



ENVIRONMENTAL
LAW • INSTITUTE®

ENVIRONMENTAL LAW INSTITUTE
RESEARCH REPORT

Rediscovering the National Environmental Policy Act

Back to the Future

SEPTEMBER 1995

**REDISCOVERING THE
NATIONAL ENVIRONMENTAL POLICY ACT
Back to the Future**

**Environmental Law Institute
Copyright © 1995**

This project was supported in part by Cooperative Agreement CR-822795-01 with the Environmental Protection Agency and by a generous grant from the Geraldine R. Dodge Foundation, Inc. The authors were James McElfish and Elissa Parker. Special thanks to Dave Rejeski of EPA's Office of Policy, Planning and Evaluation for his support of the project and his insights into NEPA. The views expressed herein should not be attributed to EPA nor should any official endorsement be inferred.

Copyright © 1999 Environmental Law Institute ®. A limited license is hereby granted to visitors to the ELI Web site to download, electronically or mechanically store, or retrieve and print one copy of this work in its electronic format for personal, academic research, or similar non-commercial use only, provided that notice of copyright ownership appears prominently on the copy. Electronic retransmission of the work without the express consent of the Environmental Law Institute is strictly prohibited.

Rediscovering the National Environmental Policy Act: Back to the Future

Copyright © 1995 Environmental Law Institute ®. All rights reserved.

ELI Project # 922055, ELI Project # 950300

Portions of this report were previously published as James McElfish, "Back to the Future," The Environmental Forum® 12(5): 14-23 (1995).

(Environmental Law Institute®, the Environmental Forum®, ELR®, and the Environmental Law Reporter® are registered trademarks of the Environmental Law Institute.)

TABLE OF CONTENTS

I. ANCIENT TEXTS FOR OUR TIME	1
II. WHAT DOES NEPA SAY?	3
NEPA Establishes a "Continuing" National Policy With Six Discrete Objectives	3
NEPA "Authorizes and Directs" Implementation of These Objectives	4
III. WHAT DOES NEPA DO?	9
NEPA is a Grant of Authority	9
NEPA Gives the Future a Seat at the Table	12
<i>Considering a Longer Time Scale</i>	12
<i>Are We Making Progress on What Matters?</i>	16
IV. WHY ISN'T NEPA WORKING THIS WAY?	25
V. USING THIS LEGACY	29
NEPA as Self-Implementing	30
Presidential Executive Order	31
New Council on Environmental Quality Regulations	32
Agency Implementation Options	33
Adopt a Congressional Rule	34
NEPA's Renewal	35

Chapter I

Ancient Texts For Our Time

One principle of conservation has always been to find new uses for old things. One such old thing, in mint condition, is the National Environmental Policy Act (NEPA),¹ signed on January 1, 1970. Like an unexpected legacy from a forgotten relative, it is about to come in handy.

While 25 years may not seem that long to most people, it is a lifetime in law. We don't even write laws like NEPA any more -- three pages long, free of legalistic jargon, and still relevant a quarter century later. Contrast, for example, the Clean Air Act Amendments of 1990 -- 800 pages of dense, nearly incomprehensible clauses requiring equally complex regulatory interpretations, and scheduled for amendment at seven-year intervals.

NEPA is an intelligent law. It uses a model of thinking about nature, the economy, individual rights, and decisionmaking that we are only now beginning to understand. Today there are competing schools of "ecosystem management," "sustainable development," "reinventing government," "reviving responsibility," "devolution to the states," and other concepts. But NEPA anticipates and integrates these ways of dealing with the world. Indeed, NEPA provides a way to address issues -- including patterns of consumption, the urban environment, the relationship between natural resources and economic prosperity, and sustainable design -- that we have greater capacity to handle than we did in 1970.

The conventional wisdom about NEPA is that it is a flowery preamble attached to a single -- and wholly procedural -- requirement to prepare environmental impact statements for a small subset of federal decisions. This conventional wisdom is wrong. Like a classic of literature read when one is too young, what one remembers about NEPA is not, in fact, what is most important about it. NEPA is not just an environmental impact statement law. It is, rather, a

vision for this nation's future, coupled with an intensely practical strategy for action.

Two forgotten elements of NEPA are critically important if it is to be understood as an opportunity:

First, the law is a grant of authority to take action. NEPA establishes goals of greater ecological and economic productivity, fills gaps in federal agency authority, and authorizes federal partnerships with state and local governments and the private sector.

Second, NEPA both authorizes and directs a focus on the future consequences of governmental and nongovernmental actions. NEPA's focus overcomes inconsistent policy signals, particularly those that may lead to the pursuit of short-term returns without regard to resulting future losses.

If we want to solve our problems as a nation and pursue a path toward sustainability, we have the law we need for effective action -- unused and in its original box.

Endnotes

1. Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-4347.

Chapter II

What Does NEPA Say?

It is impossible to make intelligent use of a tool like NEPA without reading it. Relying on court decisions and articles for one's view of NEPA is like reading commentaries on the Ten Commandments without ever picking up the text itself -- a fatal error when it comes to law or life.

NEPA ESTABLISHES A "CONTINUING" NATIONAL POLICY WITH SIX DISCRETE OBJECTIVES

The Congress...declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.¹

NEPA establishes a policy intended to promote ecological and economic productivity -- a "productive" harmony that is designed to fulfill social, economic, and other requirements. The policy is carefully broken down in NEPA into six discrete objectives -- imposed on all federal "plans, functions, programs, and resources." Federal decisionmakers must take care to assure:²

1) responsibility for the future.

"fulfill the responsibilities of each generation as trustee of the environment for succeeding generations"

2) environmental equity.

"assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings"

3) beneficial use.

"attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences"

4) historical, cultural, and biological diversity and individual liberty.

"preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice"

5) widespread prosperity.

"achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities"

6) management for quality (and for conservation).

"enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

These six objectives are the guts of NEPA's commands to the agencies. They may be regarded as a *checklist* to be used to measure the ability of a policy decision or action to serve the stated national policy of enhancing ecological and economic productivity. If actions are consistently measured against the six objectives in a systematic way, then federal decisions will tend to favor sustainable courses of action, or at least will mitigate unavoidable adverse effects.

NEPA "AUTHORIZES AND DIRECTS" IMPLEMENTATION OF THESE OBJECTIVES

The objectives spelled out in NEPA are not mere sentiments, but positive law, binding on Congress, the President, the courts, and all federal agencies. ³ Section 102 of NEPA says:

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be *interpreted and administered* in accordance with the policies set forth in this Act, and

(2) all agencies of the Federal Government shall...[take enumerated actions, including, but not limited to, preparation of environmental impact statements in certain circumstances].⁴

Both of these subsections of § 102 are extremely important, although subsection (2) has received virtually all of the attention from lawyers and policy makers.

Section 102(1) provides a rule for formulation of policies and regulations, for statutory construction, and for enforcement and administration. It is the legal basis for applying the six NEPA objectives, and is the reason why they cannot be dismissed as "preamble."⁵ Moreover, § 102(1) is not limited to "agencies," a term that is used in § 102(2).

Section 102(2), while better known, is also important for its lesser known parts. In addition to requiring preparation of environmental impact statements (EISs) for a small subset of federal decisions,⁶ it requires all federal agencies to use a "systematic, interdisciplinary approach" using the "natural and social sciences and the environmental design arts" in their planning and decisionmaking.⁷ It requires them to "develop methods and procedures" to "insure that presently unquantified environmental amenities and values" are given appropriate consideration in decisionmaking.⁸ And it requires agencies to identify and develop alternatives "in any proposal which involves unresolved conflicts concerning alternative uses of available resources."⁹ Agencies are directed to recognize the "worldwide and long-range character of environmental problems" and to support international cooperation with respect to those problems to prevent a decline in the world environment.¹⁰ They must make advice and information available to assist state and local governments and private institutions and persons in activities to restore, maintain, and enhance the quality of the environment;¹¹ and they must "initiate and

utilize ecological information" in the planning and development of resource-oriented projects.¹² They also must assist the Council on Environmental Quality in its information gathering and other functions.¹³

These § 102(2) obligations are profoundly important. They go far beyond the simple environmental impact assessment requirements enforced by the courts. Nor are these mere subsets of the EIS requirement.¹⁴ Principles of statutory construction compel a contrary conclusion: First, these requirements are set out in subsections that make no reference to the EIS provisions or to "proposals for legislation and other major federal actions" that require an EIS.¹⁵ Second, several of these subsections precede while others follow the EIS subsections, indicating their independence of those requirements. Third, these subsections include requirements - such as the requirement to study alternatives where there are unresolved conflicts concerning resource use - that would be redundant if limited to EIS situations (since the EIS provision contains its own requirement to study alternatives).¹⁶ Fourth, the subsections contain directions to the agencies that have nothing to do with the EIS requirement - such as the requirement to support "initiatives, resolutions, and programs designed to maximize international cooperation."¹⁷

A careful reading of NEPA shows that it addresses core issues of policy, executive discretion, statutory construction, and engagement by the federal government with the private sector and state and local governments. These are precisely those areas in which guidance is frequently lacking in agency-specific federal laws.

NEPA provides authority to engage in activities that we might today gather under the rubric of "sustainable development." What NEPA contains, however, is well beyond what even the most optimistic observer could hope for as a legislative response to the recommendations of of the President's Council on Sustainable Development.¹⁸ NEPA sets six discrete national policy objectives and directs the entire governmental apparatus to implement them to the fullest possible extent, while providing even more detailed instructions to federal agencies. A similar proposal, if made today, might be dismissed as hopelessly visionary.¹⁹ But it is already the law of the land.

Endnotes

1. 42 U.S.C. § 4331(a). Congress gave NEPA three purposes: NEPA was enacted to declare a policy of "productive and enjoyable harmony" between humans and the environment. It aimed to promote efforts to "prevent or eliminate" damage to the environment and to "stimulate" human health and welfare. NEPA also was enacted to "enrich understanding" of ecological systems and natural resources important to the United States. 42 U.S.C. § 4321.
2. 42 U.S.C. § 4331(b)(1)-(6).
3. Even though Congress, the judiciary, and the President are not "agencies" within § 102(2) (*see* 40 CFR 1508.12), the duty to "interpret and administer" policies, regulations, and laws in accordance with the policies set forth in NEPA is created by § 102(1), 42 U.S.C. § 4332(1), which is not limited to "agencies." 40 CFR 1500.1(a) also notes that while § 102(2) applies to federal agencies, "the President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."
4. 42 U.S.C. § 4332 (emphasis supplied).
5. See Nicholas C. Yost, "NEPA's Promise - Partially Fulfilled," 20 *Envd. L.* 533, 548 (1990) ("section 102(1)...explicitly requires all agencies to follow the policies of section 101. That is a substantive requirement and it is appropriately judicially enforceable.")
6. Agencies must prepare environmental impact statements in connection with "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).
7. 42 U.S.C. § 4332(2)(A).
8. 42 U.S.C. § 4332(2)(B).
9. 42 U.S.C. § 4332 (2)(E). This "alternatives" requirement is clearly *not* limited to proposals for "major Federal actions significantly affecting the quality of the human environment" - the trigger for an environmental impact statement. The law avoids that formulation in favor of the broader mandate. Also, by requiring development of the alternatives "in any proposal" rather than in the "detailed statement" the law makes it clear that the obligation is not limited to EIS situations.
10. 42 U.S.C. § 4332(2)(F).
11. 42 U.S.C. § 4332(2)(G).
12. 42 U.S.C. §§ 4332(2)(H).
13. 42 U.S.C. § 4332(2)(I).
14. § 102(2)(C), 42 U.S.C. § 4332(2)(C).

15. The EIS requirement is subsections (2)(C) and (D); the other requirements are in subsections (2)(A), (B), (E) - (I).

16. Compare § 102(2)(C)(iii) (alternatives required for EIS) and § 102(2)(E) (alternatives required for unresolved conflicts). See n.9, *supra*. See also *Trinity Episcopal School Corp. v. Romney*, 523 F. 2d 88 (2d Cir. 1975) (§ 102(2)(E) requires consideration of alternatives even where no EIS is required), subsequent decision rev'd. on other grounds, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

17. 42 U.S.C. § 4332(2)(F).

18. The PCSD was established by Exec. Order No. 12852, 58 Fed. Reg. 35841 (1993), as amended by Exec. Order No. 12855, 58 Fed. Reg. 39107, ELR Admin. Mat. II 45058 (1993). Its mission is to develop and recommend to the President a sustainable development strategy for the nation. Sustainable development is generally defined as development which provides for the needs of the present generation without compromising the ability of future generations to meet their own needs.

19. See, e.g., *Draft Sustainability Council Proposals Widely Deemed Unrealistic, Inside EPA* (April 28, 1995), at 3-7.

Chapter III

What Does NEPA Do?

Properly understood, NEPA has three consequences, only the last of which has been substantially realized: First, it is a grant of authority. Second, it gives the future a stake in present decisions. And third, it provides a procedural mechanism (the EIS) to consider certain agency actions. Using NEPA as a modern tool for sustainable development requires us to recover the first two consequences and to understand their importance for governmental decisionmaking.

NEPA IS A GRANT OF STATUTORY AUTHORITY

Federal agencies frequently complain that their authorizing legislation (or "organic" laws) do not allow them to consider certain issues or to involve public and private entities in cooperative or co-funded efforts. The National Park Service complains that it cannot deal effectively with issues beyond its boundaries; the Forest Service argues that it cannot enter into cooperative management of forest lands with adjacent private landowners in the same watershed; the Small Business Administration explains that it lacks authority to assure that the businesses it assists do not contribute to urban sprawl or to impacts on air quality. But NEPA, which applies to "all agencies of the Federal Government," as well as more generally to the entire federal apparatus, can overcome this apparent disability.

NEPA provides a mandate to the agencies. Section 102 provides that agencies shall administer their laws "to the fullest extent possible" in accordance with the policies and prescriptions set forth in the Act.¹ Section 105 of NEPA provides:

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.²

Construed as a grant of authority, NEPA provides an excellent basis for governmental action. Indeed, the law provides ample authority to accomplish desired actions not covered in specifically targeted laws. The Council on Environmental Quality's (CEQ's) regulations make clear that the phrase "to the fullest extent possible" in § 102 means "that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations *expressly* prohibits or makes compliance impossible."³

NEPA can shape policy choices by providing a basis for selecting among competing social benefits and tailoring actions to serve multiple objectives.⁴ All agencies are to meet the six objectives of responsibility for the future, environmental equity, enhancing beneficial use of resources, preserving diversity and choice, increasing prosperity, and achieving quality in renewable resources and recycling of nonrenewable resources.⁵ How many federal agencies use this NEPA checklist of six objectives along with their other statutory mandates? Today none do.

NEPA directs agencies to break down the barriers among disciplines that inform federal decisionmaking. The old paradigms embodied in most of our law do not reflect ecological understanding and, indeed, often compel unsustainable development. This is why NEPA's approach is so important. Specifically, NEPA directs agencies to "insure the integrated use of the natural and social sciences and the environmental design arts" and include "unquantified environmental amenities and values" in decisionmaking.

This mandate is intended to overcome barriers that prevent economic policymakers from considering ecological effects, and barriers that lead to conflicting results -- such as cases in which one federal program subsidizes activities that must then be mitigated by another program. For example, one of the greatest, yet often ignored, impacts of federal law on the environment is governmental direction of private sector investment through subsidies. Development subsidies often undermine expensive environmental protection efforts -- destroying natural resources, communities, and other economic opportunities. For instance, quotas on sugar protect Florida sugar producers whose effluents, when released into the Everglades, require massive water pollution cleanup projects.⁶ Yet the destructive activity would be uneconomic if not for the intervention of law in the marketplace.

Virtually all extant legal structures allow economic development to externalize certain costs -- such as environment and human health costs or resource depletion. Because of this fundamental flaw in the laws governing most activities, unsustainable activities almost always assure a higher rate of return on capital than more sustainable alternatives. This is so not because unsustainability is naturally more competitive, but because the legal structure creates artificial advantages for unsustainable activities. NEPA provides a way to bring in additional information and considerations through the mandate to look beyond agencies' organic laws.⁷ The "blindness" that often limit (or comfort)⁸ bureaucracies are not legally required. Indeed, NEPA outlaws them and directs agencies to include an entire array of additional considerations -- considerations of sustainability, environmental equity, beneficial use, and others.

NEPA can break down jurisdictional barriers as well. For example, one persistent question has been whether federal agencies have authority to look at adjacent land uses in order to coordinate programs with differing objectives toward a common end - that of sustaining natural systems and communities. As a step toward this approach, but lacking explicit authorizing legislation, Interior Secretary Bruce Babbitt issued an administrative order establishing the National Biological Service (NBS), making it "primarily responsible for accomplishing biological research and collecting, analyzing and disseminating the biological information needed by the Interior Department and other Federal agencies to meet responsibilities related to the sound management of the Nation's resources..."⁹ The NBS is required to work closely with States, other agencies, nongovernmental organizations, and professional and scientific organizations. The NBS mission statement is consistent with -- but far less detailed than -- NEPA's statement applicable to *all* federal agencies. NEPA requires them to "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."¹⁰ Whether or not the NBS survives as an entity, its mission is already part of the nation's laws - and has been since 1970.

The understanding of NEPA as a grant of authority is liberating. It provides the discretion necessary to consider a broad array of relevant factors in decisionmaking. It also provides a basis for cooperation among agencies, governmental levels, and the private sector.

NEPA GIVES THE FUTURE A SEAT AT THE TABLE

In addition to being informed about the range of alternatives to any action under consideration,¹¹ the public has a fundamental right to know at least four other things, if they can be known: (1) what are the likely cumulative effects of an action, (2) what are the intergenerational effects of an action, (3) what, if any, irretrievable commitments of resources are being made by an action, and (4) are things getting better or worse as measured by accepted indicators?

NEPA requires answers to these questions, and thereby forces a future perspective -- overriding the typical short time frames that lead agencies to destructive economic, social, and ecological choices. It does so in two ways. First, NEPA compels the use of a longer time scale in decisionmaking. Second, it commands the national government to identify and track indicators of environmental progress.

Considering a Longer Time Scale

NEPA requires a profound shift in perspective -- a lengthening of the usual time horizons used in making decisions to commit resources. It expressly directs the government to use all practicable means to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."¹² This is one of the hallmarks of the law of sustainable development.¹³ It mandates the need to look at a longer period. The attention to "future generations" that is explicit in Agenda 21, as well as the maxim among certain American Indians to consider the impacts of actions upon the seventh succeeding generation, gives some idea of the scale involved.¹⁴

Most institutions and organizations operate with, at most, 5- or 10-year plans because of the volatility of human affairs. Many use only shorter planning horizons. Even very sophisticated economic models do not perform well over longer periods. The Intermodal Surface Transportation Efficiency Act (ISTEA) establishes a 20-year resource planning horizon for metropolitan planning organizations.¹⁵ Public utilities

use a similar 20-year planning horizon. In many respects, however, all of these horizons are too short for meaningful sustainable development activities.

Planning over a period as long as 100 years is probably impossible. *Considering* such a long period in decisionmaking is, however, essential. For example, decisions about infrastructure -- roads, bridges, sewers, industrial and residential developments, railroads, and port facilities -- have a long term set of consequences, affecting land development patterns for 100 years or more. The giant steel mills of Pittsburgh came (and went) within a 100 year period for the most part, although site contamination lingers. Land preservation decisions also require a lengthy time horizon. So do many commercial decisions. Prime farmland, once covered by asphalt and development, cannot be restored to meaningful productivity. Even commercial hardwood forests need to be managed on 60-100 year rotations if they are to produce continuous supplies of maximally valued wood. Forests in parts of the West may require even longer periods.

Roads may require the longest view. They remain upon the landscape for a long time, and they dictate patterns of development. Ancient Roman roads remain in use today in Britain. In western Maryland and Pennsylvania, Braddock's road -- now over 200 years old -- was significant in dictating where many of today's roads, towns, and developments exist. In addition, because in law, roads are linear properties legally held by perpetual entities, it is less likely that they will eventually be turned to other uses or combined with adjacent properties for other purposes. When a factory or school building is erected, it is possible to plan or foresee other uses for the building or the site after the intended activity has run its course. This is rarely, if ever, the case with roads.

It is also the case that some decisions take a long time to show adverse consequences. For example, decisions about dams made 50 years ago have produced resource constraints, resulting in hard choices today about maintaining or restoring native anadromous fish stocks. Decommissioning of infrastructure has rarely been a part of planning in this country. Thus, taking the long view can be critical. The hallmark of sustainability may well be the attention given to long-term consequences of decisions. NEPA, properly understood, requires us to take the long view of a whole range of activities. In its 1993 treatise, *Sustainable Environmental*

Law: Integrating Natural Resource and Pollution Abatement Law from Resources to Recovery, the Environmental Law Institute used a simple version of this approach -- linking the laws that govern extraction and processing of raw materials to the laws that govern their end use and disposal or reintegration into the environment.¹⁶ Anticipating or planning for the fate of materials, however, is only a small portion of what is possible.

Indeed, it is *profoundly conservative* to anticipate long term consequences of decisions. The 18th century envisioned construction and land use choices as exerting perpetual influences upon the landscape.¹⁷ Such an approach is deemed radical today where the time horizon seldom extends beyond 20 years. Nevertheless, public decisions about land, water, and other resources require greater attention to time scale issues. What happens at the end of a project's useful life? What opportunities are foreclosed and created?

Architect and visionary Bill McDonough, now Dean of the University of Virginia's School of Architecture, talks about these considerations in terms of design. He argues that design decisions must incorporate ultimate reuse or recycling of a building, product, or machine. If these are not taken into account at the outset of a project, he maintains, implicit design decisions (with adverse or at least unexamined consequences) have been made.¹⁸ But these concepts of long term consequences are not simply matters of "green design." They are equally important in understanding and taking into account the vulnerability and biological resilience of ecosystems. They require us to seek to understand: How will the salmon sustain themselves if there are long term adverse impacts in the oceans as well as dams in the estuaries? What happens when - as it inevitably will - a 100-year storm hits the "mitigation" area for a proposed construction project? Taking a longer view is essential if the nation is to foster effective and realistic sustainable development practices.

This is not a matter of envisioning "worst-case" scenarios. Rather, it is an attempt to use the NEPA §101 time horizon for decisionmaking. It is a way to drive for "quality" in decisionmaking. Looking at longer time scales and cumulative effects is a way to move away from the present policy of environmental crisis management. The conservation of endangered species is far simpler if long term

effects on ecosystems and habitats are considered, rather than attempts to preserve and restore remnant populations on the brink of extinction. If NEPA's commands to give the future a seat at the table were taken seriously, we would have little need for an Endangered Species Act. EPA's Science Advisory Board recently recommended a serious attempt to implement this approach across the board on environmental matters, arguing that from a research point of view "[a]s much attention should be given to avoiding future environmental problems as to controlling current ones."¹⁹

Contrast NEPA's approach with most other law, which brooks no interference with immediate use. "Use it or lose it" is the hallmark of Anglo-American law. Owners can lose lands to adverse possessors; rights can be surrendered by laches in defending them;²⁰ landowners are taxed by state and local governments on the potential productivity of their lands rather than their actual use or nonuse; resources set aside for the future are derided as "lock-ups" of our national wealth. But NEPA says to look at the future, manage for quality, and assure equality of opportunity over the long term.

Thomas Jefferson understood the tendency of each generation to squander the inheritance of its successors. In 1789, he wrote to James Madison:

Then I say, the earth belongs to each...generation during its course, fully and in its own right. The second generation receives it clear of the debts and encumbrances [of the first], the third of the second, and so on. For if the first could charge it with a debt, then the earth would belong to the dead and not to the living generation. Then, no generation can contract debts greater than may be paid during the course of its own existence.²¹

NEPA gives these future generations a seat at the table where decisions are to be made. Its consideration of objectives does not discount the future to present value, nor does it ignore the long term consequences of decisions for future generations. Rather, it directs all federal officials to implement the six objectives of NEPA set out in § 101 -- including the sustainable management and responsible use of resources. NEPA's long term approach is to avoid the creation of encumbrances that may be costly for those in the future to remove.

Are We Making Progress on What Matters?

One of the greatest difficulties in making policy decisions is the problem of discerning whether things are getting better or worse, given the welter of confounding factors and influences. NEPA provides authority to take a clear-eyed view of our progress. This is necessary in order to make mid-course adjustments and whole-sale changes in course.

The importance of "evaluation" is often invoked but frequently misunderstood. Typically, it is limited to questions like -- *Did the law change? Was the project built? Did the desired economic results occur? Did the species recover?* These are important questions, but what is more important are the larger questions about progress toward specific objectives defined in a vision of the future.

NEPA requires the identification and monitoring of a whole range of *indices* of national progress.

Because both the natural world and human society are characterized by complex relationships, it is important to measure the outcomes of concern and not just the means by which we hope to achieve them. Someone once said that people in Washington, D.C. talk about how many hours they work because it is not possible to measure outputs; so instead, they measure inputs. What we should be measuring, and what the voters intuitively know they need to know, is whether things are getting better or worse. Are there more jobs or fewer jobs? Is there more crime or less crime? Is the drinking water safer or less safe? Is the air cleaner or dirtier?

Breadth of vision is important in measuring progress because of the possibility of unexpected outcomes and the variety of impacts. For example, environmental or economic conditions may improve because of the establishment of a new industry that was created not by a formal development incentive or an environmental regulation, but because of a new technological discovery. Indicators may show a decline even though all intervention efforts have been successful on their own terms. It is important to know this so that another strategy can be tried. Indicators may even improve although no efforts were focused on the right things.

(An inscription on the Yale School of Medicine says "seven out of ten get better anyway.") Yet if we monitor change, reasons for the change may be discernable so efforts can be refocused if necessary.

Few organizations have attempted the kind of monitoring that NEPA requires. Seventeen years ago, the Council on Environmental Quality undertook a worthy effort to make compliance with NEPA's EIS requirements a vital and meaningful exercise. Its 1978 regulations and *Forty Most Asked Questions Concerning CEQ's NEPA Regulations* provided detailed guidance on how to evaluate alternatives and provide for an effective review process.²² But this was not NEPA's only command to the Council. CEQ also has "the duty and function --

(1) to assist and advise the President in the preparation of the [annual] Environmental Quality Report [on the status and condition of the nation's environment, current and foreseeable trends, the adequacy of natural resources for fulfilling human and economic requirements of the nation, and an evaluation of programs and activities of all levels of government, nongovernmental entities, and individuals, and a program to remedy deficiencies]²³;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere with the achievement of the policy set forth in subchapter I [of NEPA]...

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy...

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirement and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying cause; and

(7) to report at least once each year to the President on the state and condition of the environment."²⁴

In sum, NEPA commands CEQ to identify indicators on the basis of ecological, economic, and social principles, and to track them in order to guide federal policies and activities toward sustainability.

Unfortunately, over the 25 years of CEQ's existence, its annual report, *Environmental Quality*, continually shifted focus in response to resources and politics of the moment. Instead of following indicators consistently or serving as a guide to policy, the report became a pastiche of miscellaneous information provided by federal agencies. It had no link to the past and no vision of the future. For example, discussion of population issues disappeared after the 1984 report; discussion of noise disappeared after 1979 (when funding for federal programs in the area disappeared); energy issues have been covered sporadically, with discussion of renewables disappearing in 1980 for about a ten-year hiatus; discussion of mining and nonfederal land use both disappeared as issues in the early 1980s.²⁵

In several recent years, preparation of the report has been delayed, while the fate of CEQ was considered by the administration and the Congress. If the CEQ report had been designed and consistently carried out in accordance with the clear vision set out in the statute, such delay would have been tragic. As it is, few outside the conservation community noticed the report's absence.

But it is not too late. With the resurrection of CEQ from its near-death experience in 1994, there is an opportunity to develop indicators and restore a forward-looking, prospective view to the task of tracking results. NEPA provides

the authority that could make environmental indicators key decision-making tools. Imagine a CEQ report that has the same impact on federal policy-making and private decision-making as the Commerce Department's reports on economic indicators or the Labor Department's employment statistics. The nature of decision-making would be transformed.

Much of the needed information is available and is already being tracked by government programs. It is simply not being coordinated, collected by CEQ and handled in a consistent way year to year, thus reducing its value for decisionmaking. NEPA requires all federal agencies to assist the CEQ. Thus the relevant information could be gathered in a manner conducive to long-term tracking and continuous use.²⁶

Such indices of environmental status may have substantial value in developing recommendations and assisting policy makers in targeting resources.²⁷ The value of indicators is being recognized in a number of areas. The Environmental Protection Agency is, for example, developing environmental "goals" for the nation with 10-year benchmarks for measuring progress toward the goals.²⁸ Indicators are a hallmark of "sustainable development" efforts in communities around North America.²⁹ Such recent efforts have gathered stakeholders together over time to define their aspirations for the future of a region and, having done so, to devise indicators of progress. For example, King County in Washington State embarked on a multi-year process to develop a regional vision; the participants arrived at agreement on 40 indicators to determine whether the region is making progress or losing ground on its goals. Indicators include such things as economic performance, job creation, environmental quality measures, average travel times, crime statistics, and health data.

Chattanooga, Tennessee undertook a similar effort (called Re-Vision 2000) in which it identified 27 general regional goals and 120 specific recommendations in five categories:

places (including specific locations, environmental conditions, transportation, historic preservation, beautification),

work (including economic development, tourism, job training, workplace conditions),
government (including leadership, neighborhoods, crime and safety, citizen involvement),
people (including education, health, housing, social services), and
play (including parks, recreation, culture and arts).³⁰

At the state level, Oregon and Minnesota are tracking goals and indicators and have established benchmarks of performance.³¹ A multi-county coalition centered around Albemarle County, Virginia, is currently engaged in a similar effort to identify indicators to guide future decisions. The Canadian provinces have used indicators as a way of explicitly fostering and measuring "sustainable development," a national goal of the government of Canada.

Indicators must be used wisely. Sometimes indicators will get worse before they get better because of forces already in operation. For example, stratospheric ozone loss is expected to get worse because of past discharges of chlorofluorocarbons and other compounds even though recent discharges have been reduced. But over the longer term, the trend is expected to improve if international agreements are maintained. Tracking actual results against projected trends will be critical in instances like these. EPA's Science Advisory Board recently recommended an approach whereby the federal government would issue a report biennially "that describes potential environmental conditions 20 years into the future under several sets of assumptions." The idea is to stimulate public thinking about choices and to foster necessary research and data collection efforts.³² This approach would be fully consistent with NEPA.

Indicators can be used to evaluate the relative importance of specific project proposals, policies, or laws. Synergies and indirect effects will be discernable as will prospects for success or failure. Risks of inaction will become apparent. Sometimes indicators are affected by unexpected forces - shifts in consumer preferences, or rises in energy prices, for example. But it is important to understand these as well as the predicted influences if we are to steer a course toward sustainability. Continuing to look at indicators requires discipline. It is more rewarding for organizations to measure what they succeed at and to avoid measuring things over which they have

tenuous control. But the purpose of the measurement of indicators required by NEPA is a way to adjust actions in the future to get more of what we want and less of what we don't.

If responsibility for tracking indicators can be assumed by local institutions or communities, a set of indicators can build community commitment and environmental literacy. Communities that track their own air quality or that measure acres of greenways conserved may take greater interest in the processes that bring these results about. While the CEQ report has traditionally used aggregated national data, collecting and making data available regionally and locally is becoming ever more possible as information-transfer capabilities improve. Regional planning commissions and metropolitan planning organizations in many areas of the country already have access to databases that can be highly useful in a local context. And NEPA provides for cooperation among federal and non-federal entities, a basis on which to build regional as well as aggregate information.

Investments in the development of indicators not only provide tools for measuring progress, but can also help bring about that progress by empowering people to take responsibility for their own welfare. By forcing the compilation and disclosure of relevant information, NEPA is a tool that promotes both individual responsibility and informed private and public decisionmaking. That use of information can make the marketplace function better and cause it to reflect true costs and benefits of decisions.

Endnotes

1. This provision was substituted by the conference committee for a provision in the House Bill, which had provided that "nothing in the Act shall increase, decrease, or change the responsibility of any Federal official or agency." See *Flint Ridge Dev. Co. v. Scenic Rivers Assn.*, 426 U.S. 776, 6 ELR 20528 (1976).

2. 42 U.S.C. § 4335. See also § 4334: "Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."

3. 40 CFR § 1500.6 (emphasis supplied).

4. NEPA as a whole applies to policies, not just projects. But even the EIS requirements apply in many contexts to policies. For example, NEPA can affect the shape of federal legislation. See 42 U.S.C. § 4332(2)(C)(EIS required on "proposals for legislation"); see 40 CFR 1506.8, 1508.17, 1508.18(a) (rules covering legislative EIS). The EIS process can shape agency programs as well as projects. See 40 CFR 1508.18(b)(1)-(3) ("adoption of policies...adoption of formal plans...adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive."). See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (programmatic EIS). NEPA is also not limited to federal actions which affect U.S. lands and waters. See 42 U.S.C. § 4332(2)(F) (international cooperation). It arguably applies to federal agency actions anywhere, since it is designed "to control the decisionmaking process" and decisionmaking "take[s] place almost exclusively in this country." *Environmental Defense Fund v. Massey*, 986 F. 2d 528 (D.C. Cir. 1993) (EIS applies to U.S. decisions affecting Antarctica). But cf. *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993) (EIS requirement not applicable to extraterritorial military bases subject to complex treaty provisions). The issue of whether NEPA's EIS requirements apply to U.S. actions abroad is still unresolved. See Daniel Mandelker, *NEPA Law and Litigation* § 5.04 (2d ed. 1992, updated annually).

5. 42 U.S.C. § 4332(1), incorporating 42 U.S.C. § 4331(b).

6. See J. William Futrell, *The Transition to Sustainable Development Law*, ELI Research Brief No. 3 (April 1994).

7. See *Ocoee River Council v. Tennessee Valley Authority*, 540 F. Supp. 788 (E.D. Tenn. 1981) (TVA has authority to consider recreational uses as well as uses specified in its enabling legislation). Cf. *Grindstone Butte Project v. Kleppe*, 638 F. 2d 100, 103 (9th Cir. 1981), cert. denied 454 U.S. 965, reh. denied 454 U.S. 1165 (1982) (where other statutory laws allow conditions, NEPA requires that these be taken into account).

8. See Philip K. Howard, *The Death of Common Sense: How Law is Suffocating America* (1994) (bureaucracies avoid responsibility by claiming that discretion is severely circumscribed by an agency's organic law).

9. The order establishing the National Biological Survey was issued on September 29, 1993 (Order No. 3173); the organization was renamed and its mission was restated on January 5, 1995 (Order No. 3185).

10. 42 U.S.C. § 4332(2)(G).

11. NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E).

12. 42 U.S.C. 4331(b)(1).

13. See Philip Warburg and James M. McElfish, Jr., "Property Rights and Responsibilities: Nuisance, Land-Use Regulation, and Sustainable Use," 24 ELR 10520 (September 1994) (identifying prevention of adverse cumulative impacts and protection of the interests of future generations as key precepts of emerging "sustainable use" doctrine).

14. In a similar vein is the statement in Article 1, Section 27 of the Pennsylvania Constitution that the commonwealth's natural resources are "the common property of all the people, including generations yet to come."
15. 23 U.S.C. § 134.
16. Celia Campbell-Mohn, et al., Sustainable Environmental Law (West Publishing, 1993), updated periodically.
17. See James M. McElfish, "Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment," 24 ELR 10231 (May 1994).
18. William McDonough, Design, Ecology, Ethics and the Making of Things (February 7, 1993).
19. U.S. Environmental Protection Agency, Science Advisory Board, Beyond the Horizon: Using Foresight to Protect the Environmental Future, EPA-SAB-EC-95-007 (January 1995), at 6, 21.
20. Laches is a legal term that means that a party has waited too long to assert its rights and that a court will therefore not consider them in resolving a dispute.
21. Thomas Jefferson to James Madison, September 6, 1789.
22. 40 CFR §§ 1500-1508; 46 Fed. Reg. 18026 (1981); 51 Fed. Reg. 15618 (1986) (Question 20 withdrawn).
23. 43 U.S.C. § 4341.
24. 42 U.S.C. § 4344.
25. Council on Environmental Quality, Environmental Quality, (1970-1992).
26. 42 U.S.C. § 4332(2)(I).
27. See S. Novick et al. (eds), Law of Environmental Protection § 9.02[5][a] (1987, updated annually) ("Indices" of environmental status and conditions useful because although scientists may be limited in their ability to predict outcomes, they may nevertheless be able to recommend preferred approaches).
28. See U.S. Environmental Protection Agency, Proposed Environmental Goals for America With Benchmarks for the Year 2005, EPA-230-D-95-001 (February 1995) (Draft). The data collection mechanisms needed to assess progress in these areas are already in place.
29. "Sustainable development" means development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. World Commission on Environment and Development, Our Common Future (1987).
30. Walter Corson, An Inventory of Local and Regional Programs Using Goals and Indicators to Define and Measure Quality of Life, Progress, and Sustainability at the City, County, and State Level, (Global Tomorrow Coalition, 1994).

31. Id.

32. U.S. Environmental Protection Agency, Science Advisory Board, Beyond the Horizon: Using Foresight to Protect the Environmental Future, EPA-SAB-EC-95-007 (January 1995), at 21.

Chapter IV

Why Isn't NEPA Working This Way?

It is now a commonplace that the courts have abridged NEPA, reducing it to a mere procedural requirement -- specifically, the requirement in § 102(2)(C)¹ that an environmental impact statement be prepared and considered before certain federal agency decisions are made. This view of NEPA is completely wrong.

The only limitation imposed by the judicial decisions is that the *courts* have not enforced against unwilling agencies requirements other than the EIS provisions.² The Supreme Court has said:

Once an agency has made a decision subject to NEPA's procedural requirements, *the only role for a court* is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive...³

While these judicial decisions limit the courts' ability to overturn agency decisions on the basis of NEPA's provisions, they do not abrogate the other commands of the law itself -- commands directed at the agencies and the President. The fact that Congress enacted and the President signed NEPA means that the commands contained therein must be adhered to as the commands of the republic expressed through its representative institutions. They are not simply expressions of opinion, letters to the editor, or petitions seeking the favor of federal officials.⁴

There are, in fact, many laws on the books that cannot be enforced by injunctions in court, but that nevertheless provide affirmative direction to the conduct of federal officers. The Administrative Procedure Act itself recognizes that many final governmental actions prescribed by law are not subject to judicial review -- specifically, where "statutes preclude judicial review, or...agency action is

committed to agency discretion by law."⁵ Even parts of the U.S. Constitution fall into this category of law. For example, Article IV, § 4 guarantees to every state a "republican form of government." Although no court has ever held this to be a judicially enforceable obligation, it remains the law of the land and must be followed by the federal government and its officers.⁶

To treat a statutory obligation as non-binding unless a court can order a government official to comply -- or take away liberty and property if one does not -- mocks the Constitutional obligation of the President to "take Care that the Laws be faithfully executed."⁷ Such a crabbed view of NEPA's authority implies that those charged with carrying out the law are free to evade what cannot be compelled -- that the President and the executive branch are presumed to act like Justice Oliver Wendell Holmes's hypothetical "bad man" who cares for nothing in ordering his affairs but the prospect of punishment.⁸ As CEQ's long-time general counsel has noted, this view is plainly incorrect. NEPA, she wrote, "remains law that the President is sworn to uphold."⁹

Moreover, even if one were to take the view that only sanctions make a law "legal" in character, there are other consequences than orders by the judicial branch. For example, an official's failure to follow the dictates of law -- even where not enforceable by court order -- may provide a basis for discipline or dismissal from federal service.

Unfortunately, apart from environmental impact assessment -- which has been integrated into agency procedures and which has served as NEPA's great export to the nations of the world¹⁰ -- federal agencies have substantially neglected NEPA. Part of this neglect is due to an understandable focus on keeping the agencies out of court. But part of it, too, is due to the absence of any focus by the President and the Congress on the main provisions of this law.

Even a study commissioned by the Council on Environmental Quality recently missed the point. In 1994, the CEQ released a contractor's diagnosis of weaknesses in NEPA implementation, including the following preliminary finding:

NEPA's principal purposes are philosophical, and reach beyond the capability of the courts or the administrative process to enforce or achieve.¹¹

This is the sheerest nonsense. NEPA's purposes are not philosophical, but substantive.¹² And NEPA's purposes are in no way beyond the "capability of...the *administrative process* to enforce or achieve." There has simply been no attempt to create or implement an administrative process that would make these portions of NEPA central to agency decisionmaking.

The President or the heads of executive agencies could easily devise processes to ensure that NEPA's call for interdisciplinarity, its emphasis on the future, its six objectives for federal policy, and its use as an affirmative authority are integrated into the processes that agency decisionmakers follow. The following chapter shows some of the ways in which this may be brought about.

Endnotes

1. 42 U.S.C. § 4332(2)(C).

2. The courts have limited their review to subsections 102(2)(C) & (D). 42 U.S.C. §§ 4332(2)(C) & (D). One court did independently apply § 102(2)(E), *Trinity Episcopal School Corp. v. Romney*, 523 F. 2d 88 (2d Cir. 1975), later reversed on other grounds, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). It may be that other portions of NEPA can support judicial relief. See, e.g., Nicholas C. Yost, "NEPA's Promise - Partially Fulfilled," 20 *Envtl. L.* 533, 549 (1990) ("The judicial enforcement of section 102(1) remains and holds the unfilled promise of NEPA.").

3. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1979) (citation omitted) (emphasis supplied). See also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989): "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed -- rather than unwise -- agency action." This emphasis on what NEPA "prohibits" reflects the court's concern with identifying obligations that can serve as the basis for injunctive relief. See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."). This statement was itself obiter dictum by the court: ("All this leads us to make some further observations of relevance to this case...") 435 U.S. at 557.

4. Cf. *Public Citizen v. United States Trade Representative*, 5 F. 3d 549, 554 (D.C. Cir. 1993) (Randolph, J. concurring): "Of course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA..."

5. 5 U.S.C. § 701(a).
6. See *New York v. United States*, 112 S. Ct. 2408 (1992).
7. U.S. Const. Article II, § 3.
8. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." O. W. Holmes, Jr., "The Path of the Law," 10 *Harv. L. Rev.* 457-478 (1897).
9. Dinah Bear, "Using the National Environmental Policy Act to Protect Biological Diversity," 8 *Tulane Env'tl. L. J.* 77, 80 (1994).
10. Nicholas A. Robinson, "Environmental Impact Assessment Abroad," Conference for Federal Agency Personnel on The National Environmental Policy Act: Today's Law for the Future, U.S. Department of State, Washington, D.C. (September 22, 1989).
11. Information Paper, CEQ Effectiveness Study of the National Environmental Policy Act - Section 102, p. 5 (July 1994). CEQ has subsequently affirmed that this paper, prepared by one of its contractors, does not represent the position of the Council. Personal communication, Ray Clark to author, August 1995.
12. "Contrary to erroneous, but all too common impressions, the purpose of NEPA was not the regulation of pollution nor the preparation of environmental impact statements. The purpose of NEPA, as the Act declares, was to adopt a national policy for the environment within the context of the planetary biosphere." Lynton K. Caldwell, "NEPA Revisited: A Call for a Constitutional Amendment," 6 *Environmental Forum*, No. 6, at 18 (Nov./Dec. 1989).

Chapter V

Using This Legacy

Advancing the law is often an exercise in interpretive archeology. A society often doesn't understand what it has until it looks at an old law in a new way. For example, a careful re-reading of the 1899 Refuse Act¹ in 1966 became the basis for a whole new approach to federal control of water pollution - one that led directly to the 1972 Clean Water Act.² Similarly, in the 1980s, those resistant to environmental and social regulation rediscovered the Fifth Amendment's limitation on the taking of private property for public use without just compensation.³

But these illustrative cases are far more of a stretch than the rediscovery of NEPA. Indeed, they required a use of law in a manner probably not foreseen by the law's originators. In contrast, NEPA was designed to do precisely what the this report has identified -- provide new authority and include the future in decisions about the present.

The restoration of NEPA through understanding it as a grant of authority and as a law compelling a focus on the future is timely. Not only does the United States need such a tool to fulfill its commitments to the nations of the world under Agenda 21, signed at Rio de Janeiro in 1992, but also federal officials need ways to break out of the constraints of narrow, issue-driven programs using broader perspectives. The "reinvention" of government requires flexibility, the exercise of discretion, and the ability to address new challenges without constantly changing statutory directions. In this context, NEPA can help by:

- Cutting through problems of cooperation among federal and nonfederal entities by authorizing collaboration;⁴
- Offering a 6-objective paradigm for decisions (not limited to risk assessment or regulatory impact analysis);⁵

- Providing a way to deal with the international implications of U.S. decisions and international cooperation;⁶ and
- Providing authority to track and report on indicators of sustainability.⁷

There are numerous practical ways to integrate this proper understanding of NEPA into practice. They include treating NEPA as self-implementing, issuing a Presidential executive order, issuing additional CEQ regulations, relying on agency-specific mechanisms, and involving the Congress.⁸

NEPA AS SELF-IMPLEMENTING

Agencies and members of the judiciary could take seriously the provisions of NEPA that make it a rule for interpretation and administration of statutory commands. Such rules of interpretation are not unique to NEPA.

Rules of interpretation are often legislatively prescribed. For example, every time Congress enacts a severability clause, it directs the courts how to interpret its laws. Similarly, legislative clauses like "including, but not limited to" direct agencies and courts not to apply the common law principle of *expressio unius est exclusio alterius*.⁹ Even more direct statements about statutory interpretation and administration occur in statutes. For example, the Racketeering Influenced Corrupt Organizations (RICO) Act directs: "The provisions of this title shall be liberally construed to effectuate its remedial purposes."¹⁰

NEPA, as a self-described "supplementary" authority¹¹ that says "the policies, regulations, and public laws of the United States *shall be interpreted and administered* in accordance with the policies set forth in this Act,"¹² provides a rule for judges and administrators to use in construing the other laws of the land.

The rule provided by NEPA identifies six objectives as a checklist for agency decisionmaking. This portion of NEPA is self-implementing, although agencies may design processes to ensure that the checklist is, in fact, used consistently.

PRESIDENTIAL EXECUTIVE ORDER

The most direct approach to realizing the potential of NEPA would be a Presidential executive order directing agencies to use NEPA as a grant of authority and to integrate the decisionmaking objectives into their activities. The purpose of an executive order is to ensure that executive agencies are carrying out their statutorily prescribed duties in a way that reflects the President's goals.¹³ Executive orders have been used, for example, to assign responsibility for environmental programs.¹⁴ Executive orders were used to implement the rediscovered mandates of the 1899 Refuse Act.¹⁵

The executive order is a how-to directive. In recent years executive orders have prescribed procedures for considering costs and benefits,¹⁶ for addressing environmental justice concerns,¹⁷ for promoting waste prevention and recycling in federal procurement,¹⁸ and for federal compliance with right-to-know laws and pollution prevention requirements.¹⁹

It is undoubtedly time for a new NEPA Executive Order. In 1970, President Nixon issued Executive Order 11514 to assure that federal agencies would carry out their then-new NEPA obligations.²⁰ The Nixon order directed agencies to "monitor, evaluate, and control on a continuing basis their...activities so as to protect and enhance the quality of the environment," to develop procedures "for provision of timely public information...in order to obtain the views of interested parties," to "insure that information regarding existing or potential environmental problems and control methods" is made available, to "exchange data and research results, and cooperate with agencies of other governments to foster the purposes of the Act," and to "proceed, in coordination with other agencies, with actions required by section 102 of the Act."²¹

But the Nixon Order did not use NEPA as a grant of supplemental authority, nor did it explain that the six objectives in § 101 are obligatory components of all federal policy decisions. As a result, the 1970 Order completely overlooked the pro-active aspects of the law, including its implications for social justice and economic development consistent with environmental protection. A new executive order could make these links explicit.

The President could issue an executive order with four components:

- (1) The order could require agency adherence to the six NEPA objectives in decisionmaking, possibly building in a review role for CEQ like the role the Office of Management and Budget (OMB) has in clearing proposals for legislation and regulations.
- (2) The order could emphasize the use of NEPA as a grant of authority to the agencies.
- (3) The order could authorize NEPA's use as the basis for federal participation in state, local, private, academic, and other nongovernmental partnerships designed to solve social problems.
- (4) Finally, the order could require the development and monitoring of indicators.²²

The recommendations of the President's Council on Sustainable Development will need a vehicle for implementation. Sustainable development rests upon three foundations -- economics, environment, and communities. All of these are central to NEPA and reflected in its provisions. An executive order grounded in NEPA could be the best approach for assuring implementation of the Council's recommendations by federal agencies and officials.

NEW COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

The CEQ has not issued regulations on NEPA implementation since 1978, even though a great deal of experience has been gained since that time. Much of NEPA has never been covered explicitly by CEQ regulations. Moreover, the 1978 regulations were expressly confined to implementing § 102(2) of the Act; and most of them dealt with the environmental assessment/environmental impact statement process.²³

New CEQ regulations could enlist federal agencies in the implementation of the other provisions of NEPA. For example, such regulations might (1) require agency cooperation in the compiling of data for tracking environmental indicators, and (2) require agencies to use the checklist of 6 NEPA objectives in decisionmaking. New CEQ regulations also might require agencies to implement NEPA's objectives by selecting less damaging alternatives when making decisions on projects, if consistent with agency statutory laws. Or they might require the use of mitigation where feasible and consistent with statutory laws. These requirements cannot be compelled by the courts, but can be adopted by regulation as a matter of policy under the authority of NEPA.

A number of the agency implementation options discussed below could also be set forth in new CEQ regulations.

AGENCY IMPLEMENTATION OPTIONS

NEPA could be used by individual federal agencies to set goals and to establish procedures to meet those goals in decisionmaking. For example, consider NEPA's command to "enhance the *quality* of renewable resources and approach the maximum attainable recycling of depletable resources."²⁴ Just imagine what a Forest Service, or EPA, or Housing and Urban Development policy built on this might look like. Unheard of -- yet required by law since 1970. Similarly interesting results would obtain if agencies were to pursue policies that "maintain, wherever possible, an environment which supports diversity and variety of individual choice."²⁵ Policies built upon this precept, for example, could provide EPA the flexibility it needs to structure variable cleanup standards or to establish alternative performance and design standards based on community or ecosystem needs.

Agencies might also consider adopting process-oriented tests to assure that NEPA's objectives are being met. Agencies could adopt the "checklist" of objectives enumerated in § 101 to assure that decisions are being made with full regard to national policy objectives, as required by § 102(1). Recall that these are (1) responsibility for the future, (2) environmental equity, (3) beneficial use,

(4) historical, cultural, and biological diversity, and individual liberty, (4) widespread prosperity, and (6) management for quality and conservation.

Alternatively, NEPA implementation might benefit from agency use of some version of the three-part test developed by the Pennsylvania state courts in *Payne v. Kassab*.²⁶ That test helps agencies implement Pennsylvania's environmental constitutional amendment protecting the environment and its resources for "all the people, including generations yet to come."²⁷ The decisionmaker must determine -

- (1) that the proposed action fully complied with all rules and regulations,
- (2) that the record demonstrates a "reasonable effort to reduce environmental incursion to a minimum," and
- (3) that the environmental harm from the proposed action does not "so clearly outweigh the benefits" that to proceed further would be an abuse of discretion.²⁸

This test is not intrusive, but provides a simple way - particularly in steps two and three - to implement minimal compliance with NEPA's commands. While such a test might not be appropriate for judicial review -- given the courts' pronouncements about NEPA's procedural character -- such a test could be adopted as part of an agency's administrative approach to assuring that NEPA's objectives are met.

ADOPT A CONGRESSIONAL RULE

Congress could act to make NEPA a part of Congressional reform. For example, Congress could adopt a rule applying the NEPA standards to legislation developed by Congressional committees, using an approach it pioneered in the new Unfunded Mandates Reform Act (UMRA).²⁹ UMRA requires the Congressional Budget Office (CBO) to analyze the implications of legislative proposals and provides that it is not in order for either the House or the Senate to consider a bill

unless the committee has published a statement from the CBO on the costs of any mandates in the bill.³⁰

If Congress took seriously the six NEPA objectives, a CEQ report, like the CBO report, could be required on legislative proposals or on a specific subset of legislative proposals originating in committee.³¹ While the time may not be ripe, politically speaking, for Congress to think about applying NEPA objectives to its own actions,³² this approach could be effective in informing the legislative branch in the future.

NEPA'S RENEWAL

NEPA is an invaluable tool that, with the exception of environmental impact assessment, has been unjustly neglected in its first quarter century. It provides a clear set of objectives and a mandate to federal officials. It provides authority for new types of cooperation and a way to lengthen the time horizon for decisionmaking. It is a template for sustainable development. We may need to practice using this law in order to use it well, but like any well-made thing, it will accept some awkwardness until we gain proficiency. To the conservationist slogan "reduce, reuse, recycle" we might properly add -- with respect to NEPA -- renew.

Endnotes

1. 33 U.S.C. § 403.

2. 33 U.S.C. §§ 1251-1376. See *United States v. Standard Oil Co.*, 384 U.S. 224 (1966) (covers discharges of pollutants); Exec. Order No. 11,288, 31 Fed. Reg. 9261 (1966); Exec. Order No. 11,574, 35 Fed. Reg. 19627 (1970) (establishment of regulatory program).

3. See Charles Fried, *Order and Law: Arguing the Reagan Revolution - A Firsthand Account* 183 (1991) ("The grand plan was to make government pay compensation as for a [Fifth Amendment] taking of property every time its regulations impinged too severely on a property right...If the government labored under so severe an obligation, there would be, to say the least, much less regulation").

4. For example, a number of federal agencies have expressed concern that the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2, may prohibit them from working on committees together with nonfederal participants. The

Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. No. 104-4, § 204(b), exempts meetings of federal and state, local, or tribal officials where meetings relate to the administration of federally established programs that share responsibilities. NEPA may extend the reach of the exemption to most federal activities. Moreover, FACA itself does not apply to meetings with nonfederal participants where the purpose is not to render advice to the federal government; NEPA's provisions may provide a basis for such meetings where it is clear that the reasons are not provision of advice.

5. See Exec. Order No. 12291, 3 CFR 127 (1982); Exec. Order No. 12866, 3 CFR 638 (1994); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, Title II ("qualitative and quantitative assessment of the anticipated costs and benefits").

6. 42 U.S.C. § 4332(2)(F). This section was added during conference committee deliberations on NEPA. Senator Henry Jackson, the chief sponsor of the bill, explained that the section would give express "statutory authority to all Federal agencies" to engage in international cooperative efforts. 115 Cong. Rec. 40416-40417 (1969) (statement of Sen. Jackson).

7. 42 U.S.C. §§ 4341, 4344.

8. Others have suggested that some additional form of law may be necessary for anyone to pay attention to NEPA. Lynton K. Caldwell, author of much of the content of NEPA, has even suggested that its precepts be re-adopted as a new constitutional amendment. See Lynton K. Caldwell, "NEPA Revisited: A Call for A Constitutional Amendment," 6 *Environmental Forum* 17-22 (Nov./Dec. 1989); Lynton K. Caldwell, "A Constitutional Law for the Environment: 20 Years With NEPA Indicates the Need," 31 *Environment* 6-11, 25-28 (Dec. 1989).

9. The expression of one thing (in a legal provision) implies the exclusion of others not expressed.

10. Racketeering Influenced Corrupt Organizations Act § 904(a), 18 U.S.C. § 1981 note.

11. 42 U.S.C. § 4335.

12. 42 U.S.C. § 4332(1).

13. Executive orders can also create new bodies to assist the President in carrying out duties. A recent executive order established the President's Council on Sustainable Development, and charged it with developing a sustainable development strategy for the nation. Exec. Order No. 12852, 58 Fed. Reg. 35841 (1993), as amended by Exec. Order No. 12855, 58 Fed. Reg. 39107, ELR Admin. Mat. II 45058 (1993). It supplanted the President's Commission on Environmental Quality, established by Exec. Order No. 12737, 55 Fed. Reg. 51681, ELR Admin. Mat. II 45041 (1990).

14. E.g., Exec. Order No. 12580, 52 Fed. Reg. 2923, ELR Admin. Mat. II 45031 (1987) (Superfund implementation); Exec. Order No. 12777, 56 Fed. Reg. 54757, ELR Admin. Mat. II 45042 (1991) (implementation of Oil Pollution Act). The Environmental Protection Agency was itself created by executive action. Reorg. Plan No. 3 of 1970, 5 U.S.C. App. III.

15. Exec. Order No. 11, 288, 31 Fed. Reg. 9261 (1966); Exec. Order No. 11, 574, 35 Fed. Reg. 19627 (1970).
16. Exec. Order No. 12866, 3 CFR 638 (1994); See Exec. Order 12291, 3 CFR 127 (1982).
17. Exec. Order 12898, 59 Fed. Reg. 7629, ELR Admin. Mat. II 45075 (1994), as amended by Exec. Order 12948, 60 Fed. Reg. 6381, ELR Admin. Mat. II 45081 (1995).
18. Exec. Order No. 12873, 58 Fed. Reg. 54911, ELR Admin. Mat. II (1993).
19. Exec. Order No. 12856, 58 Fed. Reg. 41981, ELR Admin. Mat. II 45059 (1993).
20. Exec. Order No. 11514, 3 CFR 902 (1970), ELR Admin. Mat. II 45001. Exec. Order No. 11991, 3 CFR 123 (1978) amended the 1970 order to assure that agencies would comply with the 1978 CEQ regulations.
21. Id.
22. An executive order of this type is overdue. See Kennedy P. Maize (ed.), Blueprint for the Environment (Nov. 1988), at 32: "We recommend that the President issue an executive order establishing a new government-wide process designed to ensure that all the consequences of proposed decisions including long-term, international, and cross-cutting effects are taken into account. This foresight process should apply especially to Presidential decisions." See also T. Allan Comp (ed.), Blueprint for the Environment: A Plan for Federal Action (1989), at 319: "The President should declare by executive order...that federal lands and resources will be managed under a mandate of conservation stewardship...as environmental exemplars for the world."
23. 42 U.S.C. § 4332(2). See 40 CFR 1500.1(a): "The regulations that follow implement section 102(2)."
24. 42 U.S.C. § 4331(b)(6).
25. 42 U.S.C. § 4331(b)(4).
26. 11 Pa. Commw. 14, 312 A.2d 86, aff'd, 468 Pa. 226, 361 A.2d 263, 6 ELR 20796 (1976)
27. Pa. Const. Art. I § 27.
28. 11 Pa. Commw. at 29-30.
29. Pub. L. No. 104-4 (1995).
30. UMRA §101, CBICA § 424, 2 U.S.C. § 601 et seq. It is also not in order to consider a bill that would increase federal mandates to state, local, and tribal governments by more than \$50 million annually unless the bill provides federal funding to cover the increased costs. See John Pendergrass, Paul Locke, and James McElfish, "The Environment and the Contract," 25 ELR 10350, 10351-52 (July 1995).

31. The currently required "legislative EIS" only applies to agency recommendations or reports on proposals for legislation, not to legislation developed by Congress itself. 42 U.S.C. § 4332(2)(C).

32. E.g., Hearing, "Implementation of the National Environmental Policy Act," U.S. Senate, Committee on Energy and Natural Resources, Subcommittee on Oversight and Investigations, 104th Cong. 1st Sess. (June 7, 1995) (considering whether NEPA is unduly burdensome or costly).

THE ENVIRONMENTAL LAW INSTITUTE

For a quarter century, the Environmental Law Institute has played a pivotal role in shaping the fields of environmental law, management, and policy domestically and abroad. Today, ELI is an internationally recognized, independent research and education center.

Through its information services, training courses and seminars, research programs, and policy recommendations, the Institute activates a broad constituency of environmental professionals in government, industry, the private bar, public interest groups, and academia. Central to ELI's mission is convening this diverse constituency to work cooperatively in developing effective solutions to pressing environmental problems.

The Institute is governed by a board of directors who represent a balanced mix of leaders within the environmental profession. Support for the Institute comes from individuals, foundations, government, corporations, law firms, and other sources.



**ENVIRONMENTAL
LAW • INSTITUTE®**

**1616 P Street, N.W., Suite 200
Washington, D.C. 20036
Telephone: (202) 939-3800
Fax: (202) 939-3868**

E-mail: law@eli.org • Web site: www.eli.org