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# NEPA and State NEPAs: Learning From the Past, Foresight for the Future

by Kenneth S. Weiner

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## I. Foresight as a Foundation for Security

The National Environmental Policy Act (NEPA)[1] has often been called our nation's environmental Magna Carta. NEPA's structure and language are constitutional in character. Widely recognized as the world's first comprehensive statement of environmental policy, NEPA became a model for environmental policy and law around the globe.

NEPA has had as much impact as any environmental statute in history. With some imagination and daring, NEPA could help us meet the 21st century challenge to confront global climate change, restore human and natural ecosystems and species, and build a green economy.

A prime motivation for NEPA was the explicit concern that economic and social factors were overriding environmental quality in public decisions. In a time of war and national security priorities (Vietnam, nuclear threats, Cold War detente with China and Russia), social upheaval (racial and gender equality and urban neglect), and economic problems (energy crisis, budget deficits, inflation, and scarce public dollars), the U.S. Congress and ultimately the president agreed that the deteriorating quality of our environment could not be relegated to second-class status. The parallels today to the need for NEPA are striking.

NEPA recognized environmental quality—including the health of our natural resources and urban communities—as an integral and interrelated aspect of our social and economic well-being and national security in the short and long term. NEPA's motto to "look before we leap" forcefully articulates its fundamental focus on foresight needed to address environmental challenges domestically and globally.[2]

Both the U.S. Senate's and the U.S. House of Representatives' prime sponsors of NEPA believed that the lasting legacy and biggest impact of NEPA would be the establishment of the White House Council on Environmental Quality (CEQ), with a lead environmental advisor to the president. As experienced Washington insiders in a time of a strong if not imperial presidency, they understood the power that a top White House official with an adequate staff can have in shaping policy.[3]

The CEQ was modeled after the National Security Council and its national security adviser and the Council of Economic Advisers in the Executive Office of the President (the extended White House family, which includes other powerful offices such as the Office of Management and Budget).[4]

Just as there are multiple Cabinet departments and other agencies with primary national security roles—such as the U.S. Departments of State, Defense, Homeland Security, and the Central Intelligence Agency and other intelligence agencies—so there are multiple agencies with primary environmental and natural resource roles, including the U.S. Departments of Energy, the Interior, Agriculture, Com-

1. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
2. NEPA expressly recognizes the "worldwide and long-range character of environmental problems" and maximizing "international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. §4332(2)(F).
3. Sen. Edmund Muskie (D-Me.) even deferred to Sen. Henry "Scoop" Jackson (D-Wash.) on the prime sponsorship of NEPA in the Senate because Sen. Muskie was satisfied with the compromise that he would be the prime sponsor of the companion measure to NEPA, the Environmental Quality Improvement Act (42 U.S.C., §§4371-4375), providing staff to the Council on Environmental Quality (CEQ), which he felt would be the lasting contribution of NEPA. The legislative history of NEPA in the U.S. House of Representatives gives even more emphasis to Title II of NEPA and the establishment of the CEQ and the president's environmental adviser.
4. Lynton K. Caldwell, *Implementing NEPA: A Non-Technical Political Task*, *in* Environmental Policy and NEPA, Past, Present, and Future (E. Ray Clark & Larry W. Cantor eds., 1997). *See, e.g.*, National Security Act of 1947, 50 U.S.C. §§401 et seq., and the Full Employment Act of 1946, 15 U.S.C. §§1021 et seq. The composition of the Executive Office of the President is described at http://www.whitehouse.gov/administration/eop/.

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merce (National Oceanic and Atmospheric Administration (NOAA)), State, and the U.S. Environmental Protection Agency (EPA), to name a few.[5]

The president needs an in-house top level assistant to advise on the intersection of these agencies' missions, as well as an impartial broker to coordinate advice from and direction to these line agencies. Each president has also had special area advisors, such as on urban or energy issues, but permanent Executive Office institutions for national security, economic health, and environmental quality make eminent sense.

Although the National Security Advisor and the National Security Council did not play central roles from the 1940s to the 1960s,[6] few people would question their role and importance today. As domestic and world affairs are perceived to be more interconnected and dynamic, the key role of foresight by these Executive Offices has been recognized. No longer is there a question about the need to anticipate, prepare for, and respond to challenges and change:

> . . . the current environment virtually by definition puts a premium on foresight—the ability to anticipate unwelcome contingencies. While the ability to specifically predict the future will always elude us, foresight that enables anticipation and planning is the only means we have to increase response times in a world of rapid unpredictable change. It constitutes the critical precondition for actively shaping the global security environment in ways conducive to achieving national security goals.

This excerpt is not from an environmental report. It is from a comprehensive recent report on steps to improve national security to meet 21st century challenges.[7] One could easily substitute the words "national environmental goals" in the last line.

As we approach the 40th anniversary of NEPA and of the first Earth Day, global climate change may instigate policy change at least as revolutionary as NEPA and the environmental legislation of the 1970s. This Article highlights lessons learned from the states over the past decades and proposes focused actions that could reinvigorate NEPA for the future.

## II. From Imitation to Innovation

Some background on NEPA's early years and the transition from states copying NEPA to innovations with state NEPAs may help to set the stage.[8]

Congressional sponsors saw NEPA first and foremost as a *government management* statute. One reason NEPA was not overly controversial is that it directs the federal agencies to change the way they do business, and to protect, restore, and enhance environmental quality in carrying out their missions. The law applies to the private sector indirectly.

As with President Theodore Roosevelt's creation of the U.S. Forest Service and many New Deal and Great Society reforms, NEPA's sponsors saw the federal government as providing a "model." Through NEPA and its mandate to consider both a short and long-term view, government agencies would show the private sector that environmentally responsible actions were integral to and compatible with economic and social well-being nationally and globally.

This focus on government management and serving as a model for sustainability cannot be overemphasized. NEPA and state NEPAs apply to private actions to the extent private actions need public funds or approvals, such as permits. Millions of private actions occur every day without any governmental involvement or environmental review.

Whether this is good or bad can be debated elsewhere, but the point is that NEPA and state NEPAs require public agencies—no matter what their other missions may be—when doing the public's business, to use all practicable means and measures to protect, restore, and enhance environmental quality. This is a different kind of law than the typical environmental statute or regulation, because it does not prescribe emissions or conduct. Instead, it gives a public official discretion beyond the agency's formal charter or authorization to protect the environment.[9]

There are two primary "action-forcing" mechanisms in NEPA to provide accountability for agencies' compliance with this mandate:

- The "procedural" provisions of §102, most notably a report to demonstrate that appropriate consideration was given to environmental factors; and
- The establishment in Title II of NEPA of the White House CEQ) a relatively small office on the CEO's

5. The same is true in the economic arena, including the U.S. Departments of the Treasury, Commerce, and Labor, as well as multiple offices in the Executive Office of the President, including the Office of Management and Budget, the U.S. Special Trade Representative, and the National Economic Council. A 10-year review by the U.S. Comptroller General confirmed the value of this function of the CEQ, as did a recent Jackson Foundation colloquium. General Accounting Office (GAO), *The Council on Environmental Quality: A Tool in Shaping National Policy,* GAO/CED 81-86 (Mar. 19, 1981); Henry M. Jackson Foundation, Facing the Future: Recommendations on the White House Council on Environmental Quality (Oct. 2008).
6. Stephen Hess, Brookings Institution, Organizing the Presidency (1976).
7. Project on National Security Reform, Transforming Government for the 21st Century, Excerpt From the Executive Summary of *Forging a New Shield* (Nov. 2008), *available at* http://www.pnsr.org/data/files/pnsr%20forging_exec%20summary_12-2-08.pdf. Primary study leaders include several members of the Obama Cabinet and national security agencies. The report identifies four fundamental principles that define national security and its key policy objectives (Executive Summary, p. vii). Significantly, the three other principles mirror NEPA as well: multidimensional response, interdisciplinary approach, and better resource management. Basically the words "environmental quality" or "environmental security" could be substituted for "national security" in most of the report's Executive Summary. Although one might not agree with all of the specific recommendations of the report, the overall thrust bears a remarkable parallel to the original letter and spirit of NEPA in the environmental sphere, the federal management reforms needed to meet our environmental challenges, and the integral role NEPA can once again play in our environmental security. The more people understand the relationship between environmental quality and national security, the more likely NEPA and the CEQ will play a role in meeting the 21st century challenges.
8. This Article will speak largely from the perspective of Washington state's SEPA, as a leading state, but reflects similar experience in other leading states, such as California, Hawaii, Massachusettes, New York, and other states.
9. *See* Kenneth S. Weiner, *Basic Purposes and Policies of the NEPA Regulations*, *in* Environmental Policy and NEPA, Past, Present, and Future (E. Ray Clark & Larry W. Cantor eds., 1997). NEPA's basic mandates are its supplemental, affirmative, procedural, substantive, balancing mandates. *Id* at 62-63.

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staff, the Executive Office of the President, to oversee NEPA's implementation.

Various states adopted state NEPAs that each have their own characteristics. Most include similar procedural provisions as NEPA. They vary widely as to existence and functions of an oversight agency.

### A. A Substantive Revolution at the Local Level

In the beginning, Washington state, as many states, adopted a state environmental policy act (SEPA) virtually identical to NEPA. Of course, Washington state had a certain vested interest, in that the state's then-Sen. Henry M. "Scoop" Jackson (D-Wash.) was both highly respected and the prime sponsor of NEPA in the Senate.

Washington state retained the "fundamental and inalienable right to a healthful environment" language compromised out of §101(c) of NEPA, but otherwise, the statute closely resembled the brief phrasing and constitutional character of NEPA.[10]

The Washington state courts, following the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit and other federal courts, gave teeth to NEPA, so it would not become a paper tiger, halting projects that plowed forward despite failures to prepare adequate environmental reviews.[11] They even suggested that the courts could overturn agency action that did not give sufficient weight to the environmental values set forth in the statute's statement of environmental policy.[12]

As in California and to some degree in New York and other states, the backlash from land developers in particular came swiftly. And, as in California, the Washington courts upheld both SEPA's application to private development when government project approvals or funding were involved, and SEPA's supplementation of the underlying charter and mandate of every agency to invest discretion in agencies to protect the environment.[13]

There has never been a serious question that federal agencies could condition or deny projects as a result of environmental impacts disclosed under NEPA. Most people would take this for granted, and few would even think of this as a legal issue. The issue of NEPA's substantive effect at the federal level became preoccupied with whether a court could overturn an agency's decision based on the court's interpretation of the policies in §101 of NEPA.[14]

At the state and local level, however, the issue was—and remains—quite different.

At the local land use level, using SEPA to condition or deny projects was revolutionary. Until the state NEPAs in the 1970s, many state and local permits were characterized as ministerial, meaning that agency approval was mandatory if the proposed development met the standards in adopted building and zoning codes. Development rights and standards were guaranteed (vested) when a complete application was submitted. SEPA turned these well-established doctrines on their head, because the local agency now possessed the discretion to condition or deny a project based on its environmental impact, even if the proposal complied with all other adopted codes.[15]

One revolutionary step often leads to others.

Because most state NEPAs, including Washington's SEPA, were as skeletal as NEPA, administrative rules were needed to create a process and specify documents that would comply with the statute. The CEQ 1971 Interim Guidelines and 1973 Guidelines provided a powerful influence, and again, like the statute, these were initially imitated.

For the first time, the public, as well as other agencies and Tribal governments, had the opportunity to review and comment on proposals before final decisions were made that might significantly affect environmental quality. At the local level, even more than at the federal level, most commenters do not distinguish between commenting on environmental aspects and commenting on any topic of concern on a proposed action.

10. Wash. Rev. Code §43.21C.010(3). Despite fears that the environmental rights language would bring civilization as we know it to a screeching halt, it has not been interpreted as conferring rights or obligations different than most NEPA case law.
11. Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *See also* Frederick R. Anderson, Resources for the Future, NEPA in the Courts (1973). In the states, the courts halted projects already underway but not completed for failure to comply with state NEPAs. *See, e.g.*, Eastlake Community Council v. Roanoke Ass'n, 513 P.2d 36 (Wash. Supp. 1973). In these early cases, state courts often cited other states' and federal cases interpreting both NEPA and state NEPAs.
12. Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289, 2 ELR 20740 (8th Cir. 1972).
13. 42 U.S.C. §4335). *See, e.g.*, Polygon Corp. v. Seattle, 578 P.2d 1309, 8 ELR 20561 (Wash. 1978), which was cited by many other states. Similarly, the California Supreme Court decision applying the California Environmental Quality Act (CEQA) to private projects for government permits in *Friends of Mammoth v. Board of Supervisors of Mono County*, 502 P.2d 1049, 2 ELR 20673 (Cal. 1972), was likewise cited by other state courts. California likes to boast that it's statute is more "substantive" than NEPA and other states because it requires certification that all mitigation measures have been taken. Although there may be some merit to this claim, its practical effect is to require a bit of a harder look than most states. In the end, the practical difference is quite limited. Other states and localities routinely require extensive mitigation measures as a result of environmental review without making this finding, and California agencies routinely either make conclusory findings or make the necessary findings that other factors override the presumption.
14. It is essential to avoid confusion when using the term "substantive." As explained in this Article, NEPA and state NEPAs are "substantive" in that proposals may be conditioned or rejected based on the EIA. An additional dimension is whether NEPA or state NEPAs dictate a "particularly substantive result." None do. Some, like California, go further in this direction than others, by establishing essentially a rebuttable presumption that the environmentally preferred alternative will be selected and that all necessary mitigation will be implemented. The NEPA Rules require agencies to provide an explanation for acting otherwise. 40 C.F.R. §1505.2(b) and (c).
15. Section 105 of NEPA has never been particularly controversial and has never been amended. The difference between the federal and state perspective on the "substantive" effect resulting from "supplemental authority" is readily apparent in the amendments to Washington's SEPA as a result of these cases. Fearful of abuse by local officials seeking extractions or other amenities unrelated to actual adverse impacts, SEPA was amended to structure the use of agency discretion in the use of substantive authority. SEPA requires that any conditions or denials be based on substantive SEPA policies adopted by state and local agencies, that the adverse environmental impacts be identified in the environmental review documents, and that a reasoned written decision be issued. Wash. Rev. Code §43.21C.060; Wash. Admin. Code 197-11-660. This has some similarities to the accountability imposed on agencies by the NEPA Rules in 40 C.F.R. §1505 and the requirement for records of decision (RODs).

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NEPA's novel contribution to democracy—empowering citizens and communities to participate in the political process, not just the judicial process—fundamentally altered federal decisionmaking forever.

When one considers how many more proposed actions are covered by environmental review under state NEPAs, which typically include the land use permits of every city, town, and hamlet in the state, every port and special district, every state and municipal agency, the legacy is difficult to comprehend.[16] Now, state and local agencies had sister agencies and citizens demanding they "look before they leap."

### *B. Parity at the Federal and State Levels*

By the mid-1970s, state and local experience was sufficiently intense that the early "little NEPA" states such as California, Hawaii, Massachusetts, and Washington leapfrogged the CEQ with newer and, in many cases, more innovative procedures. The CEQ used these as models for the 1978 NEPA regulations.[17] Many states, in turn, emulated the CEQ NEPA Rules in their next rulemaking iteration.

One reason the 1978 CEQ NEPA Rules have lasted for 30 years through scrutiny by several White House regulatory reform commissions under Democratic and Republican presidents is that the rules were written from experience by users from all sectors at the local level.[18] It was not skewed to any interest other than the integrity of the statute.

In the 1970s, federal agencies developed expertise in environmental impact assessment (EIA, a globally accepted generic term for environmental reviews) faster than the states in part due to political will and available resources.[19] By the 1980s, however, federal interest diminished. State NEPAs had picked up steam, given the wide range and number of local actions subject to environmental review. Many NEPA experts also moved from Washington, D.C., to universities and into the private and public sectors around the country in the early 1980s.

NEPA is a demanding law because it requires rigorous interdisciplinary thinking, public transparency, and good, clear communication. These qualities require competent, well-trained staff. NEPA is also inherently nonpartisan, emerging from conservation traditions in both major parties, enacted by a bipartisan majority, and strongly supported by the CEQ under Republican and Democratic administrations. However, environmental staffing in the federal agencies did not fare well under Republican presidents or Republican control of Congress, which comprised 93% of the past 30 years.[20]

Today, it can fairly be said that professionals in many states and localities are as skilled in NEPA and state NEPAs as federal staff. Likewise, governors, mayors, and local public works and planning directors actually rely more on environmental impact statements (EISs) and other EIA documents—and are more directly affected by public comments—than most federal agency heads. Plus, many states with state NEPAs are comparable in size and complexity to other nations performing EIA.

The NEPA process has taken root in many states, and we should turn to them for some key lessons.

### *C. Foresight at the Strategic Level*

Conditioning or denying projects based on environmental impacts together with opening up agency decisions to the public is only one shoe that dropped from the CEQ's guidance. The other, for states like Washington's SEPA, came from NEPA and SEPA's attention to foresight at the strategic level.

The statutes and the CEQ emphasized that *planning-level* policy decisions—well before individual projects are proposed—establish a framework for project-level decisions that can be sustainable or environmentally damaging. At the federal level, management plans for public lands were the model, a somewhat limited application.

In states such as Washington and many others, localities and regional agencies prepare comprehensive coastal zone and/or land use plans; functional plans such as water, stormwater, sewer, solid waste, open space, transportation and energy plans; and zoning, environmentally sensitive area, and other development regulations to implement their land use plans.

There is usually a range of alternatives for each of these plans and regulations, and these decisions will shape growth and a community's environment. These growth-shaping actions have a powerful impact on whether sustainability is

16. State NEPAs generally work by requiring all state agencies and municipalities to adopt implementing procedures under a uniform set of state rules, similar to federal agencies adopting NEPA implementing procedures. Individual cities, such as New York or Seattle, do not have their own mini NEPAs, but they will have adopted ordinances or other statutes or regulations that contain their state NEPA procedures. Rather, the hundreds or thousands of state agencies, counties, cities, towns, and special districts, such as regional transit agencies, ports, public utility districts, and public development corporations in any given state, all have a set of procedures to implement the state NEPA Rules for that state.

17. Several states, including California, Massachusetts, and Washington, had updated their state NEPA procedures just prior to the 1978 NEPA Rules, which were considered by the CEQ in its regulations.

18. Before drafting the regulations, then-CEQ Chair Russ Peterson, former governor of Delaware, Staff Director Steve Jellinek, and General Counsel Gary Widman supported my spending six months meeting with a wide range of users and practitioners from many interests and disciplines in statehouses and communities across the nation, finding out what worked and what did not. We examined the EIA experience of other countries such as Canada and the Netherlands. The CEQ also completed the landmark NEPA study, *Environmental Impact Statements: Six Years' Experience of Seventy Federal Agencies* (1976). In 1977, CEQ General Counsel Nicholas Yost continued these efforts with questionnaires, public meetings, and hearings around the country before the rules were adopted. Nicholas C. Yost, *Streamlining NEPA—An Environmental Success Story*, 9 B.C. Envtl. Aff. L. Rev. 507 (1982). The 1978 NEPA Rules therefore reflected state and local experience and a bottom-up community and private-sector perspective, as well as a Washington, D.C., national, and international perspective. *See also* Dinah Bear, *NEPA at 19: A Primer on an "Old" Law With Solutions to New Problems*, 19 ELR 10060, 10062 (Feb. 1989), which two decades ago noted NEPA's potential role in addressing global warming.

19. In this Article, EIA refers to the environmental impact assessment process and documents of any kind, whether they are environmental impact statements (EISs), environmental assessments (EAs) or other environmental impact reports, checklists, or formal documents required by NEPA-type laws.

20. The lack of adequate, knowledgeable staff to manage and perform EIA in federal agencies has been a persistent problem, as noted in Robert G. Dreher, NEPA Under Siege (Georgetown Univ. Law Ctr. 2005).

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translated into action or becomes relegated to the dustbin of greenwashing jargon.[21]

Washington's SEPA process has applied to non-project actions, including formal plans, policies, and programs, for more than 30 years. Although the quality of these SEPA documents has been mixed, as with NEPA, the process has enabled the public to raise environmental sustainability in local strategic planning before individual public and private projects are proposed.

### *D. Port of Seattle Harbor Development*

A prime example is the Port of Seattle's strategic plan for handling containerizing cargo for 20 years and subsequent container terminal development.

As containerized marine cargo become a dominant way to move goods, the Port of Seattle decided to develop a long-term plan to stay competitive and meet this demand. Several factors drove a strategic approach, including the cost and lead time to develop container shipping terminals, the urban port location and need to be compatible with surrounding neighborhoods, and the need to restore habitat in Puget Sound's urban estuaries (a foresighted assessment, as many salmon species were later put on the endangered species list).

- Rather than copy the standard federal programmatic EIS, the Port took an innovative approach of preparing a strategic document, identifying both structural alternatives (new or expanded shipping terminals) and nonstructural alternatives (management actions and cooperation with other ports). It is no surprise that the preferred alternative plan combined elements of both, but the document looked nothing like a conventional EIS.
- The EIS analyzed the policy implications from an environmental perspective of each alternative, including the kind of infrastructure associated with the alternatives, including transportation, public shoreline access, and fish and wildlife habitat.
- The EIS analysis resulted in a set of Environmental Guidelines for future container shipping facilities, adopted by the Port in 1991, that are largely an early expression of sustainable development.
- The Port then proceeded to "tier" from this strategic plan level EIS to specific projectins, including the largest new marine container shipping terminal on the West Coast at that time.
- The approximately 100-acre project site was located next to a residential neighborhood on an estuary of national significance in waters that are Tribal fishing grounds and contained three federal/state Superfund sites.
- The project-level EIS for this new Terminal 5 for American President Lines was similarly innovative and had the following features.
- It was a joint federal-state-local EIS combined with the state cleanup process (there is no SEPA exemption in Washington state for cleanups). The NEPA process was focused on problem solving, not document producing. The scoping process continued until the draft was issued through a series of informal work groups on key issues that included neighbors, scientists, Tribes, and other agencies.
- The draft was issued before there was a preferred alternative to avoid prejudicing review, consultation, and comment.
- The EIS included a rare explicit evaluation of the project based on the environmental policies in §101 of NEPA and long-term sustainability, urged by the local community and the NEPA Rules.
- The Summary contained a two-page Readers Guide with a brief explanation of each of the 20-some technical appendices and their length, offering reviewers an advance opportunity to select the appendices they wished to receive, so the reviewers would have them for the full review period.
- A reflection of its success was that the Audubon representative testified at the EIS public hearing that the economically most intensive alternative was the environmentally preferred alternative.

As our nation tries to stimulate the economy, it's timely to recall examples where the options that are best for the environment can also lay a foundation for long-term economic health. The project was constructed in the mid-1990s and continues to operate, and similar innovative projects have spun off from the strategic plan analysis.

## III. From Isolation to Integration

NEPA and state NEPAs were so successful that they created two complexities that threatened to undermine effective and timely implementation.

First, people began to see the EIS process as separate and distinct from the planning and permitting process. Both the federal and state statutes and regulations make EIA an overlay on existing agency processes, meant to bring environmental analysis to bear on agency planning and decisions (including permitting). EIA does not work well if it is a separate process

21. The challenges of climate change and watershed management have brought sharp relief to the connection between infrastructure, land use, pollution, and a sustainable foundation for economic growth. The CEQ highlighted these connections in the mid-1970s in CEQ, Growth Shapers (1976). Today, the climate change debates are causing people to refocus on how land is used, recognizing that green buildings, energy and transportation systems, water conservation, and stormwater management for nonpoint runoff form the heart of sustainable communities. Most of the actions in a private enterprise (or regulated free market) economic system will be taken by the private sector; however, the regulations (whether incentives and/or sanctions) and infrastructure that helps to promote or shape these actions will likely be public or public-private partnerships. NEPA's concept of public agencies providing models of feasibility for the private sector is likewise relevant to the experimentation and "adaptive management" that will be needed.

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divorced from the agency staff planning or deciding on a proposed action, because the environmental considerations need to be integrated at every stage into the plans and decision.

In an effort to meet the strict procedural compliance standard in NEPA and state NEPAs, however, lead agencies became preoccupied with technical compliance and sometimes lost sight of NEPA's basic objective to *integrate* environmental analysis with agency processes. A related problem occurred when agency processes were not updated to allow environmental information to be readily incorporated.

The success of EIA as a methodology led to a paradox. Those frustrated with an agency's lack of a planning process would seek to use EIA to substitute for a planning process. This runs counter to its role as an overlay. NEPA and state NEPAs would in turn be blamed for deficiencies and delays that were actually the result of an agency's lack of planning, political controversies, and inability to reach decisions. As CEQ staff are often heard to say, the NEPA process cannot make up for problems in an agency's planning or decision-making process or political gridlock.

A second complexity resulting from the success of EIA was that other laws emulated the process of examining alternatives, impacts, and mitigation measures, including the endangered species, essential fish habitat, historic and cultural preservation, air and water quality, environmental justice, Superfund, and so on.

This created an alphabet soup of environmental review requirements for specific environmental media or resources that had to be coordinated with NEPA and state NEPAs. Since the coverage of these more specific reviews was not as comprehensive, they could not substitute for EIA, but needed to be integrated with the broader EIA process. Because they often require construction-level detail, coordination could be difficult because NEPA encourages analysis at the early planning or feasibility stage, rather than the design and construction stage.

Again, states took the lead, often with innovative private companies, to demonstrate how EIA could be integrated with existing agency processes and with other environmental reviews.

### *A. St. Paul Waterway Cleanup and Habitat Restoration*

The first completed Superfund cleanup and natural resource restoration in U.S. coastal waters on St. Paul Waterway in Commencement Bay, Tacoma, Washington, provides an outstanding example.

Simpson Tacoma Kraft Company (Simpson) had purchased the largest pulp and paper mill on Puget Sound from Champion International in 1985.[22] The mill was located in a federal Superfund site known as the Commencement Bay Nearshore Tideflats, which essentially included the entire Tacoma downtown waterfront, port, and harbor. Tacoma has one of the largest deepwater ports on the West Coast of the United States.

- The sediments on the bay bottom next to the mill were a biological dead zone, considered one of the two most polluted sites in Commencement Bay.
- Instead of arguing about or seeking exemptions, "categorial exclusions," or "functional equivalence," Simpson and the key agencies used the state EIA document as a tool to bring all relevant laws together for the agencies and public.[23]
- A comprehensive project analysis integrated all laws and areas, including cleanup, water quality, habitat, and biodiversity on an ecosystem approach, endangered species, cultural resources, shoreline and coastal zone management, brownfield redevelopment, urban infill, and smart growth analyses. EIA provided an organizing mechanism for considering a potentially complex project.
- The document was brief and understandable and resulted from an informal and intensive scoping process. Even though the preferred capping alternative could have been controversial, as it involved filling in tidal waters, no participant thought an EIS was necessary or would add useful information to the document.
- Environmental and community groups, Indian Tribes, companies, and business groups were involved early and throughout the planning. They all urged the federal and state agencies to approve the project.
- The SEPA process and project approvals, including multiple federal, state, and local permits, a tidelands lease, and state court approved cleanup consent decree, were completed in six months.
- The cleanup, source control, and new habitat were in place nine months later, and wildlife began returning immediately. Within a few years, a healthy tideflat supported diverse species including young salmon.
- The project included an intensive minimum 10-year monitoring and adaptive management plan. Although not required to do so, Simpson invited interested citi-

22. The mill had been operated by St. Regis for about 60 years, with no or varying levels of water quality treatment as is typical for many pulp and paper mills around the world. Champion, which is now International Paper, had acquired St. Regis six months earlier. By way of background, Simpson negotiated a cleanup cost-sharing agreement with Champion as the former owner and an agreement with its union to give the company time to deal with the cleanup obligation, since the cost potentially threatened the mill's viability. Simpson was one of the first companies at that time to perform a comprehensive pre-purchase EA of a facility.

23. The agencies alone included the city of Tacoma, state Department of Ecology, state Department of Natural Resources, and the U.S. Army Corps of Engineers (the Corps), in consultation with EPA, NOAA and the U.S. Fish & Wildlife Service, state Fisheries and Wildlife Department, and the Puyallup and Muckelshoot Indian Tribes. The project required SEPA and NEPA review, a shoreline (coastal zone) and related local permits from the city, cleanup consent decree from the state, hydraulics permit from state fisheries, aquatic lands lease from the state, individual §404 permit from the Corps with concurrence from the federal fisheries agencies, historic/cultural resources review, and the state clean water agency—all obtained in six months—and ultimately a federal cleanup consent decree (which occurred later but did not delay the project). A leading environmental advocate commented at one public hearing on the irony of the difficulty in obtaining approval to do an environmentally positive project.

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zens and agency staff to inspect the project and observe the monitoring annually, and provided drafts of the monitoring report before its submittal to EPA.

- This transparent approach to accountability for project results meant adaptive management actions were taken without controversy and with widespread support by all interests.[24]

The project changed federal policy as the first marine cleanup in the country to integrate natural resource restoration. It spawned a baywide ecosystem-based natural resource restoration plan, still being implemented as cleanups of other waterways in the bay are currently being completed. It offers a model of accountability for post-project monitoring and adaptive management.

The St. Paul Waterway project was the least cost alternative and was completed in record time and without litigation. Now, 20 years later, the habitat continues to be a healthy success, and the mill has been transformed into a modern facility employing hundreds in the community at good wages.

## IV. From Information to Iteration

Since 1976, when the CEQ completed its landmark study of 70 federal agencies leading up to the current NEPA Rules, we have known the paradox: it's the NEPA *process* that makes a difference, far more than the NEPA *documents* themselves.[25]

Yet, the NEPA process would not be taken seriously by the public and private sectors without the requirement for rigorous documents and accountability, whether by the lead agency, by EPA and other agencies, by the public and political process, or by the courts or other external independent review. Although the documents are at best a reflection of the process, the documents often serve as a touchstone for robust dialogue on more sustainable alternatives and for resolving complex environmental issues.

Even if we accept that the NEPA process, and in particular the EIA process, is essentially procedural as discussed earlier in this Article, this mandate goes beyond rote disclosure or presentation of information.

### *A. NEPA Follows a Business Model*

The NEPA process emulates a private-sector business model. This is not surprising, as its sponsors' goal was for the government to manage itself better, and the typical U.S. management models are those of private businesses.[26] The fundamental EIA requirements are:

- Articulate your *goals* (purpose and need)
- Identify *options* to meet your goals (alternative analysis) including actions to reduce downsides, track and respond to changing conditions (mitigation measures)
- Evaluate the *pros and cons*, including the options you are preserving or precluding for your future (impact analysis)
- In light of existing conditions (affected environment)
- Using relevant team expertise (systematic interdisciplinary approach)[27]

NEPA does not pose a caricatured choice between a touchy-feely "treehugger" versus a hard-nosed "business" approach to decisions. It picks the latter, directing federal agencies to apply good business practices to public environmental investments, but it insists that decisions be evaluated and made with a long-term perspective. NEPA also recognizes that, as with most business decisions, there are relevant unquantifiable factors and unquantified values.[28]

As a starting point, it is instructive to look at how the business world defines "information." Like the action-forcing role of NEPA's procedural mandate and the express injunction of the NEPA Rules, "information" is not about facts, figures, studies, or analyses for their own sake, but linked to mak-

24. The monitoring program allowed for the public to suggest additional monitoring (contingency monitoring) and for a reduction in monitoring based on the results. Both were done. When citizens observed methane gas bubbles in the tideflat, the company agreed to increase testing to verify the seeps were not transporting pollutants. When the company proposed reducing the intensity of monitoring, all interests agreed. Typically, this would be viewed with suspicion as weakening environmental protections. Because the regulators, resource agencies, and public reviewed the results together—as a result of active annual outreach by the company—reduction in the scope of monitoring was a technical conclusion, not a political issue. Similarly, because of all participants' familiarity with the restoration project over the years, preventive beach nourishment in one location was a non-issue. Equally important to the success of this approach is that the monitoring contractor was retained by the company and was accessible to the public and the agencies. This also contributed to a focus on the merits and to building trust among all participants. From the outset, the St. Paul Waterway project avoided a "we-they" dynamic all too common in Superfund, natural resource damage, or potentially controversial pollution problems.

25. This well-documented assessment is contained in many public and private independent analyses. The CEQ has produced three comprehensive reviews of the implementation of NEPA in the federal government that identified the same phenomenon. CEQ, Environmental Impact Statements: Six Years' Experience of Seventy Federal Agencies (1976); CEQ, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years (1997); CEQ, Modernizing NEPA Implementation: The NEPA Task Force Report to the Council on Environmental Quality (2003).

26. *See, e.g.*, Kenneth S. Weiner, *NEPA Is Good Business—The Close Relationship Between Environmental Impact Assessment and Sound Business and Management Practice*, *in* Industry and Environment (United National Environment Programme, ISSN 0378-993, Special Issue No. 1 1980 on Environmental Impact Assessment, a Tool for Sound Development).

27. Section 102(2) and 40 C.F.R. §§1501 and 1502, also evident in the EIS contents in 40 C.F.R. §1502.10.

28. Section 102(2)(B); *see also* 40 C.F.R. §1502.23 on cost-benefit analysis. Most state NEPAs contain language similar to §102(2)(B) of NEPA. Even in the quantitative business environment, the extensive literature and commentary on the effects of the qualitative "crisis of confidence" on the current world economic crisis bears testament to the role of unquantifiable values and factors influencing decisions. The incorporation of a long-term perspective, not just how Congress will view annual budgets, or in the case of the private sector, how the market or shareholders will view quarterly profits, are reflected for example in NEPA §101(a) (fulfill "the requirements of present and future generations of Americans"), §101(b)(1) ("fulfill the responsibilities of each generation as trustee of the environmental for succeeding generations"), §102(1) ("to the fullest extent possible" interpret and administer policies, regulations, and laws in accordance with these policies), and §102(2)(F) ("recognize the worldwide and long-range character of environmental problems").

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ing real-time decisions.[29] The term information is defined in *BusinessDictionary.com* as follows:

> In general, raw data that (1) has been verified to be accurate and timely, (2) is specific and organized for a purpose, (3) is presented within a context that gives it meaning and relevance, and which (4) *leads* to increase in understanding and decrease in *uncertainty*. The *value of information* lies solely in its *ability* to affect a *behavior, decision,* or outcome. A piece of information is considered valueless if, after *receiving* it, things remain unchanged.[30]

It is uncanny how close this business dictionary definition matches statements by judges about the role of information, analysis, and disclosure under NEPA, both before and after the Supreme Court's characterization of NEPA as "essentially procedural." In short, if information is the focus of the EIA process, then giving a hard look means making use of the information, even if people may disagree about the ultimate decision.[31]

Requiring public officials to identify the options and their pros and cons from an environmental perspective is hardly a left-wing communist plot. It is what successful businesses do every day. It is NEPA in a nutshell.

More, it's what the Barack Obama Administration understands is needed as the basis for a "Green Recovery"—infrastructure in the broadest sense, including our energy policy and the health of our natural resources, that lays the foundation for a sustainable economic, social, and environmental future.

If public decisionmakers make investment decisions that affect our urban, rural, and natural environments and their natural resources—but do not look at the options being preserved or foreclosed for the future—then our public dollars and resources have been squandered on the same short-term approach that put us in our current predicament. This is precisely what NEPA's foresight is all about.

As the states become the laboratories of EIA innovation, they employed another concept common in the business world, that of iteration. Businesses have used various names for this process, from the Japanese automobile model of "total quality management" or "continuous improvement" to many other monikers. *Business Dictionary.com* likewise links "iteration" to making decisions, as a: "*Process* for arriving at a progressively 'better' *decision* or a desired *result* by repeating the *rounds* of *analysis* or the *cycles* of *operations*."[32]

Moving from information to iteration should not be an excuse for delay or inaction. Studying an idea to death is not preparing to make a decision, in the words of the NEPA Rules. Developing and using good information through phases or rounds of analysis—each tailored to the goal or issue to be decided at that time—can be both more efficient and lead to better decisions.

### *B. Regional Water Quality Plan and West Point Treatment Plant*

An outstanding example was the phased (or tiered) SEPA process used for meeting a major regional infrastructure need: the metropolitan Seattle regional wastewater treatment plan and the upgrading of its facilities to secondary treatment. The plan and project were accomplished in a remarkably short period of time given the scope of the challenge.

Under encouragement by EPA, the state Department of Ecology issued a compliance order to the Seattle-King County metropolitan regional water quality agency (Metro) in the mid-1980s to implement secondary treatment at all of its wastewater plants.[33]

- Rather than argue an enforcement exemption, Metro undertook a phased SEPA process.
- Metro had several plants that needed to be upgraded, closed, or replaced. Without a plan—informed by a

29. Information is linked to following subjects, all related to the *use* of information: Decisionmaking, Problem Solving, & Strategy, Information & Knowledge Management, and Information Science & Technology. *See* http://www.businessdictionary.com. Under the NEPA Rules, a proposal exists and the formal EIA process commences "when the agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. §1508.23.
30. BusinessDictionary.com, http://www.businessdictionary.com/definition/information.html (emphasis added).
31. There are numerous cases stating that NEPA requires a hard look and does not dictate a particular substantive result. *See, e.g.,* Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 19 ELR 20743 (1989), and the companion case Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 19 ELR 20749 (1989). Whether a court can use NEPA review to overturn an agency's final decision to act in an environmentally destructive manner—after the agency has given a "hard look" with solid information of the options and consequences and provided a reasoned explanation of its decision—seems to be settled administrative law in the United States. As noted earlier in this Article, this is largely an academic discussion. In practice, at both the federal and state levels, the authority of an agency to condition or deny a proposal based on its environmental consequences are equally well-established and common in practice. As heady as it would have been for NEPA's mandate and legacy to so empower the courts to "substitute their judgment" for agency officials on the proper balance to be struck in a given decision among environmental and other essential considerations of national policy, it would likely take explicit congressional direction to vest the judiciary with this standard of review. The more important question is whether the courts are willing themselves to take a "hard look" at the agency's record to determine if the agency gave a "hard look" and appropriate consideration to the alternatives and impacts (including the effectiveness of mitigation measures) and will remain accountable for the decisions (including the monitoring and mitigation commitments) that the agency finally makes.
32. BusinessDictionary.com,http://www.businessdictionary.com/definition/iteration.html (emphasis added).
33. Until the mid-1980s, common wisdom held that Puget Sound flushed itself out to the Pacific Ocean pretty regularly and quickly. It turns out that Puget Sound's inland sea is more complex. Deeper waters flow southerly, and other areas flush slowly or not at all. The earlier proposals for waivers to continue primary treatment into marine waters were rejected. Secondary treatment was required as part of an effort initiated in the 1980s to protect and restore Puget Sound. The compliance order did not address the potential timing conflict between the Clean Water Act and NEPA or SEPA. Metro decided that the infrastructure investment in upgraded treatment would be a "generational decision" in place for the long term. Instead of using the compliance order as a reason not to examine alternatives, Metro used an iterative processing of revising its long-term regional wastewater plan and then planning and designing the appropriate treatment facilities. Although the compliance order lent urgency to the process, EPA, the state Department of Ecology, and local governments understood the need for a deliberative and efficient process, so that the actions both addressed urgent needs and were sustainable in the long term. This is a useful example for the current challenges to expedite and use "stimulus" funds wisely to serve short job creation needs and lay a sound foundation for a long-term "green recovery."

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solid analysis of alternatives and their environmental consequences—the region might be wasting billions of public dollars on infrastructure improvements that would not have a sound, sustainable long-term basis.

- The options were highly controversial because communities that did not have a wastewater treatment plant, did not want one, and the existing major plant (formerly on an Army base) was now located on prime shoreline next to a major regional park.
- Reflective of the real complexity of our times, the trade offs were between two environmental values—clean water and recreation—not a simplified media portrayal of environment versus development.
- An EIS was prepared on an updated regional comprehensive plan for secondary treatment and combined sewer overflow control. The initial EIS narrowed the options, and a supplemental EIS (SEIS) focused on the location of upgraded plants.[34]
- Metro followed a similar iterative process for the specific siting and design of the West Point Treatment Plant, establishing treatment technology, footprint, design guidelines, and similar parameters in the initial EIS, and facility design alternatives in an SEIS.
- Despite the constraints of a compliance order and the time involved in an iterative SEPA process to work through the plan-level and project-level alternatives, the result was a win-win for protecting water quality and recreational values that seemed irreconcilable.

As a result of this iterative approach, one plant was closed and its shoreline became a public beach and park. Two plants became needed stormwater treatment facilities. Speaking of foresight, stormwater (nonpoint runoff) is widely recognized 20 years later as the biggest current challenge to meeting water quality goals. The upgraded one-half-billion-dollar West Point Treatment Plant has now become an international attraction. Through the use of the environment design arts, as required by NEPA and SEPA (not just science and technology),[35] the region made a 50-year investment in clean water that also allows the plant to blend into a regional park and open up a restored shoreline to the public.

## V. From Imprisonment to Imagination

A lot has changed since January 1, 1970, when President Richard M. Nixon signed NEPA. We now have a plethora of environmental laws, regulations, and requirements at the federal, Tribal, state, and local level, not to mention international treaties and agreements. The list of environmental law acronyms has grown to encompass most environmental media and natural resources.

What's left for NEPA and state NEPAs to do?

For starters, if we learn anything from global climate change or any number of other fields of study, it is that humans are not omniscient. With all our intelligence, we necessarily face our environmental challenges with some humility. There are gaps in our knowledge that the laundry list of existing environmental laws do not address today and will not cover in the future.

NEPA's supplemental authority provides a tool and a safety net for these gaps, so we are not paralyzed from acting simply because Congress or an agency does not have the knowledge or the political will to have adopted a specific statute or regulation.

We have also learned about synergies and cumulative effects. Compartmentalizing can miss interconnections. We also have a complex regulatory structure, where conflicts among our environmental requirements sometimes need reconciliation. NEPA allows us to address the overlaps as well as the gaps.[36]

NEPA provides a critical tool that individual environmental laws do not: a single picture that integrates the parts. All participants benefit, from the public and agency reviewers to managers and decisionmakers. This also helps provide participants with a common language, in contrast to the often highly specialized language of a single-focus environmental law.

A driving force behind NEPA's enactment was the lack of coordination among federal agencies affecting the environment and natural resources. Coordination has at least two parts: not acting counter to another agency; and working together toward a common goal.

Finally, few laws require agencies to be accountable for their actions. Here is an area where business and environmentalists share an objective: agencies should be accountable for the conditions they impose, on themselves and others, in the name of environmental quality.

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34. The city of Seattle administratively appealed the initial plan-level EIS to seek consideration of additional non-shoreline locations. The appeal settlement resulted in an SEIS that allowed siting decisions to be made without prejudicing the design of the facilities, which would be accomplished through an interactive, project-level SEPA process. A subsequent administrative appeal of the project-level SEIS likewise resulted in a settlement on the specific mitigation measures and design that satisfied all parties. Of course, Seattle might be one of the few communities that would engage in a vigorous civic debate on environmental values to spend an extra one-third of a billion dollars to move a functioning treatment plant because it was on a shoreline next to a park.
35. Section 102(2)(A). Good environmental design can often produce solutions for apparently intractable issues.
36. Washington's state SEPA is explicit: "The legislature intends that a primary role of environmental review is to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed action." SEPA "should not be used as a substitute for other land use planning and environmental requirements." Preamble to SEPA/GMA Integration Rules, Wash. Rev. Code §§36.70B.030-040, 43.21C.240 & Codified Legislative Intent Statement, Wash. Admin. Code 197-11-158. Project-level environmental review should be integrated with and not duplicate other requirements, and should be used to: review and document *consistency* with plans and regulations; provide prompt *coordinated review* by agencies and the public on compliance and on mitigation measures not addressed in adopted plans and regulations; ensure *accountability* to applicants and the public for requiring and implementing mitigation measures (which includes monitoring and adaptive management, the need, and capacity to respond to changing conditions).

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In summary, NEPA and state NEPAs will still be needed for:

- gaps;
- overlaps;
- comprehensive, comprehensible picture; meaningful public involvement;
- agency coordination; and
- accountability.

These are much the same reasons behind NEPA's passage. Other laws may reduce the dependency on NEPA and state NEPAs for specific environmental standards and protections, but the need for a comprehensive, coordinated approach with accountability for decisions has not changed.

### *A. Learn From State and Local Examples*

So, where does NEPA go from here?

First, we have a lot to learn from just these three examples and many other state and local examples of innovation, integration, and iteration in the EIA process. Each of these examples shows:

- First and foremost, that the NEPA/SEPA process can focus on substance, on real issues and outcomes that matter to diverse interests and communities. The §101 goals of productive harmony between people and nature and trusteeship of the environment for present and future generations can be translated into action.
- The NEPA/SEPA process was not just another regulatory hurdle, but a tool to bring people together to solve seemingly insurmountable problems. This can even be accomplished in record time.
- NEPA/SEPA documents are not boiler plate. They can and will look different from each other when they contain the information and analysis right for a particular proposal. They will rarely be found inadequate if they truly meet the laws' purpose.
- The NEPA/SEPA process can focus on sustainability in the full sense of the word. Each example supports important economic activity and the health of our human communities. Each restores natural resources, habitats, and species with which we share the earth and depend on for food and other sustenance. Each provides critical long-term infrastructure for business, the public, and natural ecosystems.

### *B. No More Telephone Books*

Second, we have serious unfinished business. Let us just start with what most people who have heard of NEPA think of the law: old-style telephone book-size EISs.

It is not just the size of the documents, it is what they imply: a bloated, costly process. It's also what they do: make information inaccessible to decisionmakers and the public.

In his 1977 Environmental Message ordering the NEPA Rules, President Jimmy Carter said: "We do not want impact statements that are measured by the inch or weighed by the pound."[37] Now, 30 years later, it's long past time to get real. Our electronic age allows us to do this.

When we wrote the current NEPA Rules, the drafters debated two principal formats for an EIS. The format in the Rules has not produced shorter, more useable documents that a decisionmaker might actually pick up and read. With advances in technology, the alternate format we developed in 1978—a briefing-style EIS—deserves serious reconsideration as the format for an EIS:

- An EIS would be one bound document limited to 50 sheets, including text, graphics, and anything else.[38]
- This short EIS would contain a readers' guide that lists all appendices and supporting documents (which could be included in soft copy). Principal technical supporting materials would need to be readable to the lay person (as with the current big EIS) but could have additional technical material as well. Provision would be made for interested members of the public or communities without computer access.

A 50-sheet document, whether one-sided or two-sided, is ample to provide cogent analysis of even complex proposals and the key environmental issues, trade offs, pros/cons among alternatives. Most public or private decisionmakers would not even allow their staffs to provide them with so lengthy a memorandum.

Not surprisingly, the main opposition to this briefer format came from two opposite quarters: (1) big agencies who had the game figured out and could put enough material in an EIS so that it looked adequate enough to pass muster nearly all of the time if challenged; and (2) frequent challengers of EISs who were concerned that this format would lower the adequacy standards because the document would be too cursory and not contain the requisite analysis.

The concern about availability of sufficient technical analysis and data seems almost quaint 30 years later, in light of advances in technology and electronic media, including the internet, CDs, and DVDs. The concern that a short document might actually focus and highlight the real environmental differences among alternatives, rather than create a mountain of paper, is precisely why we need a better format.

To compensate for the decision not to adopt a briefer EIS format, the existing NEPA Rules require a robust Summary that highlights areas of controversy and uncertainty and major environmental differences among alternatives—*not* an

37. The President's Message to Congress, May 23, 1977, referring to Executive Order No. 11514, May 24, 1977.

38. Whenever format rules are discussed, people want to discuss every detail. There is no need to get overly prescriptive about font size, page size, single- or double-sided printing. The plain fact is that 50 sheets, when bound and legible, are not very thick. Such a volume would have a fighting chance of being picked up and read.

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annotated table of contents with endless tables that compare minor differences among alternatives.[39]

The NEPA Rules also required agencies to evaluate their decisions against the national environmental policy in §101 of NEPA, if the environmentally preferred alternative is not selected, explain why, and commit to any needed mitigation and monitoring, for accountability. You can probably count on your hands and toes the number of EISs/record of decisions (RODs) that meet these requirements, not to mention the required page limits in the existing Rules.

If we do not adopt a briefing-style EIS format for the future, then EPA, with the CEQ's support, should refuse to file EISs that are longer than the maximum page limits in the NEPA Rules and do not contain discussion of the required elements of the Executive Summary and ROD. These Rules have a purpose: to prevent obfuscation of the real issues and to establish agency accountability to sister agencies, applicants, and the public. It is the least we can do.

We have more important problems and needs than focusing on EIA documents, but we will never get to these if we do not reform the documents.

### C. Bring Foresight Back Into NEPA

It's time to go back to the future and focus on NEPA's goal of foresight to achieve sustainable communities and a healthy environment. Only a small section of NEPA is about EISs. Let us stop marginalizing this remarkable statute as we move forward toward an authentic Green Recovery.

If NEPA had truly met its promise to force us to look before we leap, we would not be facing the current extent of environmental degradation. Yet, we now also face an unprecedented opportunity to reshape our future relationship with nature. Ironically, the same motivation drove NEPA's enactment 40 years ago. Did NEPA fail us, or did we fail NEPA? Can we reinvigorate NEPA to fulfill its purpose and our future?

NEPA first and foremost is a government management statute, as noted at the outset of this Article. NEPA directs that all federal officials and agencies perform good environmental management by providing a model of sustainability for the private sector, for citizens, and for the world.[40]

It is time to empower federal agencies and their staff to use their imagination to think and act in this way. This would represent a future for NEPA that implements its words and its intent.

One of the main critiques of the effectiveness of the NEPA process, as it has been generally understood and conventionally carried out, is that the timing of NEPA documents are too late in the planning and decision process to shape strategic choices: the alternative courses of action to be examined. This has been a conundrum the CEQ and federal agencies have faced since NEPA was enacted.[41] The 1978 CEQ NEPA Rules improved prior practices, but 40 years of experience and new technology allow for another leap forward.

The NEPA process often results in better proposals because of the agency and public scrutiny that will follow in the formal process.[42] The formal NEPA documents and process also result in improving proposals. However, good environmental information does not come to bear, as NEPA intended, on the initial identification and vetting of options. To the contrary, the conventional process often involves agencies hiring consultants to perform EIA on a proposed action (the agency's preferred alternative) in order to comply with NEPA.[43]

### D. Two Radically Modest Proposals

The following two proposals are forward-looking, yet radical because they return to NEPA's roots and intent. These proposals would allow agencies, applicants, and the public to use new and different NEPA processes to bear on the environmental challenges of today and tomorrow: global warming and climate change; energy and renewable resources; healthy human communities and natural habitats; biodiversity; and species extinction on a local and global scale, to name a few.

They would not undermine the conventional NEPA EIA process, yet they would not import the perceptions and baggage associated with that process. They could be implemented by rule or executive directive, if not by legislation, but they would need to be formally authorized, or agencies will not have the regulatory incentive and legal protection to use them.

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39. The Summary is required to stress the issues to be resolved including the choice among alternatives (not comparing the description of the alternatives). 40 C.F.R. §1502.12. The Washington SEPA requirements are more explicit, stating the Summary "shall not merely be an expanded table of contents." Wash. Admin. Code 197-11-440(4). The Summary for an integrated plan/EIS Summary is focused on sustainability: "The summary should highlight from an environmental perspective the main options that would be preserved or foreclosed by the proposed [Growth Management Act] action. It should reflect SEPA's substantive policies." Wash. Admin. Code 197-11-235(4).
40. Long before sustainability, stewardship, and precautionary principle became buzzwords, §101 articulated these, such as acting as a "trustee of the environment for succeeding generations" and creating and maintaining conditions under which people and nature "can exist in productive harmony."
41. The point in time between thinking and proposing is difficult to define. The NEPA Rules try to address this mainly through the definitions of major federal action and proposal, which must be read together, and by encouraging agencies to provide more specific guidance in their own procedures relevant to their own programs. 40 C.F.R. §1508.18(b). Washington's SEPA, as some other state NEPAs, provides more explicit direction relative to rulemaking and permit processes. *See, e.g.*, Wash. Admin. Code 197-11-055.
42. The CEQs three comprehensive reviews over the past four decades have documented this result.
43. To be clear, there is much value in having knowledgeable consultants in the EIA process, especially to implement a systematic interdisciplinary approach, obtain information, and provide technical reports. However, many agencies with limited staff largely delegate EIA preparation to consultants, rather than integrating environmental information with planning in an iterative way. More important, agency staff rely on consultants to synthesize information, such as preparing an EIS Summary or providing comparative evaluation of alternatives. This usually results in inventories of impacts rather than highlighting key environmental trade offs among alternatives. This is not to fault consultants, as they are not usually brought into the internal high-level strategic thinking of the agency and do not have the knowledge or confidence to go out on a limb to articulate the basic environmental perspectives motivating decisionmakers. EIA post-mortems with agency staff often reveal that the staff believe the process and documents would be more effective if the agency staff itself assumed more of the process and writing, especially relating to alternatives. In part, for this reason, it is likely of less importance whether consultants are retained by agencies or applicants than whether knowledgeable agency staff are involved in the process.

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- ***Iterative environmental process***: Authorize a community-oriented, iterative EIA process that results in a preferred alternative *before or in conjunction with* a formal NEPA document (or alternatively through a series of EAs). This takes the scoping concept to its full potential.

  Standard practice over the past 40 years often has the lead agency grasping for straw alternatives to put in an EIS or EA so that it looks adequate. How many NEPA practitioners have been asked by clients, "how many alternatives do we need to discuss to be adequate?" This proposal uses an inclusive, consensus-based process for agencies and affected interests and communities to work together to *develop* the best alternative. The resulting EIA document can reflect this process, rather than start over from scratch.[44]

- ***Strategic environmental assessment (SEA)***: Just as the NEPA Rules provide for a different kind of "legislative EIS," NEPA will only be used for strategic-level assessments if these are recognized as different in nature than the "policy, plan, and program" EAs and EISs as defined in the NEPA Rules.[45]

  Given the broad-scale policy choices associated with an agency thinking through its actions to reduce carbon footprint, implement green buildings, and make similar fundamental changes in operations, the traditional EA/EIS is not likely to be the vehicle an agency uses for policy change. The same is true for an agency undertaking a concerted strategic approach to changing its policies and programs to promote sustainability.

  Environmental strategy analyses can be more like white papers than a traditional EIS. There is good reason to provide for interagency and public review, yet insulate them from judicial review.[46] If an agency wishes to rely on them for subsequent NEPA coverage, as in a tiered process, then study would of course need to be subject to judicial review. We can also learn from other countries' experience with SEA.

### *E. New Life for §§102(2)(A) and (B)*

The 1978 NEPA Rules were a marked departure from the prior CEQ guidelines because they shifted the focus from preoccupation with EISs to an environmental review process. Still, NEPA remains preoccupied with §102(2)(C): whether an action is categorically excluded from review, requires an EA or an EIS. It's time for another leap forward.

Both of the proposals above would provide federal officials with the ability to interrelate environmental, economic, and other essential considerations of national policy from the outset, using rigorous environmental analysis, precisely as contemplated by §102(2)(A) and (B), not to mention (E) and (F), of NEPA.[47]

Rather than become preoccupied with an illusory, "litigation-proof" objective of producing an "adequate document," these innovations would refocus on NEPA's substance: looking for a better path from the outset in all government activities to carry out business in a way that restores, improves, or does not cause long-term harm to our environment.

The legal basis for both proposals is well-founded in the distinction between contemplated and proposed actions.[48] In essence, both address the early period of policy development before the options have coalesced to the point where a formal NEPA document (EA, EIS, or supplement) may be required, i.e., prior to the time the agency is "actively preparing to make a decision on a proposal and the environmental effects can be meaningfully evaluated."

As noted above, this moment in time has never been easy to define, but given the reality that EAs and EISs are necessarily later in the process than early strategic choices, why not encourage both early strategic use of environmental information *and* a more structured process when proposals for agency action are in fact made?

Far from duplicating or delaying the process, this allows NEPA §§102(2)(A) and (B), coupled with the §101 policy goals, to come into their own to help shape early policy formulation as part of pro-active environmental management by each agency, while preserving the action-forcing

44. This approach depends on a robust scoping process and participation by cooperating agencies including agencies with jurisdiction. To prevent short-circuiting the public review process for those who did not participate in the iterative process, the formal EIA circulated for comment would explain the other alternatives and variations considered in developing the preferred alternative, however, the document would not need to manufacture alternatives for the sake of looking adequate. The lead agency would still need to give serious consideration and, for EISs, respond to suggestions to examine other alternatives. One model for this approach can be found in the Washington state SEPA Rules, Wash. Admin. Code 1971-11-235, esp. 235(6) on integrated land use plans and environmental reviews.
45. 40 C.F.R. §1508.18(b) describes the four types of actions: the four "Ps." These definitions were written with great care to refer to non-project actions that will actually direct or govern a series of projects, not simply any policy or programmatic activity by an agency. The courts have not always interpreted these definitions properly (along with the definition of "proposal") and have both required and excused agencies from EIA as a result, without a consistent jurisprudence.
46. Even though the threat and reality of NEPA litigation had consistently been documented to be overblown, public officials are understandably concerned about subjecting early internal thinking to litigation, potentially stalling the policy development process well before a "proposal" may even exist in NEPA terminology. The only chance for robust strategic EA in the United States at a stage earlier than the formal programmatic actions defined in the NEPA Rules is through an alternative process that does not involve potential litigation, at least until an NEPA EA or EIS would otherwise be required under the NEPA Rules. A pass on judicial review for the SEA (with perhaps an alternative form of quality assurance review) would provide a powerful protection and therefore incentive for agencies to try it. If the agency wished to use the SEA to provide NEPA compliance coverage for later proposals, the proposal would presumably govern a series of subsequent actions and therefore meet one of the existing NEPA definitions of policy, plan, or program (40 C.F.R. §1508.18(b)), an EA or EIS would be prepared, subject to judicial review, and usable for efficient tiering (or coverage for) subsequent actions.
47. To paraphrase NEPA §§102(2)(A) and (B), require a systematic interdisciplinary approach and development of methods and procedures to give appropriate consideration to environmental values along with economic and technical considerations. Sections 102(2)(E) and (F) require developing alternatives where there are unresolved conflicts in resource use and taking a global and long-term view.
48. Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976).

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requirements of NEPA when the agency proposes major federal actions.

## VI. Conclusion

Sometimes it is hard not to feel imprisoned by NEPA. Any good practice can develop bad habits and rigor mortis after four decades. As report after report has concluded, NEPA itself is sound, but it needs to be carried out better. NEPA isn't easy: you can't legislate wise thinking or good writing. An important element involves adequate competent staff in our agencies.

It is not exactly as though we have been wandering in the wilderness for 40 years—NEPA and state NEPAs have been revolutionary and made remarkable and positive contributions to environmental quality—but the question remains whether the past 40 years has been time enough for a new generation to lead us into the Promised Land.

Thomas Jefferson reminded us that the revolution takes constant renewal. The challenges of our time demand it. The pyramid on the Great Seal of the United States on the back of every dollar bill shows us three powerful images that are a metaphor for NEPA: a new order has begun (the phrase under the pyramid), the work is not yet finished (the incomplete pyramid), foresight is the key (the divine eye above the pyramid).

In the face of daunting challenges, President Obama dares us to dream, and to act to realize these dreams. NEPA too, dares us to dream and to realize a community and a world of productive harmony between people and nature.

Environmental impact assessment, as practiced in the United States at the federal and local levels, has been criticized for being a negative law, focused on the impacts or problems with proposed actions, rather than a positive approach of identifying sustainable alternatives. What better time to reinvent EIA in the United States by focusing on NEPA's original intent: finding alternatives that build a foundation for a sustainable future?

As we reflect on NEPA's past 40 years, we can learn much from states that have stepped into a void left by the federal government. We can be serious about making environmental documents more accessible and useful. Can we use NEPA to help meet the challenges of the future?

The answer is in the hands of a new generation, for whom environmental values are far more natural than preceding generations. We ancients who were present at the creation can help, but NEPA's future is up to those who learn from and are not bound by the past.