits hearing challenges under NEPA. While tracing the reasoning behind the Fourth and Eighth Circuits, differing as they do, on claims involving NEPA; it may prove helpful to evaluate if the same standards are maintained in cases involving similar matters throughout the other eleven circuits. To work through this, each circuit’s precedent will be examined. In other words, do the various circuits predominately follow the Eighth Circuit, allowing for “limited judicial review under the [APA] . . . ‘of final agency action for

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96. *Id.* at 763.

97. *Id.* at 762.

98. *Id.* at 761.

99. *Limehouse*, 549 F.3d at 328.

100. *Lakes and Parks*, 928 F.3d at 761.

101. *Id.* at 763.

which there is no other adequate remedy in court,”<sup>102</sup> or do they tend to follow the Fourth Circuit, which has allowed judicial relief for claimants to “assert procedural allegations . . . to preserve the environmental status quo pending federal review.”<sup>103</sup>

#### A. First Circuit

The First Circuit applies APA procedures to NEPA cases, in particular in instances where agency decisions are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>104</sup> Going further, they have also followed the guidance set out by the Supreme Court that “NEPA’s requirements are procedural in nature.”<sup>105</sup> The only role of judicial review in NEPA cases is to “insure that the agency has taken a hard look at environment consequences.”<sup>106</sup> Holding a similar view as other circuits, “NEPA provides no private right of action at all.”<sup>107</sup>

#### B. Second Circuit

The Second Circuit follows the guiding principle that NEPA “does not itself provide for judicial review, [and such] the [APA] controls.”<sup>108</sup> As a “procedural statute”, NEPA has only limited areas for judicial review under the APA; namely for determining if an agency’s actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>109</sup>

#### C. Third Circuit

The Third Circuit has held that NEPA “does not include a citizen’s suit provision” (i.e. a private right of action).<sup>110</sup> Therefore, any claims must be applied under the APA judicial review standard which is appropriate only following final agency actions.<sup>111</sup> Additionally, “NEPA is a procedural

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102. *Id.* at 762.

103. *Limehouse*, 549 F.3d at 330.

104. *Massachusetts v. U.S. Nuclear Regulatory Comm’n*, 708 F.3d 63, 73 (1st Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)).

105. *U.S. v. Coal. for Buzzard’s Bay*, 644 F.3d 26, 31(1st Cir. 2011) (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004)).

106. *U.S. v. Coalition for Buzzard’s Bay*, 644 F.3d 26, 31(1st Cir. 2011).

107. *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 62 (1st Cir. 2016).

108. *Friends of Animals v. Romero*, 948 F.3d 579, 585 (2nd Cir. 2020).

109. *Id.*

110. *Maiden Creek Assocs. v. U.S. Dep’t of Transp.*, 823 F.3d 184, 189 (3rd Cir. 2016).

111. *Tinicum Twp., Pa. v. U.S. Dep’t of Transp.*, 685 F.3d 288, 294 (3rd Cir. 2012).

statute that does not mandate particular substantive results.”<sup>112</sup> All that is guaranteed under NEPA is the “necessary process the [federal] agency must follow while reaching its decision [to act in a manner that effects the human environment].”<sup>113</sup>

#### D. Fifth Circuit

Likewise, the Fifth Circuit reads NEPA as a procedural statute, which at its core, “requires certain steps [be taken] before federal agencies may approve projects that will affect the environment.”<sup>114</sup> The Circuit has also followed the majority approach that review of NEPA cases are carried out through the APA.<sup>115</sup>

#### E. Sixth Circuit

Like the other circuits, the Sixth Circuit abides by the principle that NEPA does not provide for a private right of action, however the APA provides for judicial review.<sup>116</sup> This right to judicial review only begins once final action is taken by the agency.<sup>117</sup> The Sixth Circuit agrees with the view of other circuits that “final agency action” exists when a “final EIS or the ROD is issued”<sup>118</sup>

#### F. Seventh Circuit

The Seventh Circuit utilizes the APA framework to govern its review of agency action.<sup>119</sup> Under the APA framework, as with other circuits, the rather narrowly framed, standard question to ask is “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement.”<sup>120</sup> Although the agencies carry the obligation of undergoing “weighing of substantive environmental goals,” it is the judiciary’s role to review and uphold the “procedural” nature of NEPA.<sup>121</sup> Due to NEPA’s procedural nature, “agencies may decide to

112. *Id.*

113. *Maiden Creek Assocs.*, 823 F.3d at 190.

114. *Atchafalaya Basinkeeper v. U.S. Army Corps. Of Eng’rs*, 894 F.3d 692, 695 (5th Cir. 2018).

115. *Id.* at 696.

116. *Sierra Club v. Slater*, 120 F.3d 623, 630–31 (6th Cir. 1997).

117. *Id.* at 631.

118. *Id.*

119. *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003).

120. *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003) (quoting *Marsh*, 490 U.S. 360 at 378).

121. *Wisconsin v. Weinberger*, 745 F.2d 412, 416 (7th Cir. 1984).



subordinate environmental values to other social values with which they sometimes compete.”<sup>122</sup> In other words, should the social values of an agency’s action cross the values held by NEPA to protect the environment, the agency may show preference to abide by the social values.

#### G. Ninth Circuit

The Ninth Circuit follows the principle that NEPA violations are reviewable largely only under the APA and that agency decisions may only be set aside if “they are ‘arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law.’”<sup>123</sup> The Ninth Circuit and other circuits have long followed that due to NEPA’s procedural nature, it “exists to ensure a process, not to ensure any result.”<sup>124</sup> NEPA’s goals are met once “(1) [the agency] ensure[s that] the[y] will have detailed information on significant environmental impacts when it makes its decisions; and (2) [the agency] guarantee[s] that this information will be available to a larger audience.”<sup>125</sup>

The Ninth Circuit does not fully shut the door on injunctive relief. They quote the Supreme Court case *Amoco Prod. Co. v. Village of Gambell, AK*,<sup>126</sup> in which the Court discussed injunctive relief regarding environmental cases. Findings of “irreparable injury” to the environment does not automatically call of an injunction, instead it merely adds to the “balancing of harm” in favor of an injunction.<sup>127</sup>

#### H. Tenth Circuit

Per the Tenth Circuit, “NEPA requires no substantive result . . . [it] imposes procedural, information-gathering requirements on an agency, but is silent about the course of action the agency should take. . . . [it] merely prohibits uninformed—rather than unwise—agency action.”<sup>128</sup>

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122. *Id.* at 426.

123. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011).

124. *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

125. *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996).

126. *Amoco Prod.*, 480 U.S. 531 at 542.

127. *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004).

128. *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1166 (10th Cir. 2012).

### *I. Eleventh Circuit*

The Eleventh Circuit agrees that “NEPA only requires that an agency follow [ ] procedure; it does not mandate any particular result.”<sup>129</sup> As a purely procedural Act, NEPA “set[s] forth no substantive limits on agency decision-making.”<sup>130</sup> The Eleventh Circuit also utilized the APA and its ability to allow court’s jurisdiction to hear cases and provide “judicial review of federal agency action” and “all [ ] courts to enjoin authorities of the United States government.”<sup>131</sup>

### *J. D.C. Circuit*

The D.C. Circuit emphasizes the “well-established” principle that “NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analysis of the environmental impact of their proposals and actions.”<sup>132</sup> These procedural requirements “simply [ ] ensure that the agency has adequately considered and disclosed the environmental impacts of its actions.”<sup>133</sup>

### *K. Federal Circuit*

The Federal Circuit has not heard many NEPA challenges, and further, has heard even fewer which would allow the circuit to provide as robust of a discussion on judicial review as other circuits have. One such case did however note that NEPA is a “procedural statute” which only binds the federal government.<sup>134</sup>

## *VII. Did Lakes and Parks get it right or did they get it wrong?*

After evaluating the statutory language of NEPA and the APA alongside precedent within both the Eighth Circuit and Fourth Circuit, and the vast majority of the other circuits including the Supreme Court; the *LPA* court and Eighth Circuit precedent is by all indications, fairly correct.

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129. *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008).

130. *Id.* at 1361.

131. *Citizens for Smart Growth v. Sec’y of Dep’t of Transp.*, 669 F.3d 1203, 1210 (11th Cir. 2012).

132. *Indian River County, Fla. v. U.S. Dep’t of Transp.*, 945 F.3d 515, 522 (D.C. Cir. 2019).

133. *Id.* at 523.

134. *Kiewit Infrastructure West Co. v. United States*, 972 F.3d 1322, 1330 (Fed. Cir. 2020).

Prior to the 2019 *LPA* holding, the Eighth Circuit, held that in accordance with the APA, “NEPA does not provide a private right of action, the APA [however] permits judicial review of [final] agency action . . .”<sup>135</sup> The vast majority of other circuits have similarly held that no private remedy exists under NEPA. For example, the Fifth Circuit held that “NEPA provides procedural rather than substantive protection,” which acts as proof that Congress was not seeking “to provide a remedy for private individuals who may be injured by a violation of NEPA.”<sup>136</sup> The Ninth Circuit mirrored this by stating; “[a] fundamental and oft-quoted principle of environmental law is that there is no private right of action under NEPA.”<sup>137</sup> Acting as the backbone for these circuit determinations, the Supreme Court has long held that NEPA does not set out any substantive goals but rather is a procedural mandate to the various federal agencies.<sup>138</sup> Although the majority have interpreted this to mean NEPA is purely procedural, one minority circuit views an exception to the rule.

This minority consists of the Fourth Circuit, which has held that “NEPA does provide a cause of action for private plaintiffs challenging compliance with its provisions.”<sup>139</sup> Although NEPA and the APA do not explicitly provide for a cause of action against state actors, the Fourth Circuit has held that “federal courts have ‘a form of pendent jurisdiction . . . based upon necessity’ over claims for injunctive relief brought against state actors in order to preserve the integrity of federal remedies.”<sup>140</sup> This is specifically applicable in situations “[w]here ‘the challenged activities’ of state actors ‘would make a sham of the reconsideration required by federal law,’ federal courts may entertain suits against state actors ‘to preserve federal question jurisdiction in the application of federal statutes.’”<sup>141</sup> This precedent dates back to 1972 in *Arlington Coalition on Transp. v. Volpe*, in which the Fourth Circuit initially decided that this form of “pendent jurisdiction” was necessary in state actions “to preserve federal question jurisdiction in the application of federal statutes.”<sup>142</sup>

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135. *Sierra Club v. Kimbell*, 623 F.3d 549 (8th Cir 2010); *E.g.*, *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808 at 813.

136. *Noe*, 644 F.2d 434 at 438.

137. *San Carlos Apache Tribe*, 417 F.3d 1091 at 1097.

138. *Vermont Yankee*, 435 U.S. 519 at 558.

139. *Limehouse*, 549 F.3d at 331.

140. *Id.* at 330 (citation omitted).

141. *Limehouse*, 549 F.3d at 330.

142. *Arlington Coalition of Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972).

This continued in the *Maryland Conservation Council* case, which held that non-federal projects are considered a “‘federal action’ if they cannot ‘begin or continue without prior approval of a federal agency.’”<sup>143</sup> Since the project in the *Maryland Conservation Council* case (i.e. a public highway) required federal approval to cross federally allocated land, approval was necessary.<sup>144</sup> This necessity of federal approval is what prompted the Fourth Circuit to provide private individuals a cause of action challenging compliance with NEPA’s provisions.<sup>145</sup> The differing precedents of the Eighth and Fourth Circuits have created a split as to what remedies the judiciary may provide regarding agency action in NEPA cases. The Supreme Court has been somewhat silent on this matter, except for an illusory mention in a 1975 case,<sup>146</sup> and as noted above in *Vermont Yankee*, that “NEPA . . . set[s] forth significant substantive goals for the Nation, but its mandate is essentially procedural.”<sup>147</sup>

Since the conflicting opinions center on Fourth and Eighth Circuit precedents, they must be evaluated independently. However, there are a few standard commonalities which need to be discussed. First, per guidance from the Supreme Court, NEPA is a procedural law.<sup>148</sup> Second, as a procedural law, the APA dictates if and when judicial review is appropriate. Per the APA, judicial review of agency action is only available when there is “final agency action for which there is no other adequate remedy in a court.”<sup>149</sup> To evaluate if an agency action is “final”, the Supreme Court has established a test.

First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.<sup>150</sup>

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143. *Maryland Conservation Council, Inc v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986). (citation omitted from 2d Cir. and D.C. Cir.).

144. *Maryland Conservation Council, Inc v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986).

145. *Id.*

146. *Aberdeen & Rockfish R.R Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 318–19 (1975).

147. *Vermont Yankee*, 435 U.S. at 558.

148. *Id.* at 558.

149. 5 U.S.C. § 704 (West 2020).

150. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *Accord Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 997 (8th Cir. 2015).

Using this test, the Eighth and Fourth Circuits agree that in NEPA cases issuance of a ROD by a federal agency is a “final agency action” of which judicial review may stem under the APA.<sup>151</sup>

One factor which weighed heavily in how the Eighth Circuit held in the *LPA* case was the fact that the FTA had been dismissed from the case per their motion to the trial court, therefore leaving only state level entities as defendants.<sup>152</sup> This is what ultimately led to the circuit’s reverse and remand of the case for dismissal for lack of jurisdiction.<sup>153</sup>

Despite this portion of the case, the Eighth Circuit’s reasoning is strong, stemming from not only its own precedent, but more specifically guidance from the Supreme Court that NEPA is a procedural law. When evaluating a procedural law which lacks substantive rights to private individuals, the only remedy created by Congress for an agency’s actions, lies in the APA. The circuit further utilizes the statutory text of the APA which dictates that judicial review is only possible following “final agency action”. In the case of NEPA, a ROD from a federal agency is a “final agency action” alongside a few other decisions not at play in the *Lakes and Parks* case. Since the LPA filed suit prior to the issuance of a ROD, and in conjunction with the EIS still being formulated, the judiciary had no formal stance to provide judiciary review over the federal agencies action. Additionally, since the Eighth Circuit does not practice the same “pendent jurisdiction” as the Fourth Circuit, there is no standing since the FTA was dismissed as a party by the district court. Aside from all the outlier facts that made the LPA ultimately lose their case, their failure to act at the appropriate time (i.e., after the issuance of a “final agency action”) is what led to their demise.

Although not the most logical when compared with the precedent of the Eighth Circuit, the Fourth Circuit did make some good points and I agree with the need for a form of injunctive relief in certain situations, until a final agency action occurs, to preserve the “environmental status quo”. However, the reasoning behind the Circuit’s precedent of injunctive relief does not quite weigh as strongly as the Eighth Circuit’s concise and well supported reasoning. Upon further review of the six “arbitrary and capricious” standards listed in the APA,<sup>154</sup> and their application throughout the various circuits, it is a high bar for plaintiffs to meet. For example, In *State of Wisconsin v. Weinberger*, a 7<sup>th</sup> Circuit case, the court was left

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151. *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808; *See Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 185 (4th Cir. 2005).

152. *Lakes and Parks*, 928 F.3d at 672–73.

153. *Lakes and Parks*, 928 F.3d at 763.

154. *See* 5 U.S.C. § 706(2) (West 2020).

performing balancing of interests test.<sup>155</sup> Ultimately, when faced with complying with NEPA's procedure and the possible harm to "national defense," the Navy's actions were found to not rise to the level of judicial intervention.<sup>156</sup> Until there is a new statute adopted or NEPA is expressly given some form of substantive right to private action, it is difficult to say whether the procedural act is making a meaningful impact on the environment, outside of simply alerting the masses to the potential harm being done in the name of our own national welfare.

Lastly, weighing in on the overall accuracy of the Eighth Circuit, many of the cases located and cited within this note consisted of claims under not only NEPA, as applied through the APA, but alongside other statutory acts such as the Stafford Act or the Clean Water Act, to name a few.<sup>157</sup> Some of these acts provide rights for private individuals to either appeal the federal agency's decision or provide some other substantive right of action. Unfortunately, due to NEPA's very purpose boiling down to a procedure of weighing effects on the environment and considering alternative courses of action, NEPA claims brought alone and applied through the APA are rather weak if a federal agency has done the very minimum effort involved in drafting an EA or an EIS. In terms of the *LPA* case, the Council, by all indication, was following NEPA and preparing a detailed EIS and ultimately obtained a ROD through the FTA. This met the loose standards that exist under the National Environmental Policy Act. Thus, under the widely accepted standard of review under NEPA, courts may not openly review agency actions. They may only do so following a "final agency action". Ultimately, the Lakes and Parks Association brought their case too early to win and did not have a federal agency tied to their appeal.

### VIII. Conclusion

Given that the *LPA* court not only followed circuit precedent but also the overwhelming evidence that the Eighth Circuit's precedent falls largely in line with the vast majority of other circuits, the *LPA* court decided the case correctly. Without the explicit authorization of Congress for individuals affected by the actions of a federal agency to have a private cause of action under NEPA, the only fallback is with an APA claim. To have an APA claim, however, hopeful plaintiffs need to overcome one small hurdle; a

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155. *Weinberger*, 745 F.2d 412 at 426–28.

156. *Id.*

157. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808; *See also Sierra Club v. Van Anterp*, 526 F.3d 1353 (11th Cir. 2008).

“final agency action” must have occurred for an action to stand up in court. Although the effort was admirable, and there may well have been proof that the Council was attempting to skirt requirements to properly evaluate alternatives for the Southwestern Light Rail Transit Project, NEPA was not the most optimal claim to combat the Council or the SWLRT’s route through the area known as the Kenilworth Corridor.

Given that NEPA is merely a procedural law which dictates that federal agencies take a “hard look” at the effects of their actions upon the human environment while evaluating viable alternatives, there appears to be no bite behind the statute for those who depart from its guidelines. In a vast number of NEPA cases where courts have held that agencies have not followed the procedures closely enough, the courts have simply ordered the agency to either proceed with the EIS process or allowed “other interests” to dominate NEPA. There is no substantive action which can be taken except for ensuring the agencies follow procedures, as they are written, and “to assess the environmental effects of their proposed actions prior to making decisions.”<sup>158</sup> This is one of the most common reasons that NEPA claims are so often tied into cases dealing with other statutory acts such as the Clean Water Act which often have substantive rights of private action expressly built into them. Unfortunately for the Lakes and Parks Alliance of Minneapolis, there was no applicable law present or plainly visible to file claims on regarding the rail plan through the Kenilworth Corridor. Given the current state of NEPA and gap of substantive law to preserve land such as the Kenilworth Corridor, the judiciary has little to no ground to stand upon in issuing injunctive relief prior to any final agency action having been issued. It is for these reasons that despite the admirability of the *Limehouse* court and the Fourth Circuit, the Eighth Circuit’s holding is ultimately correct.

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158. EPA, *What is the National Environmental Policy Act?*, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Oct. 16, 2020).