

Themes in the Evolution of the State Environmental Policy Acts

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I. Introduction

IN 1969 CONGRESS ENACTED the National Environmental Policy Act (NEPA)¹ to institutionalize analysis of proposed government actions that may affect the environment. NEPA requires the preparation of the well-known "environmental impact statements" before federal agencies approve proposals likely to have significant environmental effects.² Although some characterizations of NEPA's role in environmental law are exaggerated,³ NEPA continues to play an important part in agency decision making,⁴ with its critics currently undertaking a major effort to amend it.⁵

NEPA differs in several respects⁶ from other laws, such as the Clean Air Act⁷ and the Federal Water Pollution Control Act Amendments

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1. 42 U.S.C. § 4321 (2006).

2. 42 U.S.C. § 4332(2)(c) (2006).

3. See Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 209 (1992) (noting that NEPA "has been described as the environmental 'Ten Commandments,' 'the environmental bill of rights,' and 'an environmental Magna Carta' . . .").

4. See *The Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298 (D. Fla. 2005).

5. See INITIAL FINDINGS AND DRAFT RECOMMENDATIONS OF THE HOUSE TASK FORCE ON UPDATING THE NATIONAL ENVIRONMENTAL POLICY ACT, http://resourcescommittee.house.gov/nepataskforce/report/nepareport_finaldraft.pdf (last visited Sept. 19, 2006) (containing twenty-two recommendations to both federal agencies and to Congress); Tim Reiterman, *National Environmental Policy Act Is "at a Crossroads"*, L.A. TIMES, July 7, 2005 at 16 ("The House version of the pending energy bill would exempt many oil and gas exploration projects from NEPA review. And a congressional committee is holding public hearings with the stated intention of changing how the law works."); *Congressional Task Force Seeks Comment on Proposed Legislative Changes to NEPA*, 74 U.S.L.W. LEGAL NEWS NO. 26 (Jan. 17, 2006), at 2410.

6. See Lynton K. Caldwell, *Essay: Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 204 (1998) ("Unlike other environmental statutes, [NEPA] cuts across a broad range of public issues—economic, demographic, ecological, esthetic, and ethical. . . . It lacks the specificity of the 'thou shall, thou may, or thou shan't' provisions of most public laws . . .").

7. 42 U.S.C. § 7401 *et seq.*

of 1972⁸ (later subsumed under the name Clean Water Act),⁹ which are the pillars of modern environmental regulation.¹⁰ Perhaps most significantly, those laws set up a federal structure for implementation that largely dictates the state response.¹¹ If states do not choose to comply, EPA will not delegate authority over regulatory implementation to the states,¹² and environmental decisions will continue to be largely made at the federal level.¹³

8. 33 U.S.C. § 1251 *et seq.*

9. *Id.*

10. See, e.g., ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 569 (2001) ("Modern environmental law began with the Clean Air Act (CAA) Amendments of 1970 and the Federal Water Pollution Control Act (FWPCA) Amendments of 1972."); Christina Coop, Casenote, *Harmon Industries, Inc. v. Browner*, 28 ECOLOGY L.Q. 253 (2001) ("In the 1970s, Congress enacted the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and many other statutes that frame modern environmental law.").

11. See, e.g., Hope Babcock, *The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters*, 83 OR. L. REV. 47, 54-55 (2004):

The CWA, like other pollution control laws, uses what I have called elsewhere the state primacy, or dual regulation cooperative federalism model. Under this model, the EPA administratively delegates its authority to the states to issue standards and administer and enforce the law's permitting requirements through federally approved state programs. The states with approved regulatory programs are eligible to receive federal funds to offset the costs of administering these programs. If the state regulatory program meets some standard of comparability with its federal analog, state laws, state agencies, and state courts replace their federal counterparts. To assure no relaxation in implementation of the federal law's requirements, the EPA oversees state performance of its delegated authority, and retains authority to reassert federal jurisdiction, restrict or condition federal funding of state programs to achieve specific programmatic results, or enforce directly if the agency deems state performance deficient.

See also John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203 (1997):

Congress's usual approach is to enlist the states in the implementation and enforcement of federal regulatory programs by offering technical and financial assistance to state agencies, and by threatening to cut off federal public works funding or to increase regulatory burdens on industries in uncooperative states. The federal government does not always get its way—at times the states can be powerful political actors in the federal bureaucracy and Congress—but normally it is able to induce states to cooperate in implementing and enforcing federal environmental policies.

12. See, e.g., *Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1296 (10th Cir. 2005) ("In order for the EPA to delegate enforcement authority under the CWA to a state, the state must meet certain public participation requirements. . . ."), *BCCA Appeal Group v. EPA*, 355 F.3d 817, 826 (5th Cir. 2003) ("Although permitting authority was statutorily vested in the EPA, the agency could delegate its authority to a state if the state's program demonstrated compliance with statutorily enumerated requirements.").

13. See, e.g., *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975) (reviewing and overturning Administrator's plan imposed on state under Clean Air Act).

In contrast to the general approach of most federal environmental laws, NEPA applies only to federal agencies.¹⁴ Accordingly, absent legal or practical compulsion, a much smaller number of states chose to adopt laws modeled after NEPA. Sixteen states, the District of Columbia, and Puerto Rico¹⁵ have enacted some version of environmental impact reporting laws.¹⁶ These laws are familiarly known as "little NEPAs"¹⁷ or "State Environmental Policy Acts" (SEPAs).¹⁸ This article uses the latter term.

Unconstrained by the need to meet standards set by federal law, the development of the SEPAs has diverged from the federal NEPA model.¹⁹ These differences are apparent in features such as the types of projects subject to environmental analysis under the SEPAs,²⁰ the "threshold" tests

14. 42 U.S.C. § 4321; *see* Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

15. The "count" of SEPAs changes in various publications depending on the criteria used. Each of the seventeen jurisdictions here require some preparation of an environmental impact report or environmental impact statement.

16. CAL. PUB. RES. CODE §§ 21,000-21,177; CONN. GEN. STAT. §§ 22a-1 to 22a-1h; D.C. CODE ANN. §§ 8-109.1 to 8-109; GA. CODE ANN. §§ 12-16-1 to 12-16-8; HAWAII REV. STAT. §§ 343-1 to 343-8; IND. CODE ANN. §§ 13-12-4-1 to 13-12-4-10; MD. NAT. RES. CODE ANN. §§ 1-301 to 1-305; MASS. GEN. LAWS ANN. ch. 30, §§ 61, 62-62H; MINN. STAT. ANN. §§ 116D.01-116D.06; MONT. CODE ANN. §§ 75-1-101 to 75-1-105; 75-1-201 to 75-1-207; N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117; N.C. GEN. STAT. §§ 113A-1113A-13; P.R. LAWS ANN. 1121-1127; S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to 34A-9-13; VA. CODE §§ 3.1-18.8, 10.1-1200 to 10.1-1212; WASH. REV. CODE §§ 43.21C.010 to 43.21C.910; WIS. STAT. ANN. § 1.11. The "count" of SEPAs changes in various publications depending on the criteria used. *See* Ferester, *supra* note 3, at 209 ("Twenty-eight states enacted 'little NEPAs' that closely paralleled the federal statute."). Each of the seventeen jurisdictions just cited require some preparation of an environmental impact report or environmental impact statement.

17. *See, e.g.,* Nicolas A. Robinson, *SEQRA's Siblings: Precedents from Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155 (1982); David Sive & Mark A. Chertok, "Little NEPAs" and Their Environmental Impact Assessment Procedures, SK094ALI-ABA 1175 (2005), http://www.sprlaw.com/pdf/spr_little_nepa_ali_aba_0605.pdf (last visited Sept. 19, 2006).

18. *See, e.g.,* Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 120 (2003) ("Environmental review statutes such as the National Environmental Policy Act (NEPA) require federal agencies to analyze the effects of all federal projects that have a significant environmental impact. Sixteen states, plus the District of Columbia and Puerto Rico, have adopted similar statutes, known as state environmental policy act (SEPAs) . . .").

19. The SEPAs have been the subject of numerous law review articles. They are collected at DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* (Callahan 2005) § 12.01 n.5 DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 10A:1 n.8 (West 2005).

20. *See, e.g.,* Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2041 (1992) ("[W]hile NEPA's primary concern was government projects, much of the focus of the little NEPAs has been on government approval of private projects. . .").

used to determine whether a full environmental analysis is needed,²¹ and the substantive effect of the SEPA.²²

This article examines the evolution of the SEPA by identifying ten themes in the development of those laws.²³ The purpose is not to summarize the features of the SEPA; in states with the most active SEPA, detailed treatises undertake that task.²⁴ Nor does the article attempt to document all possible variations in the SEPA. Instead, it identifies the principal points at which states have faced significant choices in structuring their environmental reporting laws, often opting to diverge from the NEPA model, and the consequences of those choices.

The evolution of the SEPA shows states experimenting with the features of a law initially passed at the federal level and molding it to fit the policies that individual states view as important.²⁵ The SEPA "laboratories" thus suggest how environmental law, whose main outlines are now largely dictated at the federal level, might have developed in a less overtly federalized

21. See, e.g., MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 3.05[3][a] (2005 Supp.) ("While under NEPA an EIS need be prepared only for 'major Federal actions *significantly* affecting the quality of the human environment,' SEQRA requires preparation of an EIS for any action that '*may* have a significant effect on the environment.' . . .") (emphasis in original); Jeffrey L. Carmichael, Note, *The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute*, 70 IND. L.J. 613, 629 (1995) (the Washington SEPA has a lower threshold than NEPA for determining whether review under the SEPA is required).

22. See, e.g., ASARCO, Inc. v. Air Quality Coal., 601 P.2d 501 (Wash. 1979) ("while NEPA and SEPA are substantially similar in intent and effect, . . . the public policy behind SEPA is considerably stronger than that behind NEPA.") (emphasis added); Ferester, *supra* note 3, at 209 (states "sought to improve upon NEPA" by, among other things, "expand[ing] the substantive foundation of their environmental planning laws, sometimes allowing the judiciary to review the merits of administrative decisions made pursuant to EISs."); John W. Caffry, Article, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 394 (2001) ("This policy of avoiding adverse environmental impacts is one of the principal differences between SEQRA and its 'parent' statute, the National Environmental Policy Act. . .").

23. The conclusions in the article are those of the author. They benefited greatly, however, from presentations made by other individuals at the "First Annual Conference on State-Level Environmental Impact Assessment" sponsored by the American Bar Association Section on Environmental, Energy and Resources and held on May 30, 2005. Where observations were specifically made by presenters, their papers are cited and are in the possession of the author.

24. GERRARD ET AL., *supra* note 21; STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (1993, update 2005); RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS (1987, rev. ed. 2002).

25. See Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 568 (1997) ("[W]hen Congress enacted NEPA it envisioned NEPA as a model for state environmental review laws, but in the truest sense of cooperative federalism, state laws can now be used as models for changes to NEPA.").

framework. Finally, the state experience provides a context for considering whether impact reporting requirements are worth their considerable cost.

II. The Adoption and Features of the SEPA's:

A Brief Summary

NEPA's origin has been well-chronicled in treatises²⁶ and numerous law review articles.²⁷ The act, which passed with little notice,²⁸ establishes policies regarding the administrative consideration of environmental factors in decision making.²⁹ Most importantly, it requires the preparation of an "environmental impact statement," the now-famous "EIS,"³⁰ whenever a federal agency approves a "proposal for legislation or a major federal action."³¹

26. MANDELKER, *supra* note 19, § 1.1.

27. Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RESOURCES & ENV'T 70 (Fall 1995); RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 34-35 (1976) (describing Congress's failure to think the legislation through and suggesting that had Congress foreseen what NEPA would become it would never have passed the bill); LYNN G. LLEWELLYN & CLARE PEISER, NAT'L BUREAU OF STANDARDS, NEPA AND THE ENVIRONMENTAL MOVEMENT: A BRIEF HISTORY 24 (NBSIR 73-218, 1973) (report by National Bureau of Standards to EPA); FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973).

28. Denis Binder, *NEPA, NIMBYs and New Technology*, 25 LAND & WATER L. REV. 11, 11 (1990) ("As NEPA reaches twenty, it is amazing to look back and see how this little-considered statute came to the forefront in a wide variety of environmental conflicts . . .").

29. 42 U.S.C. § 4332:

(2) All agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations . . .

30. SEPA's either call for the preparation of an "Environmental Impact Statement" or an "Environmental Impact Report." In this article, for convenience the two are referred to interchangeably as an "EIS."

31. 42 U.S.C. § 4332:

(2) All agencies of the federal government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Act's spare language³² initially masked its widespread application. Judicial decisions³³ and administrative guidance from the Council on Environmental Quality³⁴ fleshed out its procedural requirements.

By 1975, a significant number of states had adopted versions of NEPA, with widely varying requirements. For example, some states tracked NEPA's language almost verbatim, while others deliberately narrowed the requirements.³⁵ The state courts also varied in their interpretations of the SEPAs. Some interpretations were broader³⁶ than the federal interpretations of NEPA, while others took a narrower approach.³⁷

As the laws developed, administrative implementation of the SEPAs became increasingly important. Some states adopted detailed rules to carry out the laws;³⁸ others relied upon handbooks,³⁹ while still others used less formalized mechanisms.⁴⁰ Gradually, the effects of the differences in the SEPAs became more pronounced as they were fully implemented. SEPAs have assumed a central role in environmental decision making in some states; in others, the SEPA has surfaced only sporadically. Many states fell between these extremes.

In short, the states experimented with and molded the impact reporting requirements. Themes and patterns in these requirements reflect the differing values that the states see in the impact reporting process and allow for comparison of the complexities of implementation.

III. Ten Themes in the Evolution of the SEPAs

A. *Allocating Analytic Resources: Structuring the Jurisdictional Coverage*

Deciding the Scope of Jurisdiction: NEPA's simple yet far-reaching purpose was to embed environmental considerations into the decision

32. See Ferester, *supra* note 3, at 207 (noting that NEPA is "superficially simple").

33. Probably the most influential of the early decisions was *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

34. 40 C.F.R. §1500.1 (2006).

35. See *infra* text accompanying notes 48–59.

36. See *Molokai Homesteaders Coop. Ass'n v. Cobb*, 629 P.2d 1134, 1144 (Haw. 1981) ("The federal decision, however, is not surprising in light of NEPA's narrower treatment of relevant environmental impacts.").

37. See *The Vill. Dev. Co., Inc. v. Sec'y of the Executive Office of Env'tl. Affairs*, 571 N.E.2d 361, 370 n.11 (Mass. 1991) ("NEPA's jurisdictional test is much broader than that of MEPA . . . and it does not have an analogous subject matter jurisdiction limitation. Therefore, the comparison between MEPA and NEPA is of limited value.").

38. *Guidelines for the Implementation of the California Environmental Quality Act*, CAL. CODE REGS. tit. 14, § 1500 *et seq.*

39. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) HANDBOOK (2d ed. 1992).

40. WASH. STATE DEP'T OF ECOLOGY, STATE ENVIRONMENTAL POLICY ACT HANDBOOK (1998, updated 2003).

making process of public agencies.⁴¹ The instrument used was a prophylactic measure, the formal environmental analysis, applied as an overlay to the previously existing decision making mechanisms of federal public agencies. As such, NEPA sweeps broadly. While NEPA applies only to "major Federal actions,"⁴² the universe of federal decisions that plaintiffs have challenged as violating NEPA reflects the scope of the Act.⁴³

However, the choice to use a policy instrument, such as an impact reporting requirement, requires consideration of the considerable institutional costs involved. For example, a state SEPA defining the term "action" or "project" broadly, and then requiring environmental analysis if the action or project "may" cause environmental effects, applies to large numbers of projects with little or no real environmental impact. In addition, duplication or overlap is likely where analysis of related actions occurs sequentially.⁴⁴ A SEPA may require a state first to analyze the environmental impacts of a plan and later mandate an examination of individual decisions implementing that plan. Finally, and not unexpectedly, there appears to be a relationship between the breadth of the SEPA's coverage and the amount of litigation that the SEPA generates.⁴⁵

It certainly can be argued that a more tailored approach to the SEPA's coverage would better use available analytic resources by focusing on projects whose environmental impacts have more societal significance. The SEPAs reflect sensitivity to this consideration, with states employing several varied approaches to the jurisdictional coverage.⁴⁶

41. MANDELKER, *supra* note 19, §1.5 ("the purpose of NEPA was to modify the decision making of federal agencies by requiring them to consider environmental values.").

42. 42 U.S.C. § 4332(2)(B).

43. James Allen, Note, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RESOURCES & ENVTL. L. 287, 289 (2005) ("It cannot be disputed that NEPA's effect on the government's decision-making process has been enormous.").

44. Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Government Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 248 (2002) ("The environmental review process is criticized for being too time-consuming and costly. Duplication can occur between the environmental review process and development regulations.").

45. Michael B. Gerrard, *Litigation Under the "Little NEPA" Laws* (prepared for Am. Bar Ass'n Env'tl. Impact Assessment Comm., First Annual "Little NEPA" Conference (May 30, 2005) at 3 ("the four states with the highest per capita number of decisions are all among the five states with the little NEPAs of broadest applicability.") (on file with author)).

46. See Sterk, *supra* note 20, at 2041 ("A study of the [environmental review] process leads one naturally to ask whether comparable environmental benefits might be available at lower costs.").

Limited State-Level Decisions or Resources Covered: One approach is to apply the SEPA only to actions taken at certain governmental levels or involving certain resources. For instance, North Carolina limits its requirement to the funding or use of state lands.⁴⁷ In contrast, the Hawaii SEPA tailors its coverage to particular land categories, such as state or county lands, conservation district lands, and shoreline areas.⁴⁸ The Indiana SEPA is even more limited, covering state agencies but excluding "the issuance of a license or permit by any agency of the state."⁴⁹

The principal advantage of an approach limited to state actions is to focus on broader policy decisions or perhaps on how government funding will affect the environment. A focus on state funding suggests possibilities of integrating environmental analysis with long-run state planning. Because the commitment of state funds is a decisive step, application of a SEPA to that step gives rise to the possibility of affecting government decisions at the state level before they gather bureaucratic or political momentum. The analysis can take place early enough in the development cycle to have a greater chance of fundamentally affecting choices. Focusing environmental analysis on state funding, as the Connecticut SEPA does,⁵⁰ comes closer to the revolution in government thinking that NEPA envisioned: the true institutionalization of environmental considerations.

But no state has fully carried out this principle; impact reporting requirements rarely apply to actions by state legislatures.⁵¹ Accordingly, the SEPA will apply only when a state agency implements a previously made legislative funding decision. At that point the fundamental political decision to fund the project has already been made. The environmental analysis may affect the design of the project, but it is unlikely to affect the basic decision of whether to go forward with the project. This outcome, it turns out, is a common one under the SEPAs.⁵²

47. N.C. GEN. STAT. § 113A-9 (2006) (SEPA applies to "action involving expenditure of public moneys or use of public land . . .").

48. HAW. REV. STAT. § 343-5(a) (2006) (listing nine subcategories).

49. IND. CODE § 13-1-10-6 (2006). The law's limited coverage has meant that the law largely is not a factor in decision making. *See Carmichael, supra* note 21, at 614 ("Indiana's statute . . . has fostered no litigation. Indiana's chief environmental administrative law judge has stated that the Act has never been a factor in any of his decisions . . .").

50. CONN. GEN. STAT. § 22a-1c (2006) ("actions which may significantly affect the environment" defined to mean "individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state . . .").

51. *Omdahl v. Hadler*, 459 N.W.2d 355, 362 (Minn. Ct. App. 1990) ("Furthermore, the rules specifically exempt proposals and enactments of the legislature. Minn. Rules 4410.4600 subd. 26 (1989).").

52. *See infra* text accompanying note 194.

Generic Categories: Another approach to tailoring the environmental review is to delegate decisions about SEPA coverage to an administrative agency, empowering it to create categories of SEPA applicability. Massachusetts employs this concept, albeit in a limited way. It authorizes the Secretary of Environmental Affairs to "establish general and specific categories of projects and permits which shall or shall not require environmental impact reports. . . ."⁵³

If a state chooses to allocate only limited resources to environmental review, this system has considerable merit. It allows a thoughtful targeting of these resources to decisions that are likely, on a generic basis, to cause the most environmental harm. The Massachusetts statute, however, requires the agency subject to such a system to approve the establishment of the categories. The permissive nature of the power to establish categories may well cause a perverse outcome: agencies which traditionally have less concern over environmental matters, such as agricultural agencies, may opt out.

State and Local Decisions: The New York,⁵⁴ California,⁵⁵ and Washington⁵⁶ laws all broadly define "action" or "project" to include both state and local governments. As noted above, these systems are more consistent with the overall purpose of integrating environmental protection into public decisions, because they include local land use powers. The approach, however, is administratively burdensome, since the number of actions taken by local governments is quite large.⁵⁷

53. MASS. GEN. LAWS ANN. tit. 30, § 62E (West 2006). *Boston Pres. Alliance, Inc. v. Sec'y of Envtl. Affairs*, 487 N.E.2d 197, 200 (Mass. 1986) ("Within thirty days after issuance of notice of the receipt of such notification, the secretary shall consult with the person or agency proposing the project and the agency, if any, from which a permit or financial assistance is or may be sought and shall issue a certificate stating whether an environmental impact report is required.").

54. N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(i) (2006) ("projects or activities"); *id.* at § 8-0105(3) ("agency" includes state and local agencies). See GERRARD ET AL., *supra* note 21, § 2.01[2] ("Under this broad and sweeping definition, a seemingly limitless variety of activities, including approval of small and large-scale residential developments, shopping centers, landfills, stadiums, mines, school buildings, and work affecting historic structures" have fallen under SEQRA).

55. CAL. PUB. RES. CODE § 21100 ("projects" of state agencies); *id.* at § 21151 ("projects" of local agencies).

56. WASH. REV. CODE § 43.21C.031(2)(a)(i) (2006) (includes "planned actions" adopted by county or city under specified statute); *see, e.g., Noble Manor Co. v. Pierce County*, 288, 943 P.2d 1378, 1388 (Wash. 1997) ("if a party proceeds with a traditional subdivision of the property . . . a public hearing process is required and SEPA applies as well. . . .").

57. See Patricia E. Salkin, *Afterward: SEQRA's Silver Anniversary: Reviewing the Past, Considering the Present, and Charting the Future*, 65 ALB. L. REV. 577, 581 (2001) (noting that, in New York, there are approximately 1600 units of local government that must comply with SEQRA).

B. Designating Thresholds: Fact-Based Versus Rule-Based Approaches

Perhaps the most problematic aspect of implementing the SEPAs has been the so-called "threshold issue" of determining when an environmental impact statement is required.⁵⁸ In particular, some states have departed from NEPA's language calling for an EIS on "proposals . . . significantly affecting" the environment.⁵⁹ Instead, the SEPAs require an EIS when a proposal "may" have a significant effect on the environment.⁶⁰ This permissive language, however, leads to great uncertainty in application.⁶¹

The states have taken at least four approaches to carrying out this type of screening for EISs:

The Low Threshold Approach: California has opted for an extremely low threshold for an EIS, requiring one when a project "may" have a significant impact.⁶² An agency must prepare an EIS whenever the record contains a "fair argument" that the record contains "substantial evidence" that a project may have a significant environmental effect.⁶³ While California law also allows agencies to adopt their own "thresholds" of significance,⁶⁴ those thresholds play a far less important role in the determination of whether an EIS is needed.

The "fair argument" standard calls for a case-by-case determination of possible significance, with the outcome dependent on the evidence in the administrative record for an individual project. In particular, well-organized opponents of projects will present evidence of potential impacts and argue, often successfully, that their presentation constitutes

58. See SELMI & MANASTER, *supra* note 19, § 10A:7 ("Undoubtedly the most litigated issue under SEPAs is whether an agency has made an erroneous 'threshold determination' that it need not prepare an EIS in a particular situation.").

59. 42 U.S.C. § 4332(2)(C).

60. CONN. GEN. STAT. 22a-1b(c) ("Each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment shall in the case of each such proposed action make a detailed written evaluation of its environmental impact before deciding whether to undertake or approve such action.").

61. See Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold: Washington's Emerging Preference for Efficiency over Accuracy*, 37 GONZ. L. REV. 403, 405 (2001/2002) (citing a "breakdown between SEPA's goals and duties [that] has appeared at the threshold stage in the environmental review process.").

62. CAL. PUB. RES. CODE § 21100; see also N.Y. ENVTL. CONSERV. LAW § 8-0109(2) ("may").

63. *Friends of "B" Street v. City of Hayward*, 106 Cal. App. 3d 988, 1002 (1980). ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration. . . .").

64. See CAL. CODE REGS. tit. 14, § 15064.7(a) (2006).

"substantial evidence" requiring preparation of an EIS. In turn, the courts find themselves examining minutiae in records to decide whether they should overturn the agency's refusal to prepare the EIS.⁶⁵

One result of this type of threshold system is a lack of predictability.⁶⁶ So-called "negative declarations," documents concluding that a project will have no significant environmental impacts, become a fertile ground for litigation.⁶⁷ Even more importantly, the low threshold can lead to the preparation of EISs on small but controversial projects, such as single family homes, thereby encouraging the so-called "not in my backyard" (NIMBY) phenomenon.

Another consequence is predictable public criticism of the agency's decision not to prepare an EIS. The difficulty arises because, under this approach, the determination of when an EIS is required may subsume a core function performed by the EIS itself. The purpose of an initial evaluation to determine whether an EIS is required, often known as an "initial study," is to act as a screening device. It separates projects subject to the EIS process from those that are not. However, like the EIS process itself, the initial study requires a determination of whether an impact is or "may be" significant.

If the agency examines a body of evidence, rejects some of it, and then determines that the project will have no significant impact, critics may well charge it with "circumventing" the function of the EIS.⁶⁸

65. *Bowman v. City of Berkeley*, 122 Cal App. 4th 572, 594 (2004) ("Here, the City found that the project would not '[s]ubstantially degrade the existing visual character or quality of the site and its surroundings' within the meaning of Appendix G of the guidelines in part because '[c]onstruction of this project is subject to design review and approval prior to issuance of building permits.' This finding was supported by the record of extensive design review in this case, was sufficient to address the Guideline criterion, and was consistent with a reasonable and practical reading of CEQA.").

66. See John Watts, Comment, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGY L.Q.* 213, 216 (1995) ("CEQA's primary burden on business is not the direct cost of EIRs . . . but instead the uncertainty that the statute engenders. Businesses often do not know how long EIR review will take . . .").

67. See, e.g., Thomas Schmid, Casenote, *Defining "Significance": Balancing Procedural and Substantive Judicial Review of Negative Declarations Under the Minnesota Environmental Policy Act*, 10 *MO. ENVTL. L. & POL'Y REV.* 104, 110 (2003) ("Minnesota case law has produced inconsistent results and approaches to judicial review of an agency's issuance of a negative declaration.").

68. Unsurprisingly, disputes of this kind are particularly prevalent where the agency places mitigation measures on the project and then prepares a "mitigated determination of nonsignificance" concluding no EIS is necessary. See Hirokawa, *supra* note 61, at 408 ("the agency may impose conditions to mitigate the significant impacts and, so long as those conditions promise to lower the environmental impacts below the threshold of significance, the agency may issue a Mitigated Determination of Nonsignificance ("MDNS") . . .").

After all, if there is doubt about whether impacts will be significant, a strong argument can be made that this determination should be made in the EIS itself. Where a SEPA statute requires an EIS when a project "may" have a significant argument, this argument becomes virtually irrebuttable.⁶⁹

California has attempted to lessen the uncertainty of its low threshold approach by adopting both statutory and administrative "exemptions" to the environmental impact statement requirement. The exemptions are a list of projects that seem to pose no possible significant environmental effect, and therefore need no EIS.⁷⁰ Even here, however, the exemption may be rebutted by substantial evidence of possible impacts, thus reintroducing some uncertainty.⁷¹ Moreover, the list of exempt projects is long, adding to the complexity of administration. It is also sometimes arbitrary, with some exemptions overtly based on politics rather than on neutral judgments about environmental effects.⁷²

The principal benefit of this low threshold approach is that it strongly discourages attempts to circumvent the impact reporting requirement by adopting a negative declaration rather than preparing an EIS.⁷³ The low threshold sends a message to public agencies that the environmental analysis requirement is a serious one that the agency can dispense with only when the record contains no possible evidence of significant effects.

69. See David Sive & Mark A. Chertok, "Little NEPAs" and Their Environmental Impact Assessment Procedures (prepared for the American Bar Association Environmental Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005) at 8 ("Under a number of the Little NEPAs, it has been held that the threshold for requirement of an EIS is lower than the federal threshold. Statutory underpinning for such a ruling is found in the use by several Little NEPA's of the term, 'may,' with respect to the impact of an action.") (on file with author)).

70. Cal. CODE REGS. tit. 14, §§ 15061(b), 15260-15285, 15300-15333; see also WASH. REV. STAT. § 43.21C.110(1)(a) ("The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment.").

71. CAL. CODE REGS. tit. 14, § 15300.2(c) ("A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.").

72. See *Infrastructure Bond Package Contains Money for Air Quality Projects and CEQA Waivers*, 19 CALIF. ENVTL. INSIDER No. 23 (May 16, 2006) (\$37.5 billion package of bond measures "provides for waivers of CEQA . . . for a number of transportation, flood control, and levee repair projects. . ."). The same phenomenon occurs at the federal level. See William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 45 (1984) (noting the NEPA exemptions and concluding that "[o]ne is tempted to invoke sheer interest group politics as the most satisfactory explanation for the generous and sometimes implausible exemptions extended to a number of agencies.").

73. See *Long Beach Sav. & Loan Ass'n v. Long Beach Redev. Agency*, 188 Cal. App. 3d 249, 254 (1986) ("In the instant case, defendants are alleged to have improperly used a document known as a mitigated negative declaration to circumvent the EIR requirement.").

Presumptions: New York approaches the threshold issue differently, utilizing a system based on presumptions. That state categorizes public agency decisions into three "types": Type I actions, Type II actions, and "unlisted" actions.⁷⁴ Type I actions are those that are "more likely" to require the preparation of an EIS than those which have not been listed. For example, Type I actions include the construction of a specified number of units of residential housing.⁷⁵ A listing as a Type I action gives rise to a "presumption that it is likely to have a significant adverse impact on the environment and may require an EIS."⁷⁶

In contrast, unlisted actions are those governmental actions that are subject to the New York SEPA but that have no presumption of potential environmental significance.⁷⁷ Unlisted actions are not subject to the review process required for Type I actions.⁷⁸ Finally, Type II actions are those actions which the State Department of Environmental Conservation has determined will not have a significant environmental effect.⁷⁹ These actions do not require the preparation of any environmental analysis.⁸⁰

Cut-Offs and Categories: A third approach is to adopt "review thresholds."⁸¹ These establish firm cut-off points over which impacts are deemed significant, thereby requiring a full environmental analysis.⁸² Alternatively, the state may adopt regulations designating "categories" in which an EIS is required or not required.⁸³

The system of thresholds and categories can provide more certainty than a presumption-based approach. However, the thresholds can be

74. 6 N.Y. ENVTL. CONSERV. LAW § 617.4 (2006); see GERRARD ET AL., *supra* note 21, § 2.01[3] at 2-5 ("The SEQRA regulations establish three categories of actions . . . and differentiate their procedural treatment under SEQRA.").

75. *Id.* § 617.4(b).

76. *Id.* § 617.4(a)(1).

77. *Id.* § 617.2.

78. See THE SEQR HANDBOOK, *supra* note 39, 16.

79. *Id.* § 617.5(a).

80. *Id.*

81. See MASS. REGS. CODE tit. 301, § 11.01(2)(b) (2006) (review thresholds "identify categories of projects or aspects thereof of a nature, size or location that are likely, directly or indirectly, to cause damage to the environment.").

82. See *id.* ("the review thresholds determine whether MEPA review is required."); § 11.03 ("MEPA review is required when one or more review thresholds are met or exceeded. . . .").

83. MINN. STAT. ANN. § 116D.04, subd. 2a(a) ("The board shall by rule establish categories of actions for which environmental impact statements and for which environmental assessment worksheets shall be prepared as well as categories of actions for which no environmental review is required. . . ."); N.C. GEN. STAT. ANN. § 113A-8(c) (ordinance requiring developers to submit detailed environmental statements "shall establish minimum criteria to be used in determining whether a statement of environmental impact is required" and also calling for "exceptions to the minimum criteria established by ordinance.").

difficult to articulate and are sometimes arbitrary. Moreover, they often provide that, under certain circumstances, an EIS is needed despite the fact the project does not meet the threshold⁸⁴—thus reintroducing at least part of the uncertainty that they were designed to avoid. They also encourage the design of projects that come in just under the review thresholds.⁸⁵ While that outcome is unobjectionable from an environmental standpoint, it may be inefficient from other viewpoints, such as the need for housing.

Two underlying goals clash on the issue of crafting the appropriate threshold: predictability and comprehensiveness. Because many public agency decisions fall into patterns, there should be some means of categorizing the types of decisions from an environmental perspective and then treating them uniformly. Predictability requires prospective rules about classes of projects; the use of exemptions, for example, furthers this goal.

Some modicum of flexibility, however, is needed. Even relatively innocuous projects, located in the “wrong” place from an environmental standpoint, can do serious damage. So comprehensiveness would favor no hard and fast categories; inclusion of an exception to exemptions furthers this goal.

A good argument can be made that the New York system strikes a defensible balance between the goals of predictability and comprehensiveness. Its use of categories coupled with presumptions provides some predictability; project applicants and public agencies will have a general sense of the level of environmental review appropriate for many projects. At the same time, the use of presumptions rather than strict categories introduces an element of necessary flexibility in the case of projects which do not fit the “mold” of that category.

C. *Avoiding Administrative Duplication:*

The Question of Overlapping Compliance

As noted above,⁸⁶ the duplication of environmental analyses is one consistent criticism of the SEPA. That criticism most often applies to two recurring situations: (1) where actions are subject to both NEPA and

84. MASS. REGS. CODE tit. 301, § 11.04 (so-called “Fail-Safe Review” provides that, upon petition by an agency or ten or more persons, the Secretary may require a review under the Massachusetts Environmental Policy Act).

85. See Watts, *supra* note 66, at 245 (discussing “standardized thresholds” used in certain non-SEPA state statutes and noting that “projects are frequently designed so as to just barely avoid the threshold for review.”).

86. See *supra* text accompanying note 44.

a SEPA, and (2) where developments must pass through a series of sequential government approvals, often in the land use context. One might assume that states could solve the problem of duplication if they made a concentrated effort to do so. However, while states have attempted to avoid duplicative analyses, for different reasons their efforts have been unsuccessful in a surprisingly high number of situations.

The NEPA-SEPA Overlap: Where a project requires both state and federal approvals, it may be subject both to NEPA and a SEPA. That possibility is hardly surprising, given that the SEPAs were, at least to some extent, modeled after NEPA and serve the same analytic function.⁸⁷ However, these overlapping purposes mean that separate compliance with both laws plainly would involve substantial duplication and inefficiency.

The various jurisdictions with comprehensive SEPAs quickly recognized this possibility and took steps designed to promote unified compliance with both the state and federal law. States often encourage the preparation of joint documents,⁸⁸ thereby assuming that the state and federal agencies can work cooperatively. Likewise, Hawaii urges cooperation to reduce duplication.⁸⁹ States also can take other procedural steps to dovetail the NEPA and SEPA processes, such as conforming state schedules for complying with the SEPA to the schedules followed by federal agencies complying with NEPA. The NEPA Guidelines also reflect the same concern over duplication and pledge that federal agencies will try to avoid it.⁹⁰

However, these efforts toward administrative efficiency often fail. Stories abound of difficulties in coordinating dual compliance, with states blaming federal officials and, undoubtedly, federal officials in turn blaming their state counterparts.

The difficulty is partly one of clashing administrative cultures; state and federal agencies are structured differently, are staffed with personnel with different expertises, and pursue different goals. Other conflicts

87. See *supra* text accompanying notes 35–37.

88. MONT. ADMIN. R. § 4.2.327 (“(3) Whenever the agency proposes or participates in an action that requires preparation of an EIS under both the National Environmental Policy Act and MEPA, the EIS must be prepared in compliance with both statutes and associated rules and regulations”).

89. HAW. CODE R. § 11–200–25 (2005) (state and federal agencies shall “cooperate . . . to the fullest extent possible to reduce duplication between federal and state requirements.”).

90. 14 C.F.R. § 1506.2(b) (2006) (“[A]gencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements.”).

may be political, if the state and federal governments are in the hands of different political parties. Because no one official has jurisdiction over both of the complying government bodies, it becomes difficult to compel joint compliance. Whatever the reason, the result is that more duplication occurs than is necessary.

The solution may be for the state simply to use the NEPA document. In situations where both NEPA and the Connecticut SEPA apply, Connecticut authorizes the use of the NEPA document in place of its state document,⁹¹ as does Massachusetts.⁹² New York declares that if the agency participates in the preparation of the NEPA document, the agency shall use a "single environmental reporting procedure" in conjunction with both NEPA and the State Environmental Quality Review Act.⁹³ Where the agency chooses not to participate in the preparation of the NEPA document, the EIS "shall suffice for the purpose of" the New York law.⁹⁴

There is some loss in ceding state control over the environmental document. Available state expertise may not be reflected in the document, or at least be underutilized in its preparation, when the federal agency takes control of it. Still, there seems little reason to prepare two separate documents, and where state-federal coordination is unlikely to improve, using the federal EIS is quite reasonable.⁹⁵

Sequential Decisions: A second area of duplication exists in regards to sequential decisions, particularly in those state and local jurisdictions where the SEPA applies to local government land use decisions.⁹⁶ If a public agency makes a series of sequential decisions involving the same

91. CONN. GEN. STAT. § 22a-1f (a) (2006) ("Environmental impact evaluations need not be prepared for projects for which environmental statements have previously been prepared pursuant to other state or federal laws or regulations.").

92. MASS. GEN. LAWS ANN. ch. 30, § 62G (2006) ("In the case of projects for which an environmental impact statement is required under the National Environmental Policy Act of 1969, draft and final federal environmental impact statements may be submitted in lieu of environmental impact reports.").

93. N.Y. ENVTL. CONSERV. LAW § 8-0111(1) (McKinney 2006).

94. *Id.* § 8-0111(2).

95. N.Y. ENVTL. CONSERV. LAW § 8-0111 (McKinney 2006) (In the Practice Commentary following the statute, Phillip Weinberg writes "to impose two separate environmental impact statement processes would amount to an environmental version of cruel and unusual punishment.").

96. See generally Daniel R. Mandelker, *Melding State Environmental Policy Acts with Land-Use Planning and Regulations*, in 2 MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, Planning Advisory Service Report No. 480-81 (Am. Planning Ass'n 1998); Kathryn C. Plunkett, *The Role of Local Environmental Impact*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 299 (J. Nolan, ed., 2003); Kenneth Pearlman, *State Environmental Policy Acts: Local Decision Making and Land Use Planning*, 43 J. AM. INST. PLANNERS 42 (1977).

underlying land area or environmental resource, the agency may have to comply with the SEPA on each occasion. Inevitably, the later analysis will cover at least some of the same ground as the earlier one.

For example, many jurisdictions require local governments to adopt general or master plans, a decision followed later by individual approvals of zoning amendments, subdivision plans, or other discretionary permits.⁹⁷ The local government will have to comply with the SEPA at each step even though the decisions involve the same property. The situation brings loud charges of waste and duplicative "red-tape."

States largely accept this criticism and have turned their focus to possible solutions.⁹⁸ One possibility is to require compliance with the SEPA at the first approval stage (perhaps when the master or general land use plan is approved). Any further approvals that implement the plan would be exempt from the SEPA on the theory that the agency has already considered the environmental effects of developing the property.⁹⁹ Alternatively, the law could require that, when the local government decides the later approvals, it must use the same environmental document that it prepared for the original plan.¹⁰⁰

These solutions seem straightforward. However, two difficulties—one analytic, the other largely political—stand in the way of effective implementation.

The analytic difficulty largely stems from the environmental analysis of initial, large-scale planning decisions. Because these plans cover

97. See, e.g., *St. Johns/St. Augustine Comm. v. City of St. Augustine*, 909 So. 2d 575, 577 (Fla. Dist. Ct. App. 2005) ("The intent of the legislature is that all development be in conformity with comprehensive plans and regulations and that all land development regulations be consistent with comprehensive plans."); *GATRI v. Blane*, 962 P.2d 367, 373 (Haw. 1998) ("[T]he county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan.").

98. See, e.g., WASH. REV. CODE § 43.21C.034 ("Lead agencies are authorized to use in whole or in part existing environmental documents for new project or nonproject actions, if the documents adequately address environmental considerations set forth in [the Washington Environmental Policy Act].").

99. See Plunkett, *supra* note 44, at 249:

By conducting environmental impact review at the planning stage, instead of the project stage, many of the procedural drawbacks of project-by-project environmental impact review can be avoided. If extensive environmental analysis is conducted at the planning stage, no additional environmental review need be conducted at the project stage. This consistent approach to environmental impact review can result in beneficial effects for both municipalities and developers, while long-term, comprehensive environmental protection is fostered.

100. See *id.* (if extensive environmental review is conducted at the planning stage, "subsequent project review is limited, saving the time and resources necessary to conduct full EIR processes for each project" and citing use of "master environmental impact reports," "generic environmental impact statements," and "planned actions.").

broad geographic areas, environmental analysis of the plan's impacts is correspondingly generalized. For example, a city may have prepared a general plan amendment for a large land area in the jurisdiction. The environmental analysis of that amendment will necessarily be somewhat "broad-brush." Analysis of impacts specific to sites within that planning area can occur only when a development proposal is offered for that property. In short, context for environmental analysis is crucial, and that context depends largely on the type of approval being analyzed.¹⁰¹

The political obstacle arises from the emphasis on public participation in the SEPA process.¹⁰² Citizen opposition to development on certain property usually coalesces only when a developer proposes a specific project, usually well after approval of a plan amendment. The imminence of a final decision on actually building triggers a political reaction on the part of opponents. If the public agency dutifully informs the now-aroused citizens that no new environmental analysis will take place at this stage of the approvals, and that the citizens should have complained or sued at an earlier time, they will complain that the legal system has trivialized their concerns. The efficiencies involved in avoiding duplication of environmental analysis will be lost on them; instead, they will emphasize the specific impacts in the immediate area of the project.

Still, there is no real reason why citizens who fail to object to an earlier environmental analysis on a broader plan cannot be prohibited from raising those objections later. The law should encourage public participation by citizens at the earlier time, when the overall development decisions embodied in a plan are to be decided. Citizen involvement on these fundamental questions of future land use is certainly quite appropriate at this time. It may be a political "fact of life" that local opposition tends to coalesce at a later time in a sequence of approvals, but there is also the countervailing consideration that the landowner or developer is entitled to rely on the broader land use choice made at that earlier time.

However, the analytic aspect of the problem presents somewhat different considerations. Environmental analysis of broader land use decisions, such as those on a general or master plan, necessarily cannot evaluate site-specific impacts on particular properties. For instance, the

101. Professor Rodgers noted this interplay between earlier and later analysis in commenting on Washington case law requiring analysis at both stages. *See* Rodgers, *supra* note 72, at 54 (observing that the Washington Supreme Court approved a "bare bones" EIS on an earlier EIS "where the nature of the project is such that later decision-making sequences allow a more detailed assessment.").

102. *See infra* text accompanying notes 132-42.

analysis of a larger plan amendment tries to outline the impacts of allowing certain levels of growth and to suggest broad alternative land uses to those proposed for the plan. Until a jurisdiction later considers the approval of a specific development project on a small part of the plan area, impacts to particular environmental features on the project site (e.g., on wildlife habitat and wetlands) will not be known.

Agencies should be encouraged or mandated to incorporate earlier environmental documents by reference whenever possible. They can employ "tiering"¹⁰³ and "phasing"¹⁰⁴ of environmental documents, both terms of art that encourage the re-use of environmental data prepared for earlier approvals. But the earlier approval cannot, as has been suggested,¹⁰⁵ simply dispense with all environmental analysis on the specific impacts of the later proposal. To do so abandons consideration of site-specific impacts.

D. *Integrating Environmental and Land Use*

Disciplines: The Commonality of Planning

The problem of sequential decision making, discussed immediately above,¹⁰⁶ is part of a larger question regarding the appropriate interplay between environmental analysis and land use decision making.¹⁰⁷ When some SEPA's were first made applicable to local governments, they promised to make an extremely important contribution to decisions about how land should be used. That promise has been fulfilled to a large degree. But certain structural features of the SEPA's prevent the full integration of environmental analysis under the SEPA's with land use decisions.

The Promise of Environmentally Informed Land Use Decisions: Authority over land uses is the most important power that local governments exercise today.¹⁰⁸ These decisions often involve environmental

103. CAL. PUB. RES. CODE § 21068.5 (2006).

104. Hirokawa, *supra* note 61, at 355 ("In certain situations, SEPA regulations do seek efficiency by allowing agencies to 'phase' and 'tier' environmental review. Phased review allows the lead agency to study adverse environmental impacts effectively where separate determinations cover the same impacts and projects. Agencies have flexibility in phasing decisions in the non-project planning stages.").

105. See *supra* text accompanying note 99.

106. See *supra* text accompanying note 98–104.

107. See generally Michael Allan Wolf, *Earning Deference: Reflections on the Merger of Environmental and Land-Use Law*, 20 PACE ENVTL. L. REV. 253 (2002).

108. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 233–34 (2004) ("land use planning is often the most important function delegated to local governments. . . ."); Richard Briffault, *Our Localism: Part I: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) ("Land use control is the most important local regulatory power.").

considerations.¹⁰⁹ For example, a development can impact water supply, open space, and environmental resources such as wetlands. At the same time, project decisions have site-specific "quality of life" aspects that are important to citizens in particular jurisdictions. They involve the immediate neighborhoods where people reside and affect what is often their single most important investment: their homes.

In short, land use decisions have important ramifications for the environment.¹¹⁰ Thus, it follows that in those states which make land use decisions subject to a state's SEPA, the required environmental analysis can profoundly affect the underlying land use decision that the local government is making in three ways.

First, the SEPA can act as a check on planning by forcing local governments to confront the long-term infrastructure requirements of the land use being considered.¹¹¹ For example, a SEPA can mandate the government to identify the source of the water supply for a particular project.¹¹² By doing so, the SEPA can force a local government at least to acknowledge impacts that are otherwise easily overlooked, such as the environmental impacts sure to come from such development.

Second, certain types of land use decisions necessarily impact the larger region, and SEPAs can require the disclosure of those regional impacts.¹¹³ For example, the decision to approve a mall or "big-box" development, or a large office building, can have traffic impacts outside

109. See STATE ENVIRONMENTAL POLICY ACT HANDBOOK, *supra* note 40, at 75 ("It is not possible to meet the goals or requirements of [the Growth Management Act] or to make informed planning decisions without giving appropriate consideration to environmental factors.").

110. See MANDELKER, *supra* note 19, at 12-2 ("This extension of the impact statement requirement to private development also subject to the land use control process is a major difference between the state and federal legislation."); see also Magee, *Environmental Impact Statements: Applications to Land Use Control*, 10 ZONING & PLANNING L. REP. 113 (1987).

111. See, e.g., *Price v. Obayashi Haw. Corp.*, 914 P.2d 1364, 1377 (Haw. 1996) ("[I]n the area of water supply infrastructure, the EIS identifies the existing wells, pumps, transmission lines, and storage facilities. Waste water treatment facilities and solid waste disposal facilities are also discussed in detail.").

112. *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829 (1981). ("Our review of the final EIR in this case leads us to conclude that it does not meet the standards of an adequate EIR, because of its failure to give sufficient information concerning the delivery of water to the proposed sand and gravel mine.").

113. See Arthur Ientilucci, *SEQRA: Down the Garden Path or Detour for Development*, 6 ALB. L. ENVTL. OUTLOOK J. 102, 104 (2002):

Whether it is an adequate substitute or not, SEQRA is still the most useful mechanism available that comes close to accomplishing what comprehensive and regional planning are supposed to accomplish. It causes both decision-makers and applicants alike to look beyond the boundaries of individual development sites and to confront and consider the broader impacts of individual projects and the cumulative impacts of concurrent projects on entire neighborhoods, communities and in some cases regions.

the approving jurisdiction. In the absence of a SEPA requirement, the jurisdiction approving such a "big-box" development is often tempted to focus largely on the economic benefits of the project, while overlooking the externalities imposed on others.¹¹⁴

Third, SEPAs can force an evaluation of the "cumulative effects" of a series of land use decisions.¹¹⁵ Impacts upon infrastructure or the environment occur incrementally as individual projects come on line. Each project incrementally contributes to the larger environmental effects, such as using up the capacity of the sewer system or degrading the traffic flow in the area. SEPAs can ensure that these cumulative effects receive some attention.

The Promise and the Mismatch Dilemma: The question is whether, after thirty years, the SEPAs have lived up to their potential to provide an informational base that informs land use decision making and thus improves it. Much has been accomplished, but the answer is mixed. The prophylactic nature of the SEPAs account for a large part of their success, but it also limits their ultimate use as a vehicle for securing better land use decisions.¹¹⁶

The case law reveals that in some instances the SEPAs have prevented governments from hiding or avoiding environmentally significant details of land use projects.¹¹⁷ The SEPAs have also been useful in analyzing the potential environmental effects of larger land use decisions, such as comprehensive general plan revisions¹¹⁸ and

114. See *Sierra Club v. San Joaquin Local Agency Formation Comm'n*, No. C038622, 2002 WL 31412526 at *6 n.10 (Cal. Ct. App. Nov. 21, 2002) ("Areas where significant environmental impacts were found included land resources, water resources, . . . impacts on neighboring cities and counties, and recreation.").

115. See *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817 (Minn. Ct. App. 2006) ("our analysis of the rules' language and framework and the legislative intent evidence indicates that the 'cumulative potential effects' and 'cumulative impact' criteria both require an RGU to examine whether a given project may have a significant environmental effect when considered in conjunction with other projects."); see also *Save the Pine Bush, Inc. v. City of Albany*, 117 A.D.2d 267, 271 (N.Y. App. Div. 1986), *aff'd as modified*, 70 N.Y.S. 2d 611 (1986) (regulation "firmly establishes that cumulative impact can, in appropriate cases, be a relevant area of environmental concern, and based upon the nature of the Pine Bush and the number of pending projects in the Pine Bush, we are of the view that this is such a case.").

116. See Salkin, *supra* note 57, at 580 (observing that critics of SEQRA were calling for "a better integration of SEQRA into the local land use decision making process, or, alternatively, the exemption of local zoning from the SEQRA process. . .").

117. *Cal. Oak Found. v. City of Santa Clarita*, 133 Cal. App. 4th 1219, 1236 (Cal. Ct. App. 2005) (final EIR contains inadequate discussion of water supply).

118. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 820 P.2d 390, 405 (Wash. 1993) ("We therefore hold the EIS for the 1990 Plan Update was adequate as a matter of law under SEPA in its discussion of the impact of developing a large regional landfill on the cultural and historical environment of the Yakima Indian Nation in Klickitat County.").

annexations.¹¹⁹ Environmental analysis now unavoidably supplies the context for such decisions, a major change in how land use decisions are made. The SEPAs force local governments to face the environmental effects of urbanizing broad areas of land—the now-famous “sprawl” effect.¹²⁰

Ultimately, however, the structural limitations of SEPAs compromise their utility in informing land use decisions. As discussed above,¹²¹ SEPAs overlay the other land use laws that authorize the underlying decisions made by government,¹²² and this structural aspect has important consequences in the land use context. Because developers apply for approval of individual projects on specific parcels of land, SEPAs require an analysis of the particular proposal made by that developer. However, property lines are usually unrelated to the overall environmental context in which the project will be built. From an environmental planning perspective, the most important perspective is not from the standpoint of a smaller project but from the viewpoint of the wider environmental setting.

In short, a mismatch can easily exist between the scope of the project and the environmental setting. The city is analyzing a small proposal that implicates a much larger environmental setting or problem.

SEPAs attempt to solve this problem by requiring local governments to analyze “cumulative impacts.”¹²³ But this feature of the analysis does not fully solve the difficulty. The decision maker still must decide whether to approve a specific development proposal. Local decision makers are loathe to deny specific projects when, because of a number of earlier projects, a larger environmental effect such as traffic, air pollution, available water supply, or loss of open space has reached a critical

119. *Bd. of County Comm'rs v. City of Aurora*, 62 P.3d 1049, 1054 (Colo. Ct. App. 2002) (“Here, the court concluded that the report was inadequate because the map failed to depict the present streets, major trunk water mains, sewer interceptors and outfalls, other utility lines and ditches, and the proposed extension of such streets and utility lines in the vicinity of the proposed annexation. For that reason, the court voided the annexation.”).

120. *See, e.g., South County Citizens for Responsible Growth v. City of Elk Grove*, No. C042302, 2004 WL 219789 at *8 (Cal. Ct. App. Feb. 5, 2004) (“It seems obvious that preservation of farmland relatively isolated from urban land uses would be cheaper but less efficacious than preservation of farmland that is pivotal in the effort to prevent urban sprawl. These are matters that can and should be addressed through an EIR with an opportunity for public response.”).

121. *See* text accompanying note 41, *supra*.

122. *See, e.g., Polygon Corp. v. City of Seattle*, 578 P.2d 1309, 1313 (Wash. 1978) (“SEPA has been said to ‘overlay’ the requirements which existed prior to its adoption”).

123. *See* Scott A. Thornton, Comment, *Cumulative Impacts in Environmental Review: The New York Standpoint*, 9 PACE ENVTL. L. REV. 253 (1991).

stage.¹²⁴ A denial seems too much like visiting the past consequences of other developments upon the current proponent. Indeed, some have argued that even studying those impacts imposes an excessive burden on a project proponent.¹²⁵

A related problem arises when a project will be built in phases or is otherwise closely connected with other projects. Opponents may well argue that the agency should be analyzing all phases of the project, both present and future, and that the agency improperly segmented the project.¹²⁶ Courts on occasion have agreed that public agencies have improperly segmented projects, but only where the connection between projects is very close. As for the agencies themselves, they remain focused on the specific approval at hand and are unlikely to agree with appeals that a project has been improperly segmented.¹²⁷

The mismatch between the coverage of the SEPA and the overall environmental setting also becomes apparent when a significant regional environmental problem exists. Whether an analysis under SEPA can address that problem depends upon whether the government agency will approve a project of the same scope as the regional environmental problem.¹²⁸ If not, as is likely, the approving authority has little chance to affect the larger problem through its decision-making authority.

124. *Laurel Hills Homeowners Ass'n v. City Council*, 83 Cal. App. 3d 515, 526 (1976) (upholding agency's finding that "cumulative generation of traffic" was an overriding consideration that supported agency's approval of a project where the agency expressly found that "the regional traffic problem was an issue of citywide concern for which no adequate solution currently existed.").

125. *Hirokawa*, *supra* note 61, at 368:

[W]hen a single project application is presented to a hearing examiner, council, commission, or court, common sense seems to dictate that a cumulative impact study would impose disproportionately burdensome duties far exceeding the boundaries of the application at hand.

126. *See Caffry*, *supra* note 22, at 416 ("Segmentation, which is generally not permitted, occurs when an action is split into two or more parts for purposes of SEQRA review so as to minimize its apparent impacts.").

127. *Forman v. Trs. of State Univ. of N.Y.*, 303 A.D.2d 1019 (N.Y. App. Div. 2003) ("The court properly rejected petitioner's contention that the SUNY respondents improperly segmented the housing project at issue from other campus housing projects in order to avoid the necessity of preparing an EIS."); *see Buerger v. Town of Grafton*, 235 A.D.2d 984 (N.Y. App. Div. 1997) (no segmentation found where developer sought to develop an area of a large parcel and there was no indication that the proposed subdivision was the first phase of a larger project). *But see DeFreestville Area Neighborhoods Ass'n v. Town Bd. of N. Greenbush*, 299 A.D.2d 631 (N.Y. App. Div. 2002) (board improperly segmented zoning phase from development phase of project).

128. *See Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven*, 606 N.E.2d 1373 (N.Y. 1992). This case is discussed in text accompanying notes 222–26, *infra*, as part of a discussion concerning the mismatch between the approving government agency and other agencies. The case is also discussed in SELMI & MANASTER, *STATE ENVIRONMENTAL LAW* § 10A:10, at 10A-36.

Environmental Baselines: A final issue can inhibit the usefulness of a SEPA's environmental analysis as a means of informing land use decisions. Assume that an agency has adopted a plan that calls for the urbanization of a large, currently undeveloped area. Then, several years later but before any substantial development has taken place in that area, a new set of local government officials decides to change the plan. The latest plan provides for development that is far less dense than the previous plan.

When the agency undertakes its environmental analysis for the project, it must determine the "baseline" environmental conditions.¹²⁹ The question that arises in this scenario is whether the baseline is the actual, undeveloped environment on the property, or the urbanized land use previously planned for the property.¹³⁰ Proponents of the new plan can argue that, from a planning perspective, the baseline is the more intense development previously planned. Use of that baseline will mean the plan will have reduced environmental impacts from those previously envisioned. Opponents will argue that the baseline is the presently existing environmental condition of the property, i.e., the land in its undeveloped state. Use of that baseline for the environmental analysis will mean that the approval of the project will result in significant environmental impacts.

The baseline options present the interesting question of whether, in this situation, the SEPA's ultimate purpose is to aid planning or to ensure that present environmental conditions are considered. One certainly might argue that integrating planning with environmental analysis would call for using the land uses in the existing plan as the baseline. This choice would aid the planning effort by outlining the environmental effects of the changed plans. In contrast, using the existing environment as the baseline

129. CAL. CODE REGS. tit. 14, § 15125 (2006):

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

130. *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 127 (2001) ("In assessing the impact of [a] rezoning, it is only logical that the local agency examine the potential impact on the existing physical environment. In the context of that case our meaning was that the agency must examine the impact of the project as against the physical conditions on the subject property, as opposed to measuring the potential impact against a draft general plan.").

would ensure that, when a particular planning choice is made, its actual effects on the environment are considered. That consideration will not occur if the existing baseline is not the presently existing environment.

Of course, the SEPA could analyze both baselines. But if a choice is needed, the latter choice is more consistent with the purposes of the SEPAs.

E. *Expanding the Role of the Public: Rationales for Public Participation in SEPA Processes*

The Norm of Public Involvement: On its face, NEPA creates no overt role for the public in the EIS process.¹³¹ However, public participation quickly became the norm,¹³² and over time the public's role in the NEPA process has become accepted, even celebrated.¹³³ The public can participate in the scoping of environmental documents and can comment on the draft EIS.¹³⁴

States enacting SEPAs quickly and without much debate accepted this norm of public participation in the process.¹³⁵ However, the states vary slightly in their methods of public participation.

First, the state SEPA processes exhibit some variation in the opportunities for public participation. For example, because Hawaii does not

131. 42 U.S.C.A. § 4332 (2006). The closest NEPA comes to referring to the public is: Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

Id.

132. 40 C.F.R. § 1503.1(a) (2006) ("After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: . . . [r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.").

133. See Kevin H. Moriarity, Note, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2335 (2004) ("[t]he Forest Service attempted an end-run around the most important aspect of NEPA: public participation."). See generally Wendy Nelson Espeland, *Bureaucratizing Democracy, Democratizing Bureaucracy*, 25 LAW & SOC. INQUIRY 1077, 1083 (2000) ("NEPA was passed in an effort to make federal agencies . . . be more responsive to new constituents. . ."). But see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 225 (1997) (suggesting adverse results from mass participation in NEPA).

134. *Id.*

135. See, e.g., CODE MASS. REGS. tit. 301, § 11.08(3) ("An Agency undertaking a Project may hold public hearings, informal workshops, or public meetings at appropriate times prior to and during preparation of an EIR.").

require scoping of EISs, it has no role for the public in shaping the issues to be analyzed in the EIS, although it does require written responses to public comments on a draft EIS.¹³⁶ In contrast, public agencies in Connecticut must consider comments by the public on the draft EIS but need not respond in writing.¹³⁷ At the other extreme, the Washington SEPA Handbook contains detailed suggestions about the kinds of responses that are appropriate.¹³⁸

The states also vary on whether a public hearing on the environmental analysis is required. The Washington rule is that the agency must hold a public hearing only if requested by a group of fifty or more,¹³⁹ while Connecticut lowers the minimum group to twenty-five.¹⁴⁰ Public hearings in North Carolina are held at the agency's discretion.¹⁴¹

Certainly, the emphasis on the public's right to participate is unquestionably recognized in the law on SEPAs. The California courts have

136. HAW. CODE R. § 11-200-9(8) (2005) ("Receive and respond to public comments in accordance with: section 11-200-9.1 for draft environmental assessments for anticipated negative declaration determinations; or, section 11-200-15 for environmental assessments for preparation notices.").

137. CONN. AGENCIES REGS. § 22a-1a-9(a) (2006):

A sponsoring agency shall review all comments submitted on an environmental impact evaluation and any other pertinent information it obtains following circulation of an environmental impact evaluation, and conduct further environmental study and analysis or amend the evaluation if it determines appropriate. In all cases, the sponsoring agency shall prepare responses to the substantive issues raised in review of the environmental impact evaluation, and shall forward such responses, as well as any supplemental materials or amendments and all comments received on the evaluation to the Office of Policy and Management.

138. STATE ENVIRONMENTAL POLICY HANDBOOK, *supra* note 40, at 59:

The lead agency must consider comments received during the draft EIR comment period, and respond to them in the final EIS. Lead agency responses to comments should be as specific and informative as possible. Possible responses are to: (1) explain how alternatives, including the proposed action, were modified; (2) identify new alternatives that were created; (3) explain how the analysis was supplemented, improved, or modified; (4) make factual corrections; or (5) explain why the comment does not warrant further agency response.

139. WASH. ADMIN. CODE § 1970-11-610(5) (2006) ("[a] public hearing for such comments shall be held if, within thirty days of circulating its statement of adoption, a written request is received from at least fifty persons who reside within the agency's jurisdiction or are adversely affected by the environmental impact of the proposal.").

140. CONN. GEN. STAT. ANN. § 22a-1d (West 2006) ("The sponsoring agency preparing an environmental impact evaluation shall hold a public hearing on the evaluation if twenty-five persons or an association having not less than twenty-five persons requests such a hearing within ten days of the publication of the notice in the Environmental Monitor.").

141. N.C. ADMIN. CODE tit. 1, § 25.0604 (2006) ("The State Project Agency may hold a public hearing to complement the EIS process where significant public interest is expressed in the proposed activity and where such a hearing would be helpful in increasing public awareness, clarifying the issues, and gathering additional public comment. Notice of the public hearing shall be published in the Environmental Bulletin.").

even found that the public occupies a "preferred position" in the SEPA process¹⁴² and have strictly construed the regulations to promote public participation.¹⁴³ But neither the cases nor the regulations implementing the SEPAs clearly articulate the reasons for the widespread emphasis on public participation in the process. Four major justifications are possible.

The Acceptance Rationale: First, and most simplistically, SEPAs may encourage public participation under the theory that, if the public is involved in the environmental analysis process, citizens are more likely to accept the ultimate decision on the project. However, it seems equally likely, if not more likely, that the opposite reaction will occur.¹⁴⁴ If members of the public seriously dispute the sufficiency of the project's environmental analysis, that dispute can easily escalate into accusations that the public agency is not acting in good faith, or that a private applicant is hiding the project's impacts. Alternatively, if the environmental analysis is sufficient, opponents may cite that analysis as a reason why the public agency should disapprove the project. In either case, the SEPA process will not lead to acceptance of the outcome.

The Civic Discourse Rationale: A second possible purpose for the public participation requirement is the promotion of democracy and civic discourse.¹⁴⁵ Viewed in light of this purpose, the public participation

142. *Emmington v. Solano County Redev. Agency*, 195 Cal. App. 3d 491, 503 (1987) ("The Supreme Court has recently stressed the 'privileged position' that members of the public hold in the CEQA process.").

143. *Ultramar, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 17 Cal. App. 4th 689, 705 (1993) ("we cannot overemphasize the importance of full compliance with all notice provisions of applicable law, so that there will be maximum public comment and involvement. Given the significance of whatever path is followed, any decision must be subject to full public review before its implementation.").

144. For example, Hawaii agencies have "postcard" deluges of voluminous and repetitive public comments. See Lisa A. Bail, *The Voluminous and Repetitious Public Comment Issue Under the Hawaii Environmental Policy Act*, 1 (prepared for American Bar Assn. Env'tl. Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005) (on file with author)):

The requirement under the Hawai'i Administrative Rules that individualized letters responding to public comments be created, mailed and reproduced has created the incentive for "comment bombing." Project opposition to projects has been expressed through "supermarket postcard" campaigns, resulting in the submittal of voluminous and repetitious comments from individuals, many of whom have never read the draft Environmental Impact Assessment . . . document upon which they are commenting.

145. Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 678 (2005) ("[P]ublic participation mechanisms are seen as a step towards the development of civic virtues by providing a means for citizens to become involved in the regulatory decision-making process. Involvement in the decision-making process is believed to foster membership in the political community and enhance the ideals of democracy as a whole.").

requirements of the SEPA's are unique. Few governmental processes require a public agency to formally respond to issues raised by members of the public, as the commenting process usually does.¹⁴⁶ Only true quasi-judicial procedures, in which parties confront witnesses through cross-examination,¹⁴⁷ empower citizens to a greater degree.

Nonetheless, the abstract goal of promoting democracy seems an insubstantial justification for the commenting procedures. From a resource standpoint, considerable costs are associated with responding to public comments, including delays in reaching a final decision.¹⁴⁸ For example, Hawaii has faced situations in which agencies were inundated with repetitive, obviously orchestrated comments.¹⁴⁹ Less expensive methods than the commenting process are available to promote democracy. Moreover, particularly at the local government level, citizen access to decision makers suggests that democratic participation is robust, with little need for further promotion.

The Expertise Rationale: A third possible purpose is the provision of expertise by the public to governmental agencies.¹⁵⁰ For example, this purpose might justify seeking the public's views on the scoping of the

146. WASH. ADMIN. CODE 197-11-560 (2006):

(1) The lead agency shall prepare a final environmental impact statement whenever a DEIS has been prepared, unless the proposal is withdrawn or indefinitely postponed. The lead agency shall consider comments on the proposal and shall respond by one or more of the means listed below, including its response in the final statement. Possible responses are to: (a) Modify alternatives including the proposed action; (b) develop and evaluate alternatives not previously given detailed consideration by the agency; (c) supplement, improve, or modify the analysis; (d) make factual corrections; or (e) explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's response and, if appropriate, indicate those circumstances that would trigger agency reappraisal or further response.

147. See, e.g., Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 113 (1998) ("As in other quasi-judicial settings, testimony is subject to cross-examination and rebuttal.").

148. See Johnson, *supra* note 25, at 579, suggesting that delay alone provides benefits under NEPA:

Since NEPA can delay the federal government from taking actions that may separately impact communities, the law can provide communities with valuable time to organize and to provide information to the government concerning a proposed action's potentially adverse impacts. The delay may also provide communities additional time to explore alternative ways to prevent the proposed action.

149. See Bail, *supra* note 144.

150. *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 73 (N.Y. App. Div. 1996) ("[A] key element in the environmental review process is the public review and comments on the Draft Environmental Impact Statement . . . so as to 'draw on the reservoir of public information and expertise which SEQRA intends to tap.'").

environmental document that the agency is to prepare, because deciding the scope of the document requires the use of at least some expertise.¹⁵¹ Alternatively, citizen involvement might prevent informal collusion between the agency and a private project proponent to overlook environmental consequences.¹⁵²

Of course, on a volumetric basis the vast majority of comments will not provide any real expertise; many will simply support or oppose projects on informational grounds already known to the agency or on political grounds.¹⁵³ Nonetheless, environmental groups as well as project proponents in many instances have the capacity to marshal expertise on the environmental issues that arise from the project being considered.¹⁵⁴

Furthermore, where the SEPA extends to local land use decisions, members of the public who live in the area have particularized information to offer. They understand the conditions of the existing environment, and that understanding is useful in forecasting the possible environmental impacts of a project. However, those same participants are likely to vigorously oppose the project, a position that can call into question the objectivity of their submissions to the preparer of the EIS.

151. CAL. CODE REGS tit. 14, § 15083 (2006) ("Prior to completing the draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. Many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process. This early consultation may be called scoping.").

152. Salkin, *supra* note 57, at 585 (noting Professor Weinberg's suggestion that "both citizens and advocacy groups . . . take advantage of the 'golden opportunity' to participate in the SEQRA process and see to it that the science, the economics, and the law are all in order before a project moves forward," thereby ensuring that the SEQRA process is not a "two-handed card game between the local government and the sponsor of the project" . . .).

153. See Jonathan Poisner, *A Civil Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 57 (1996) (discussing the "synoptic" method of decision making "in which professionals exchange data so that they can then apply preset scientific rules to determine the optimal decision" and suggesting that "[P]ublic participation is consistent with the synoptic process only so long as it conforms to the scientific model.").

154. David E. Seidemann, *Insufficient Accountability: Case Study of the Recycling Plan of a Public Interest Research Group*, 3 BUFF. ENVTL. L.J. 221, 222 (1995) ("Over the past several decades, as the public's faith in the capacity of government and industry to behave responsibly has diminished, the public has turned increasingly to environmental advocacy groups for help in holding government and industry accountable. Environmental groups have become useful watchdogs because they have both the technical expertise and the inclination to monitor those segments of society in which the public has lost faith . . . "). *But see* Johnson, *supra* note 25, at 600 ("One of the major impediments to informed and meaningful public participation in the NEPA environmental review process is the highly technical nature of environmental review documents.").

In sum, the provision of expertise by members of the public offers some legitimate justification for public participation in the SEPA processes.¹⁵⁵ However, since most comments do not add expertise, and some of the comments offered may be biased, the question is whether the additional benefit sufficiently justifies the costs.

The Confrontation Rationale: A final justification for public participation directly links to the original purpose of both the SEPAs and NEPA: changing governmental decision making by forcing public agencies to confront the environmental consequences of their actions.¹⁵⁶ Unquestionably, public agencies today are far more sensitized to environmental issues than in the 1970s, and those issues are an important factor in public decision making.¹⁵⁷ Nonetheless, whether the agency acts on the basis of the analysis of environmental effects is still questionable in many instances.¹⁵⁸

One part of the problem stems from the chronology of agency decision making. The agency must consider an EIS at the time it decides to approve a project.¹⁵⁹ By the time that a project reaches the actual time for approval, however, considerable bureaucratic momentum may have built in favor of its approval. For example, in the case of a land use project, the local government and the developer may have interacted and informally agreed on such issues as the size of the project and on

155. See Poisner, *supra* note 153, at 79 ("NEPA public participation takes the form of pseudo peer review science, in which the agency uses public participation to ensure that agency experts have, indeed, considered all the relevant information.").

156. See, e.g., *Wis. Envtl. Decade, Inc. v. State Dep't of Natural Res.*, 288 N.W.2d 168, 172 (Wis. Ct. App. 1979) (Wisconsin Environmental Policy Act "is designed to ensure adequate consideration of environmental factors in the decision-making processes of state agencies before resources are irreversibly and irretrievably committed."); *Lassila v. City of Wenatchee*, 576 P.2d 54, 59 (Wash. 1978) ("A basic purpose of SEPA is to require local governments to consider total environmental and ecological factors to the fullest extent" when taking major actions).

157. Bob Warner, *Group Works to Help Candidates Think Green*, PHILADELPHIA DAILY NEWS, May 23, 2006 at 6 ("[T]he release of a public-opinion poll show[s] . . . Philadelphia residents attach a lot of importance to environmental issues, ranging from water and air pollution to improving city parks, roads and bridges."); Justin Pidot, *The Applicability of Nuisance Law to Invasive Plants: Can Common Law Liability Inspire Government Action?* 24 VA. ENVTL. L.J. 183, 211 (2005) ("A recent Gallup Poll found that sixty-five percent of Americans are concerned about environmental issues.").

158. See Watts, *supra* note 66, at 217 ("CEQA functions can provide an important check on the temptation for financially strapped local governments automatically to approve revenue-generating projects.").

159. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11 (2006) ("Prior to the lead agency's decision on an action that has been the subject of a final EIS, it shall afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS before issuing its written findings statement. No involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS, until the time period . . . has passed and the agency has made a written findings statement.").

any benefits the developer will provide to the local jurisdiction.¹⁶⁰ By the time that the agency actually considers the environmental analysis, the agency may have effectively made up its mind.¹⁶¹

A fundamental purpose of the SEPAs is to generally ensure that, in this situation, environmental impacts are actually considered.¹⁶² The public commenting process can help ensure the fulfillment of this purpose by insisting on a kind of rational dialogue about environmental impacts.¹⁶³ Members of the public can force the public agency to respond carefully to individual comments about the projects' impacts, thereby creating a record of the specific environmental impacts.

160. See, e.g., Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 472–73 (2005). The article notes that annexations, one type of land use decision, often result in agreements between the local jurisdiction and the landowner:

Should annexation into the city provide more attractive development possibilities to the landowner, negotiations between the two sides may produce an enforceable agreement stipulating the terms of annexation. Typically, the agreement will include commitments made by both parties, with the provisions covering a wide range of topics, including zoning and subdivision requirements, commitments to provide financial contributions, utility provision, and abatements of taxes, fees, and other charges.

See also Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337 (2002); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987).

161. See *Matter of Ziemba v. City of Troy*, 802 N.Y.S.2d 586, 588 (N.Y. Sup. Ct. 2005) ("Having made up their minds without going through the SEQRA process, they are convinced that it would serve no practical purpose to go through the SEQRA process in this or other instances of building demolition."); *Concerned Citizens of Rapides Parish v. Hardy*, 397 So. 2d 1063, 1068 (La. Ct. App. 1981) (noting in the context of NEPA that "defendant did not approach the design hearing with an open mind to evaluate the views to be expressed by the people of the Alexandria-Pineville area at the hearing as NEPA contemplates.").

162. *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1106 (2004) ("The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided"); *Santa Clarita Org. for Planning the Env'tl. v. County of Los Angeles*, 106 Cal. App. 4th 715, 721 (2003) ("The purpose of an EIR is to inform the public and its responsible officials of the environmental consequences of decisions before they are made.").

163. See Neil A.F. Popovic, *The Right to Participate in Decisions That Affect the Environment*, 10 PACE ENVTL. L. REV. 683, 698–99 (1993) ("In order for public voice actually to affect the outcome of the environmental decision-making process, the public must have a meaningful role in the process. In other words, the process must force the government, prior to reaching a decision, to consider the public's input."). But see Sterk, *supra* note 20, at 2052:

[T]he impact statement is less important as a mechanism for sensitizing decision-makers to environmental issues . . . [E]nvironmental issues have become an important focus for public discourse. Decisionmakers may still sacrifice environmental values, but they are unlikely to do so because they are unaware of public attitudes toward the environment. . . .

In effect, the "comment and response" under the SEPA creates a forced conversation between the parties about environmental consequences and requires the parties to stay on that point. Forcing the public agency to specify environmental consequences by itself elevates the consideration of those consequences. Because the decision-making body must include this environmental information in a document that it has prepared, the information is more likely to assume a more prominent role in the public debate about project approval.

This goal is particularly important for those groups without the political muscle to otherwise gain the attention of the decision makers. Low economic groups and minorities traditionally have less ability to influence government decisions. SEPA processes can provide a voice for these groups that is harder to ignore.¹⁶⁴

Thus, the public commenting process can be rationalized as an important mechanism for fulfilling the underlying purpose of environmental analysis. It is likely not the most efficient means of promoting those goals; some have suggested that other procedures associated with alternative dispute resolution, such as interactive workshops, would improve the process.¹⁶⁵ But this purpose, together with the more limited "provision of expertise" rationale, supplies a reasonable justification for the public's expanded role in the SEPA process.

F. *Affecting Decisions: The Irrelevancy of Alternatives*

The Role of Alternatives: NEPA reflects a model of logical planning¹⁶⁶ that is closely related to basic land use planning. Under this model the

164. Johnson, *supra* note 25, at 572:

In many cases minority and low-income communities are disparately impacted by government actions because the communities do not have a voice in the decision-making process, and the communities lack the influence or political power of special interest groups that may support the government action. Broad and flexible public participation provisions . . . empower communities and provide them with a voice in the decision-making process.

165. See Gail Bingham & L.M. Langstaff, *Alternative Dispute Resolution in the NEPA Process*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT AND FUTURE 277 (Ray Clark & Larry Canter eds., 1997) ("more specific attention to the application of ADR techniques to the NEPA process, through increased awareness of proven ADR techniques and the use of neutral facilitators or mediators where appropriate, would enhance the ability of agencies to use the NEPA process as the decision-making tool it was intended to be rather than the onerous procedural burden it seems to have become."); U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, REPORT AND RECOMMENDATIONS ON A NEPA PILOT PROJECTS INITIATIVE (Aug. 29, 2001).

166. State of Wis. v. Weinberger, 745 F.2d 412, 434 (7th Cir. 1984) (referring to "the NEPA ideal of careful environmental planning *prior* to action" (emphasis in original); Joel Ban, *NEPA Review of CAFE: An Opportunity Lost*, 23 TEMP. ENVTL. L. & TECH. J. 121, 139 (2004) ("NEPA created an obligation on the part of the federal government to use all practical means to coordinate federal plans, functions, programs, and resources . . .").

agency first identifies the goals of the planning process. The agency then gathers the relevant data regarding environmental impacts and examines alternative courses of action that would reduce the project's identified environmental impacts.¹⁶⁷ To reinforce the emphasis on reducing impacts, NEPA also requires public agencies to consider "mitigation measures."¹⁶⁸ These are measures that also reduce or avoid environmental impacts¹⁶⁹ but do so in some way distinguishable from the adoption of alternatives. The NEPA regulations go so far as to label the consideration of alternatives "the heart of the environmental impact statement."¹⁷⁰

At a minimum, the purpose of this procedure is to require the agency to consider alternatives that reduce or avoid environmental impacts. Whether the agency must act on those alternatives depends on whether the SEPA has a substantive effect on decision making. SEPAs that create an obligation to act on such alternatives differ markedly from NEPA, which imposes no substantive constraint on agency decision making.¹⁷¹

By and large, the SEPAs have closely followed the NEPA statutory model of requiring an EIS to discuss both alternatives and mitigation measures.¹⁷² There is some difference in the actual wording of the statutes.

167. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 925–26 (2002):

NEPA is predicated upon a 1960s-style faith in comprehensive bureaucratic rationality, and more specifically, the comprehensive-rational planning model associated with the large scale experiments in urban planning of that era. NEPA demands that the agency conduct a single, exhaustive, panoptic, and purely predictive information production exercise prior to undertaking action.

See also Lee R. Epstein & Larry A. Gordon, *Application of American Land Use and Environmental Planning Techniques to Environmental Recovery in Emerging Economies: Fundamental Foundations from the New World to the Old*, 16 HASTINGS INT'L & COMP. L. REV. 1, 14 (1992) ("Environmental planning also utilizes the traditional planning model. As such, it involves a future-oriented, continuous process, based upon an analysis first of environmental resources and present conditions.").

168. 40 C.F.R. § 1502.14 ("In this section agencies shall: . . . (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.").

169. *Natural Res. Def. Council v. U.S. Army Corps of Eng'rs*, No. 05-CIV-762(SAS), 2006 WL 559472, at *13 (S.D.N.Y. Mar. 8, 2006) ("A proposed mitigation measure should be accompanied by some level of assurance as to its efficacy. An agency must study the likely effects of the measure, propose monitoring to determine how effective the planned mitigation would be, and consider alternatives in the event the measure failed.").

170. 40 C.F.R. § 1502.14 (2006).

171. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). ("[I]t is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.").

172. See, e.g., N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2006) (EIS must discuss "alternatives to the proposed action" and "mitigation measures proposed to minimize the environmental impact"); WASH. ADMIN. CODE § 197-11-440 (2006) (EIS must discuss reasonable alternatives, including the proposed action with any mitigation measures).

A good number speak in terms of "feasible" alternatives or mitigation measures.¹⁷³

Substantive Constraints on Decision Making: Unlike NEPA, however, a number of the SEPA's affirmatively recognize a substantive constraint on agency decisions.¹⁷⁴ They vary in their detail. The New York SEPA requires agencies to choose alternatives which, consistent with social, economic, and other essential considerations, minimize or avoid adverse environmental effects "to the maximum extent practicable."¹⁷⁵ Some SEPA statutes emphasize mitigation; the District of Columbia, for example, requires disapproval of an action if the public health, safety, or welfare is "imminently and substantially endangered." No disapproval is required, however, if "the applicant proposes mitigating measures or substitutes a reasonable alternative to avoid the danger."¹⁷⁶

The California SEPA is the most explicit in outlining a substantive effect. It establishes a policy that agencies should not approve projects where feasible alternatives or mitigation measures would reduce environmental damage.¹⁷⁷ Agencies must make findings about the feasibility of alternatives and mitigation measures.¹⁷⁸

173. MINN. STAT. ANN. § 116D.04(6) (West 2004).

174. See Ferester, *supra* note 3, at 209 ("[S]ome states sought to improve upon NEPA by holding state agencies and municipalities to higher standards than those imposed on their federal counterparts.") The principal states with more significant substantive provisions are New York, Washington, California, and Minnesota, as well as the District of Columbia. A larger number of states—including North Carolina, Hawaii, and Maryland—have no such provisions.

175. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 2006). The section reads in full:

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

176. D.C. CODE ANN. § 8-109.04 (1989).

177. CAL. PUB. RES. CODE § 21001 (West 1979). The pertinent part of the statute declares:

(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.

(b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

(c) If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.

178. *Id.* § 21081. But see N.C. GEN. STAT. ANN. § 113A-5 (West 1971) (when a program, project or action would result in a "major adverse change in the environment," then the information "shall be presented to the Governor for review and final decision by him or by such agency as he may designate . . .").

While there has been almost no litigation over these substantive SEPA policies,¹⁷⁹ they are important nonetheless, for unlike NEPA,¹⁸⁰ they empower public agencies to condition or deny a project on environmental grounds.¹⁸¹ Indeed, in some instances the SEPA may even require the imposition of mitigation.¹⁸² This overt legislative empowerment is a significant part of the SEPAs that have such authority.¹⁸³

Given these provisions, the question then becomes whether, and how, agencies will use the authority.

Agency Use of Alternatives: A logical place to begin examining how agencies actually use their substantive authority is by looking at how they perceive alternatives and mitigation measures differently. Here, the most important point is that the concept of an "alternative" is often not easily distinguished from a "mitigation measure" if the set of examined alternatives includes only those that reduce environmental impacts.¹⁸⁴ Thus, it is not surprising that a Washington statute conjoins

179. Gerrard, *supra* note 45, at 5 ("On a nationwide basis, there are few if any cases holding, based on the little NEPAs . . . that a decision was improper because the environmental impact was excessive.").

180. Caffry, *supra* note 22, at 194 ("This policy of avoiding adverse environmental impacts is one of the principal differences between SEQRA and its 'parent' statute [NEPA] . . .").

181. See WASH. ADMIN. CODE § 197-11-660 (2006) (expressly authorizing agencies to mitigate environmental impacts:

(1) Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:

(a) Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued.

(b) Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker.

182. See Peter J. Eglick & Henryk J. Hiller, *The Myth of Mitigation Under NEPA and SEPA*, 20 ENVTL. LAW 773, 774 (1990) (The Washington SEPA "generally is considered stronger than NEPA because it provides agencies with substantive authority to condition or deny a project. Moreover, SEPA may mandate the mitigation of significant adverse impacts.").

183. See Ferester, *supra* note 3, at 231 (While CEQA's "mechanical aspects are very similar to NEPA's . . . CEQA's language clearly and forcefully communicates the legislative mandate for environmentally-sensitive decisionmaking.").

184. See Nicholas C. Yost, *State Mini-NEPAs or State Environmental Impact Assessment Law—Scope: Purpose and Need, Alternatives, and Mitigation* (prepared for the American Bar Association Environmental Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005) at 6: "While alternatives are one means of avoiding environmental harm—the agency must look for alternative means of achieving ends which are less harmful—mitigation is another means of achieving the same end—allowing an action to proceed, but only if the harmful impacts are removed or ameliorated.") (on file with author).

the two, using the phrase "significant alternatives including mitigation measures."¹⁸⁵

The following hypothetical demonstrates the close relationship between alternatives and mitigation. Suppose, for example, a developer has proposed a subdivision of 500 units, and an EIS is prepared for that proposal. Is a 400-unit subdivision an "alternative" to the 500-unit proposal? Or, instead, is it a "mitigation measure" designed to mitigate the impacts of the larger proposal? If the smaller, suggested project reduces impacts (i.e., "mitigates" them), it could likely fit under either definition.

One of the few situations in which alternatives are truly distinct from mitigation measures¹⁸⁶ occurs where the alternative would change the site of the proposed project. If the SEPA were a comprehensive planning tool, logic would require the EIR to examine any alternative that would reduce impacts regardless of location. For example, if the 500-unit project would severely impact a wetland, an alternative would be to locate the project on another site with no impacts on wetlands. That alternative would reduce environmental impacts while attaining the project's objectives.

However, the statutory language of the SEPAs does not explicitly mandate such an analysis,¹⁸⁷ and courts generally have not imposed such a requirement.¹⁸⁸ The principal reasons are threefold, and they are illustrated most vividly in the context of land use decision making.

First, in a market economy development proposals are almost always initiated by owners of the land involved or, at least, those with a legal right to control use of the land. An environmentally superior alternative site will likely be owned by someone with no connection the development

185. WASH. REV. CODE ANN. § 43.21C.031(1) (West 1995).

186. There are some situations in which an alternative does exist that is not a mitigation measure. The "conservation" alternative is one example. Water conservation may be a viable alternative to the need for a new dam. Similarly, energy conservation may obviate the need for a new power plant.

187. *But see* D.C. CODE § 8-109.03(a)(4) (1989) ("Alternatives to the proposed major action, including alternative locations . . .").

188. *Mira Mar Mobile Cmty. v. City of Oceanside*, 119 Cal. App. 4th 477, 492 (2004) ("Because the proposed project is consistent with the City's existing plans, policies and zoning, we conclude a review of alternative sites was not necessary."). Washington requires analysis of offsite alternatives only if a public agency will implement the project. *Org. to Pres. Agric. Lands v. Adams County*, 913 P.2d 793, 798 (Wash. Ct. App. 1996) ("whether an EIS must include consideration of offsite alternatives depends on whether the project is public or private" (citing WASH. ADMIN. CODE § 197-11-440(5)(d) (2006))); *see* GERRARD ET AL., *supra* note 21, § 5.14[2][f], at 5-174.5 ("developers of shopping centers have been successful in avoiding analyses of alternative sites not owned by them.").

proposal. The courts are reluctant to make governmental entities analyze an alternative on other property unless there is a greater likelihood that the alternative site could be used.¹⁸⁹

Second, requiring the examination of off-site alternatives has a sense of unfairness about it.¹⁹⁰ In formulating a proposal, a developer invests time and money to bring the project to a point where he or she can apply to the local government for approval.¹⁹¹ For example, for a subdivision these efforts will include surveying the land, investigating the local government's existing land use regulations, investigating the market conditions, and designing the project.¹⁹²

If the local government were to disapprove the project at this point because an off-site alternative is environmentally superior, much of this up-front effort would be wasted. Moreover, if the developer's proposal relies on existing zoning calling for development of that type, a denial based on the existence of an off-site alternative would seem particularly unfair.

Third, some jurisdictions emphasize that the public agency must only analyze alternatives that can attain the objectives of the project.¹⁹³ Broadly construed, those objectives could include the attainment, in at least some general sense, of the developer's projected profit. An alternative that requires the use of another site, it may be argued, cannot meet that objective.

189. The SEQRA HANDBOOK lists four situations in which analysis of alternative sites is appropriate: (1) the agency itself has undertaken the project directly; (2) a private applicant has already evaluated alternative sites; (3) the applicant owns or has options on other sites; and (4) the applicant does not yet own the proposed site. SEQRA HANDBOOK, *supra* note 39, at 63-64.

190. See Rodgers, *supra* note 72, at 57. Discussing Washington's prohibition on evaluating off-site alternatives for private projects on a specific site, Professor Rodgers observes:

The idea might be that site acquisition is so important to most proposals that the alternative of doing it elsewhere is financially out of the question and therefore unworthy of discussion. Or perhaps the notion is that developers are entitled to a decision on a take-it or leave-it basis so that the range of alternatives must be defined by the scope of their ambition. . . .

191. E.A. Prichard & Gregory A. Riegler, *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983, 1004 (1999) ("Developers may be required to invest even greater sums of up-front money to justify proposals.").

192. See, e.g., *Frankland v. City of Lake Oswego*, 517 P.2d 1042, 1044 (Or. 1973). ("Plaintiffs contend that the construction was not accomplished according to the planned unit development plan as submitted to the City.").

193. See CAL. CODE REGS. tit. 14, § 15126.6(a) (2006) ("An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.").

As a result of these factors, SEPA's in general limit the types of alternatives discussed to those that would be located on the same property. The analysis tends to focus on either reducing the size of the proposal or conditioning its approval. It is in this area that the SEPA's have had their most significant substantive effect.

In short, the purpose of the SEPA process has largely become the identification of mitigation measures,¹⁹⁴ with the process providing a vehicle for negotiating such measures. In doing so, the SEPA's partially fulfill a fundamental purpose for their existence: facilitating the reduction of environmental impacts.¹⁹⁵

G. *Using the Mitigation Power: Conditions and Bargaining*

The question then arises: how are the actual mitigation measures determined?¹⁹⁶ Both public agencies and developers often view the procedures for approving a development—including the SEPA process—as establishing a platform upon which bargaining can take place.¹⁹⁷ The environmental document does not provide the sole basis for determining the mitigation measures that the agency will place on the project. Rather, the environmental documentation serves as a starting place for bargaining.

SEPA performs a number of functions that support bargaining between the various parties interested in the project. To begin with, SEPA requires a specific definition for the project, so the parties have a clear embarkation point in their interactions.¹⁹⁸ The SEPA process also identifies the principal environmental effects of the project as it is proposed.

194. Jay Wickersham, *Mitigation Measures: Definitions, Enforcement, Monitoring, and Effectiveness*, AM. BAR ASSN. SECTION ON ENV'T, ENERGY AND RESOURCES 2 (2005) ("the identification and implementation of mitigation measures is the principal environmental benefit of little-NEPA statutes.") (on file with author).

195. CAL. PUB. RES. CODE § 21002.1 (West 1996) ("Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.").

196. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 269, 270 (2005) ("The shift in land use regulation from a primarily command and control approach to an extemporized, negotiated mode has steadily gained momentum . . .").

197. The mitigation can take the form of a mitigated negative declaration as well, which avoids the need for an EIS. See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L. J. 333, 348 (2004) ("The widespread use of the mitigated FONSI is the best evidence we have that NEPA is actually altering agency decision-making and improving environmental performance.").

198. *City of Ithaca v. Tompkins County Bd. of Representatives*, 164 A.2d 726 (N.Y. App. Div. 1991) ("SEQRA review is not required until a specific project plan . . . is actually formulated and proposed").

These effects are likely to become a central focus of dispute and, therefore, for discussions among the interested parties. Finally, and most importantly, by requiring the identification of mitigation measures, the SEPA process offers suggestions of actions that might lead to agreement among the parties.¹⁹⁹

The Incentive for Large Proposals: The concept of bargained mitigation measures, in turn, has two important practical consequences that affect whether the environmental protection purposes of a SEPA are fulfilled. First, as noted in the literature on bargaining, the starting point for a negotiation plays a critical role in its outcome.²⁰⁰ As a result, the ascendancy of bargaining has incentivized project applicants to propose projects that are larger than the size that ultimately will satisfy them. If the project proponent knows that, to mitigate environmental impacts, a local jurisdiction is likely to reduce the density of a proposal, it will seek to begin the mitigation process (and any bargaining over the mitigation) from the "starting point" of a larger project.

Of course, there are constraints on how large an original proposal may be. For example, existing land use ordinances may limit density in the area.²⁰¹ Nonetheless, where private projects are concerned, proponents have considerable ability to "set the stage" for the mitigation process through their beginning proposal that the SEPA process analyzes. After all, they initiate the process by applying for a government approval.²⁰²

Second, the bargaining is likely to extend beyond purely environmental considerations. In the land use context, for example, the bargaining might encourage trade-offs involving features of the project

199. CAL. PUB. RES. CODE § 21002.1 (West 1996) ("The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.").

200. Russell Kurobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1608–09 ("The initial terms are likely to be perceived as the terms that will govern the parties' relationship if no further action takes place, and thus as the status quo . . . terms understood as the status quo, or baseline, are likely to be sticky . . .").

201. See *Schenck v. City of Hudson*, 997 F. Supp. 902, 905 (N.D. Ohio 1998) (the City of Hudson "has the right to limit the density of population to prevent congestion."); Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 19 PACE ENVTL. L. REV. 715, 719 (2002) ("Public welfare laws embrace economic regulation of all kinds: historic preservation, open space zoning and height and density limits"); Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 257 (2002) (noting the role of courts in providing judicial validation for suburban zoning ordinances aimed at limiting density).

202. The clearest case of this is where private developers seek approval of housing projects. There is less evidence that, when public agencies propose public projects (rather than approve private developments), the same dynamic is present.

that have little or no environmental impact, or provision of services by the developer for the benefit of the jurisdiction approving the project.²⁰³ In other words, while the SEPA process establishes an initial framework for the bargaining, the environmental analysis produced by that process does not constrain the topics or the outcome of the bargaining. The ultimate agreement may accept certain environmental impacts in return for the developer's provision of other measures that the jurisdiction desires.

This outcome is not necessarily illegitimate. Decisions involving projects causing environmental impacts involve weighing the costs and benefits of those proposals, including balancing environmental impacts against project benefits.²⁰⁴ Ultimately, tradeoffs necessarily occur between those costs and benefits. SEPA's ensure that, in making those tradeoffs, public agencies will act on complete information about the environmental impacts of the project.

The negotiating process, however, may run afoul if the state has more structured statutory provisions for determining whether mitigation measures and alternatives are feasible. The California SEPA, for example, requires that mitigation of environmental effects must occur first.²⁰⁵ Only after feasible mitigation measures (or alternatives) are implemented may the agency determine whether to approve the project by balancing the project's overall benefits against its costs.²⁰⁶ Negotiating and reaching an agreement on mitigation measures before determining

203. David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 695-96 (2001) ("Development agreements are attractive to both sides of the development equation. On the one hand, a developer can achieve a freeze on development regulations and, in some cases, fees and contributions. A local government, on the other hand, can obtain "voluntary" contributions, dedications, and the developer's agreement to construct public improvements without having to establish any "nexus" between the required improvement or exaction and the proposed development.").

204. *City of Colo. Springs v. Bd. of County Comm'rs of Eagle*, 895 P.2d 1105, 1115 (Colo. Ct. App. 1994). ("The Board, acting in its quasi-judicial capacity, is capable of performing a balancing test which weighs the potential adverse environmental impact of the project against its potential benefits.").

205. See CAL. PUB. RES. CODE § 20002.1(b) (West 1994) ("Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."); *id.* § 21081 (requiring findings about whether alternatives or mitigation measures are feasible).

206. *Id.* § 21002.1(c) ("If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency . . ."); CAL. CODE REGS. tit. 14, § 15093(a), (b) (2006) (requiring a public agency to "balance . . . the economic, legal, social, technological or other benefits of a proposed project against its unavoidable environmental risks when determining to approve the project" and to adopt a "statement of overriding considerations" explaining the reasons for its action).

their feasibility may conflict with this two-step process. Mitigation measures would not be discarded because of feasibility; rather, they could simply be traded away in the negotiation process.

Third, in some cases the agency may not have the expertise needed to properly formulate the mitigation measures needed to address environmental impacts. That expertise may lie, instead, with another public agency which has only secondary authority over the project.²⁰⁷ The result, some have suggested, is "orphaned mitigation" outside the agency's area of expertise and thus less likely to be implemented effectively.²⁰⁸

In sum, the imposition of mitigation measures as conditions has become common with the SEPA framework. But the means of placing those conditions, through bargaining, was likely not anticipated by the SEPA legislative authors. Furthermore, the imposition of mitigation measures is limited by the approving agency's sphere of authority.

H. *Recognizing the Consequences of Prophylacticism: Mismatches and Political Dissonance*

The "Overlay" Methodology: Like NEPA, the SEPAs embody a particularized methodology for addressing environmental problems. Various approaches were possible. For example, instead of requiring a separate environmental analysis, legislation to protect the environment could have been amended into existing legislation governing public agencies.²⁰⁹ Instead, the NEPA-SEPA model opts for a prophylactic approach. As a

207. CAL. PUB. RES. CODE § 21069 (West 1976) ("Responsible agency" means a public agency, other than the lead agency, which has responsibility for carrying out or approving a project"); N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2005) ("As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.").

208. Jay Wickersham, *Mitigation Measures: Definitions, Enforcement, Monitoring, and Effectiveness*, AM. BAR ASS'N SECTION ON ENVTL., ENERGY AND RESOURCES, 6 (2005) (discussing the risk of "orphaned mitigation" where the mitigation measures "lie outside an agency's legal jurisdiction or technical expertise . . .") (on file with author).

209. The recent Growing Smart Guidebook outlines some possibilities for integration in the land use field. See Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 136-37 (2002) (options include "requiring local governments to conduct an analysis of alternatives in the comprehensive land use plan . . . or substituting environmental policies in a comprehensive plan and requirements within development regulations for environmental review under state law . . .").

result, the legislation overlies previously existing legislation authorizing government action.²¹⁰

For example, most states have legislation that empowers local agencies to place conditions on subdivision approvals so as to minimize impacts, including environmental harms.²¹¹ If the state enacts a SEPA, that law will overlay and co-exist with the subdivision legislation.

This approach has important consequences.²¹² Agencies must dovetail the new procedures required by the SEPA with those procedures mandated by the existing, underlying organic legislation that empowers the agency to approve projects. That type of integration may be difficult. SEPAs can also conflict with other legislation, such as permit streamlining acts,²¹³ that require agencies to act within a set time period.²¹⁴ In short, the interplay has become quite complicated.

The most important issue, however, is how the choice to employ an overlay methodology affects the ultimate purpose of SEPAs: to ensure that public agencies confront the environmental consequences of their decisions.²¹⁵ Like NEPA, the SEPA framework assumes that most important environmental issues will be encompassed within the agency's approval authority. In other words, these laws rely on the premise that, overall, SEPAs can "reach" most environmental effects because there

210. See *supra* text accompanying note 122.

211. James A. Kushner, 1 SUBDIVISION LAW AND GROWTH MGMT. § 1:16 (2006) ("Courts have uniformly sustained the power of the state to enable local subdivision regulation. . . . All states either enable local subdivision control ordinances by state statute or recognize inherent power through judicial approval of local ordinances.").

212. See Kenneth S. Weiner, *No Little NEPA an Island: Integrating Environmental Review Efficiently with Decisions* (prepared for American Bar Assn. Envtl. Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005)), at 2 (powerpoint noting "challenges with an "overlay" law as including "duplication/redundancy/cost," "delay/cost," and "paperwork/cost.").

213. See, e.g., CAL. GOV'T CODE § 65920(a) (West 1997) ("This chapter shall be known and may be cited as the Permit Streamlining Act."); CAL. GOV'T CODE § 65921 (West 1997) ("The Legislature finds and declares that there is a statewide need to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects. Consequently, the provisions of this chapter shall be applicable to all public agencies, including charter cities.").

214. *People v. Library One, Inc.*, 229 Cal. App. 3d 973, 987 n.5 (1991) ("The People's claim that various sections of the Permit Streamlining Act, Government Code section 65920, *et seq.*, provide adequate time limits for the issuance of a conditional use permit is without merit. The cited provision imposes a six-month deadline for approval or disapproval of an application for a *development permit* from the completion of the application unless an environmental impact report is required in which case the time limit is one year.").

215. *Rio Vista Farm Bureau Ctr. v. County of Solano*, 5 Cal. App. 4th 351, 368 (1992) ("The EIR has been described as the "heart of CEQA"; it is an "environmental alarm bell" which has the objective of alerting the public and governmental officials to the environmental consequences of decisions before they have reached ecological points of no return.").

will be a "match" between the governmental approval authority and those environmental effects.

This assumption is generally more accurate at the federal level of government. At that level it is more likely, though not certain,²¹⁶ that a federal agency considering a project will have the authority over and the ability to address most of the environmental consequences of that project. At the state and local levels, however, this assumption is more questionable.²¹⁷ A "mismatch" may exist between the project approval and the environmental effects that should be addressed.

The Mismatch Phenomenon: To begin with, authority over project decisions can be fragmented between state and local governments.²¹⁸ Decision-making power over environmental issues also can sometimes be split, perhaps in an awkward manner, between the state and local governments.²¹⁹ Where there is not a single decision maker with power to confront the array of environmental problems posed by a development, the SEPA approach is less successful.²²⁰

216. For example, the federal agency may have jurisdiction over only a small portion of the entire project, a situation known as the "small handle" problem. See Gordon H. Howard, *Save Our Sonoran Inc. v. Flowers: Navigable Waters and Small Handles in the Dry, Dry Desert*, 35 ENVTL. L. 605, 607 (2005) ("A 'small handle' problem occurs when a federal agency asserts jurisdiction over a small portion of a larger project, most of which requires no federal oversight."); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 613 (2005) ("small handle" cases occur "where federal approval is required for a small but integral part of a nonfederal project."); David Paget, *NEPA's "Small Handle" Problem: The Scope of Analysis of Federal Action*, in SG026 ALI-ABA COURSE OF STUDY MATERIALS 95 (2001).

217. For example, as the WASHINGTON ENVIRONMENTAL POLICY ACT HANDBOOK notes, "Most regulations focus on particular aspects of a proposal, while SEPA requires the identification and evaluation of probable impacts for all elements of the environment." WASHINGTON ENVIRONMENTAL POLICY ACT HANDBOOK, *supra* note 40, at 2.

218. For example, state constitutions preserve certain local powers from state control. Plunkett, *supra* note 44, at 240 (referring to various "home rule provisions" among state constitutions and noting that the "scope of the home rule power varies from state to state.").

219. See John L. Horwich, *Environmental Planning: Lessons from New South Wales, Australia in the Integration of Land-Use Planning and Environmental Protection*, 17 VA. ENVTL. L.J. 267, 318 (1998) (referring to land use controls in the United States as embodying "a bifurcated scheme in which the federal and state governments deal with environmental quality without directly regulating land use, and local governments regulate land use without expressly addressing issues of environmental quality").

220. The SEPA's try to solve the problem by designating one agency as the "lead agency" and the rest as "responsible agencies." See, e.g., CAL. PUB. RES. CODE § 21067 (West 2006) (defining "lead agency" as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment."); 6 N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(u) (2000) (defining lead agency as "an involved agency principally responsible for undertaking, funding or approving an action"); CAL. PUB. RES. CODE § 21069 (West 2006) (defining a responsible agency as "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project.") The lead agency is responsible for preparing the environmental document.

In addition, there may be a "mismatch" between the environmental problem and the government agency approval governed by the SEPA.²²¹ This was the situation in a New York Court of Appeals case, *Long Island Pine Barrens Society, Inc. v. Planning Board*,²²² which concerned the overdraft of the aquifer system that provides drinking water for residents of Long Island. The plaintiffs sought to compel a comprehensive environmental analysis of the impacts of 224 development projects proposed for what the plaintiff termed "the Central Pine Barrens Region."²²³ In particular, the suit sought an analysis of the effect of those projects on the Long Island aquifer system.²²⁴

The analytic problem was that, when the plaintiffs sought relief, no government agency approval "matched" the scope of the EIS sought by the plaintiffs. In particular, there was no regional approval required. Thus, while the environmental problem dictated a regional analysis, the state SEPA did not allow it because there was no regional project.²²⁵ As the court put it, the "only element they [the 224 projects] share—their common placement in the Central Pine Barrens—is an insufficient predicate" for the analysis sought by plaintiffs and needed from an environmental protection standpoint.²²⁶

Another distinct type of mismatch occurs when, in considering a project's environmental effects, the approving agency must rely on assurances from other public agencies. Scenarios involving potential water supply are examples of this situation. In California, experts have long questioned the adequacy of water supply planning by water agencies.²²⁷ However, local governments, not water agencies, approve the actual development that will require use of water.²²⁸ The local approving

221. See Hirokawa, *supra* note 61, at 416 (describing the problem of "piecemealing").

222. 606 N.E.2d 1373 (N.Y. 1992).

223. *Id.* at 1377.

224. *Id.*

225. *Id.* at 1379.

226. *Id.*

227. See, e.g., James P. Morris, *Who Controls the Waters? Incorporating Environmental and Social Values in Water Resource Planning*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 117, 161 (2000) (suggesting a conceptual and philosophical understanding of why the current water resources planning process is inadequate); Ryan Waterman, Comment, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step?*, 31 ECOLOGY L.Q. 117, 170 (2004) ("The current scheme for long-term land use and water planning suffers from three obvious omissions.").

228. See *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818 (1981) (EIR was inadequate because it failed to supply sufficient information about how water would be delivered to a mining project).

government often approves a development based on vague assurances, given by a separate public water agency, that water will be available in the future to serve the development.²²⁹

The mismatch occurs because individual project decisions, when considered cumulatively, drive the overall demand for more water. While water agencies consider water supply from a comprehensive viewpoint, they largely accept as given the demand caused by the individual development approvals. As a result, neither the environmental analysis on the individual projects nor the environmental analysis on the water agency's plan can effectively consider the environmental impacts caused by the development approvals.

Finally, the prophylactic nature of the SEPA results in another, quite different type of mismatch: one between the core controversy over a project and the impacts examined in the environmental analysis. Assume that a proposal gives rise to legitimate debate over its approval centering on non-environmental issues. For example, perhaps the government wishes to place a jail in a certain area. Whether the site for the jail is proper may depend on a variety of factors, only some of which are environmental.²³⁰

The SEPA, however, separates environmental impacts from other concerns and subjects them to discrete treatment in an environmental analysis. It also empowers those opposing the project to sue if that environmental analysis is inadequate. The result of this incentive may well lead to a quite peculiar situation: a mismatch between the parties' real dispute over the project and the dispute that actually plays out legally over the project's environmental impacts as disclosed in the EIS. In other words, in order to gain leverage under the SEPA, opponents will contest—and probably litigate—questions that are not central to their actual concerns about the project.

229. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 25 Cal. Rptr. 3d 596, 609 (Cal. Ct. App. 2005) ("[A]n EIR is adequate if it identifies and analyzes potential sources of water even though the final availability of those sources is not confirmed. . . . We conclude that the [EIR] need not identify and analyze all possible resources that might serve the Project should the anticipated resources fail to materialize."), *review granted*, *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 113 P.3d 532 (Cal. 2005).

230. *Molinari v. City of N.Y.*, 551 N.Y.S.2d 760, 764 (N.Y. App. Div. 1990) ("the EIS reviews and discusses the environmental impacts with respect to the ecology, traffic, prison demographics, and available medical care for the Project, and incorporates as conditions mitigative measures that were identified as practicable to minimize or avoid any adverse environmental impacts.").

These mismatches derive from the overlay nature of SEPA's. A concerted effort to integrate the environmental analysis with the underlying decision can ameliorate some of these concerns. Others, however, are endemic to the overlay system chosen and largely immune from attempts to resolve them.

I. Opposing Projects: Citizen Empowerment and Mixed or Ulterior Motives

The SEPA Plaintiffs: A principal feature of the NEPA model, replicated in many SEPA's, is the availability of judicial review of agency decisions for compliance with the SEPA.²³¹ In the two states with the most comprehensive SEPA's, New York and California, there has been extensive litigation over SEPA compliance. In New York, for example, litigation under the State Environmental Quality Review Act has resulted in 863 reported decisions.²³² The California SEPA has produced 808 reported decisions, while the Washington SEPA has 316 reported decisions.²³³

A lawsuit challenging a project approval has a very real effect even if the court grants no relief during the pendency of the litigation. Perhaps most importantly, banks are cautious about financing a project that lies under a legal cloud. Even if the project is public rather than private, the filing of litigation may deter the agency from beginning the project. This type of effect is arguably inefficient, for most SEPA litigation is ultimately unsuccessful.²³⁴

The effect of filing SEPA cases has attracted some plaintiffs whose motivations have little or nothing to do with environmental protection. They include the traditional "NIMBY" plaintiffs,²³⁵ as neighbors

231. See WASH. REV. CODE § 43.21C.075 (2006) (authorizing judicial review under the Washington State Environmental Policy Act); CAL. PUB. RES. CODE § 21168, 21,168.5 (authorizing judicial review under the California Environmental Quality Act); *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429 (N.Y. 1986) (judicial review available under State Environmental Quality Review Act even though no statute specifically authorizes such review).

232. Michael B. Gerrard, *Reported Decisions Under the Little NEPA's* (prepared for American Bar Ass'n Envtl. Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005) at 1). A copy of the study is on file with the author.

233. *Id.* The full list is as follows: New York-863; California-808; Washington-316; New Jersey-64; Massachusetts-50; Connecticut-42; Minnesota-40; Wisconsin-38; Hawaii-29; North Carolina-19; Montana-15; Delaware-10; Mississippi-7; South Dakota-6; Maryland-5; District of Columbia-5; Georgia-3; Michigan-3; Puerto Rico-2; Illinois-2; Indiana-2; Virginia-1; Nevada-0.

234. See Gerrard, *supra* note 232, at 4.

235. *West 97th-West 98th Streets Block Ass'n v. Volunteers of Am. of Greater N.Y.*, 581 N.Y.S.2d 523, 530 (N.Y. App. Div. 1991) ("Whether or not this is a NIMBY ("Not In My Back Yard") suit, it is certainly one of many cases challenging the placing of a social service facility on the basis that the placing violated City "land-use" procedures and State

will often employ any tool to stop a project.²³⁶ They also include, more recently, labor unions utilizing SEPAs to stop projects they consider anti-union, such as Wal-Marts²³⁷ or public projects not using union labor.²³⁸ At the other end of the spectrum, businesses can attempt to employ SEPAs as a means of delaying their competitors' projects.²³⁹

Dealing with Mixed Motives: SEPA critics suggest that SEPA suits often cause unnecessary delay.²⁴⁰ Given that criticism, the question arises whether the standing of plaintiffs in SEPA cases should be restricted. In particular, should a plaintiff's motivations be a determinative factor in whether that plaintiff has standing?

environmental law."; see Watts, *supra* note 66, at 239 (suggesting support for the conclusion that "CEQA to some degree encourages not-in-my-back-yard (NIMBY) syndrome. . .").

236. See Sterk, *supra* note 20, at 2041 ("the environmental review process has become a powerful weapon in the hands of development opponents who seek not to preserve the environment, but to protect their own economic self-interest, or to promote their own prejudices.").

237. Wal-Mart Stores v. City of Turlock, 138 Cal. App. 4th 273 (2006) (city zoning ordinance prohibiting development of discount superstores was adequately covered by discussion in prior environmental impact report); Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004) (environmental impact report invalid for failing to discuss potential that two shopping centers located 3.6 miles apart, each of which would contain a Wal-Mart, would cause urban decay); Maintain Our Desert Env't v. Town of Apple Valley, 124 Cal. App. 4th 430 (2004) (alleging environmental document was inadequate for failing to identify Wal-Mart as tenant); Wilkinson v. Planning Bd. of Town of Thompson, 680 N.Y.S.2d 710 (N.Y. App. Div. 1998) (challenging negative declaration under SEQRA for Wal-Mart supercenter).

238. Clyde v. City of Palm Desert, No. E035008, 2004 WL 2931264 (Cal. Ct. App. Dec. 20, 2004) (noting in a suit under the California Environmental Quality Act that member of union had submitted a letter attacking construction of a Wal-Mart at the project site, stressing concerns about the company's labor practices); see Michael H. Zischke, *Access to the Courts—Examples of Standing and Related Topics Under State Environmental Impact Review Statutes* (prepared for the American Bar Association Environmental Impact Assessment Committee, First Annual "Little NEPA" Conference (May 30, 2005) at 2 ("labor-motivated CEQA cases and challenges are commonplace.")).

239. See, e.g., Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641 (N.Y. 1990) (property owner lacked standing to challenge approval of mall on nearby property); Waste Mgmt., Inc. of Alameda County v. County of Alameda, 79 Cal. App. 4th 1223 (2000) (landfill operator sought to compel preparation of EIR on competitor's permit).

240. Salkin, *supra* note 57, at 579–80 ("Critics maintain that higher project costs resulting from SEQRA-related delays have been a constant in the land use permitting process" and noting that the SEQRA time frames "are rarely adhered to"); Plunkett, *supra* note 44, at 247 ("The environmental review process is criticized for being too time-consuming and costly.").

The law of standing does sift out some inappropriate plaintiffs.²⁴¹ For example, the Washington²⁴² and New York²⁴³ courts have held that economic harm is an insufficient injury to justify standing in that state. In addition, courts generally have been unsympathetic to plaintiffs with ulterior, non-environmental motives.²⁴⁴ While the opinions do not overtly state that such plaintiffs are disfavored, their tone is unmistakable.²⁴⁵ A plaintiff who may be able to demonstrate standing but whose interests are substantially non-environmental is not likely to prevail.²⁴⁶

The difficulty is that many plaintiffs have "mixed" motives.²⁴⁷ For example, homeowners can have legitimate concerns about nuisance-like or

241. See, e.g., *Sierra Club v. Comm'r of Dep't of Envtl. Mgmt.*, 791 N.E.2d 325 (Mass. 2003) (environmental group had standing to challenge expansion of ski facilities); *Sierra Club v. Hawaii Tourism Auth.*, 59 P.3d 877 (Haw. 2002) (environmental group lacked standing to challenge decision to enter contract for tourism marketing services); *Friends of Tilden Park, Inc. v. Dist. of Columbia*, 806 A.2d 1201 (D.C. 2002) (nonprofit corporation lacked standing to challenge construction of apartment building); *Kucera v. State Dep't of Transp.*, 995 P.2d 63 (Wash. 2000) (shoreline property owners had standing to challenge operation of ferry); *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health*, 387 N.W.2d 245 (Wis. 1986) (baseball club had standing to challenge decision to construct prison).

242. *Harris v. Pierce County*, 928 P.2d 1111, 1116 (Wash. Ct. App. 1996) ("The only interest alleged is economic: owning property that could be condemned. CAT has failed to allege an interest within the zone of interests protected by SEPA and therefore lacks standing for a constitutional writ of certiorari."); see also *Fox v. Wis. Dep't of Health & Social Servs.*, 334 N.W.2d 532, 538 (Wis. 1983) (denying standing based on economic injury).

243. See *Gerrard*, *supra* note 21, § 7.07[4][b], at 7-108 ("a party has no standing to invoke SEQRA to prevent a competitor from locating or expanding its business if the only harm that plaintiff would suffer is loss of business.").

244. The motives of environmental groups are generally not questioned. *But see* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1, 9 (2001) ("It is tempting to assume that environmental advocacy groups are interested in enforcing environmental regulations for ideological or public-interest reasons. However, when we are concerned with the standing issue and citizen-suit provisions, this approach may oversimplify the motives of these groups.").

245. See *Cnty. Pres. Corp. v. Miller*, 781 N.Y.S.2d 603, 607 (N.Y. App. Div. 2004) ("the presence of an economic motive alone does not constitute grounds for standing in a SEQRA action.").

246. *Waste Mgmt. Inc. of Alameda County, Inc. v. County of Alameda*, 79 Cal. App. 4th 1223, 1229 (2000):

It is clear from the record that Waste Management's interest in this litigation has been commercial and competitive due to the fact both Waste Management and Browning-Ferris are in the business of solid waste disposal. In essence, Waste Management complains that it was required to go through a permit revision process with CEQA review, while Browning-Ferris was not, thus identifying its injury as the extra cost it incurred and continuing competitive injury due to Browning-Ferris's lower costs. As we shall explain, Waste Management's commercial and competitive interests are not within the zone of interests CEQA was intended to preserve or protect and cannot serve as a beneficial interest for purposes of the standing requirement.

247. See *Duke & Benedict, Inc. v. Town of Southeast*, 678 N.Y.S.2d 343, 345 (N.Y. App. Div. 1998) (economic motive does not disqualify adjacent landowner who can allege environmental impacts from project).

other environmental effects on their neighborhoods.²⁴⁸ At the same time, they may simply wish to prevent any development. Identifying the true motives of some plaintiffs—notably, the so-called “NIMBY” plaintiffs suing solely to prevent development near them—is impossible.

Indeed, there is simply no easy empirical test to discern motivations. This is one reason why the law of standing focuses on concrete injury,²⁴⁹ a factually provable effect, rather than on the plaintiff’s state of mind in bringing the suit. This difficulty suggests that any proposed action to disincentivize suits based on “motive”—perhaps posting large bonds when a suit is brought—would inevitably impact plaintiffs whose motivations are traditionally “environmental.”

The problem of improperly motivated suits exists, although how large that problem is has not been definitively shown. In the end, however, most of these cases probably fall under the rubric of plaintiffs with mixed motives. Consequently, the choice becomes clear: should the system tolerate those kind of dual motivations or bar such suits entirely? There appears to be no middle ground.

But maybe it does not matter. The principal concern of SEPA is an insistence that environmental factors take their place in public decision making. Until the SEPA, those factors were not always considered. If any agency has continued to resist that consideration, the fact that a plaintiff has mixed motives is not important; the important point would be correcting the agency’s refusal to face the environmental consequences.

J. Utilizing Environmental Information: The Utility of the Endeavor.

The Form of the EIS: The deceptively simple point of NEPA and the SEPA is improved decision making.²⁵⁰ Over the years NEPA has

248. The same is conceivably even true of businesses. See *Duke & Benedict, Inc. v. Town of Southeast*, 678 N.Y.S.2d 343 (N.Y. App. Div. 1998) (fact that the plaintiff has an economic motive to challenge a decision will not bar it if it has also alleged environmental impacts).

249. *Metro. Museum Historic Dist. Coal. v. De Montebello*, 796 N.Y.S.2d 64, 69 (N.Y. App. Div. 2005) (“agency’s determination is final, thereby triggering the statutory limitations period . . . when the agency arrives at a definitive position on the issue that inflicts an actual, concrete injury”); *Sierra Club v. Haw. Tourism Auth.*, 59 P.3d 877, 908 n.6 (Haw. 2002) (noting previous cases in which “the plaintiffs’ geographic proximity to the site of the injury was so close as to make the concrete injury obvious without further consideration.”).

250. 40 C.F.R. § 1500.1(c) (2006):

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

regularly prompted studies²⁵¹ and scholarly commentary²⁵² on its usefulness. The same questions must be addressed to the performance of the SEPA's at the state level.

An important question is whether the information is produced in useful form. The answer here, unfortunately, is that it often is not. Some attempts have taken place to arrange the SEPA process so that the large amount of information compiled focuses on the most important environmental issues. For example, some states copy the NEPA process of attempting to "scope" the contents of the EIS before it is completed.²⁵³ Others have tried to prevent lengthy EISs through specific page limitations. In North Carolina, for example, the EIS cannot exceed 60 pages;²⁵⁴ in Washington, it must be between 75 and 150 pages.²⁵⁵

Litigation has rendered these efforts largely futile. If an EIS may be attacked and overturned because it inadequately discusses a project's

251. See, e.g., COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES, INITIAL FINDINGS AND DRAFT RECOMMENDATIONS, TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT AND TASK FORCE ON UPDATING THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 21, 2005), <http://resourcescommittee.house.gov/nepataskforce/report/nepareport.finaldraft.pdf> (last visited Sept. 19, 2006); COUNCIL ON ENVIRONMENTAL QUALITY/EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997), <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf> (last visited Sept. 19, 2006); J. AUSTIN ET AL., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Envtl. L. Inst. 2004), <http://www.endangeredlaws.org/downloads/judgingNEPA.pdf> (last visited Sept. 19, 2006).

252. See, e.g., Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVT. L.J. 333 (2004); Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931 (2003); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVT. L.J. 74 (2003); James L. Connaughton, *Modernizing the National Environmental Policy Act: Back to the Future*, 12 N.Y.U. ENVT. L.J. 1 (2003); Lynton K. Caldwell, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* (1998); *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVT. L. 447 (1990).

253. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (1996) ("Scoping" means the process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the draft EIS including the content and level of detail of the analysis, the range of alternatives, the mitigation measures needed and the identification of nonrelevant issues."); N. C. ADMIN. CODE § 25.0602 ("If an agency determines that an EIS is required on a project, it may choose to request advice from the general public and other agencies on what alternatives and issues should be addressed in the EIS. The agency must submit a copy of a scoping notice to the Clearinghouse, which shall publish the scoping notice in the Environmental Bulletin.").

254. N.C. ADMIN. CODE tit. 1, § 25.0603 (1999).

255. WASH. ADMIN. CODE § 197-11-425(4) (2000).

environmental effects,²⁵⁶ lawyers for public agencies understandably will try to “bullet-proof” their document against such attacks. This effort will necessarily mean that documents will violate any page limits whenever necessary to ensure that impacts are fully discussed.

Critics often decry the SEPA documents as too long,²⁵⁷ but length is not necessarily bad. Although long, EISs do contain the necessary information and, at least in some instances, the environmental issues are sufficiently complex as to require a lengthy document. Moreover, the length does not necessarily mean that decision makers will not get the necessary information. The information in the SEPA document will be filtered through staff reports, public comments, and hearings at which the environmental issues are ventilated—the same as is the case with non-environmental issues. Thus, decision makers are not necessarily in the dark, even if they do not actually read the lengthy EIS. Indeed, this filtering process—from information made available to the public, through public comments and responses, and through the public hearings—is the greatest strength of the SEPA. It is the process of collaborative governance between members of the public and public decision makers.²⁵⁸

This collaborative process answers, at least partially, one criticism of SEPAs: whether environmental documents required by SEPAs are really necessary.²⁵⁹ The SEPA process adds input from the public at a level and of a type not found in the ordinary regulatory process, which

256. The cases on adequacy are legion. Recent cases include *California Oak Found. v. City of Santa Clarita*, 133 Cal. App. 4th 1219 (2005) (section of the EIR discussing water supplies was inadequate), *Friends of the Wild Swan v. Department of Natural Resources & Conservation*, 6 P.3d 972 (Mont. 2000) (EIS failed to adequately analyze cumulative impacts of project).

257. NEPA documents are criticized on the same grounds. See Brian L. Cole *et al.*, *2004 Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 J. HEALTH POL. POL'Y & L. 1153, 1164 (2004) (“Excessive document page length has been a major problem for NEPA implementation. The EPA estimates that only 37 percent of EISs stay within the CEQ guidelines of 150 pages or less.”).

258. See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 421–22 (2000) (defining “collaborative regulation” as “a variant of self-regulation in which beneficiaries of regulatory statutes are empowered to participate in regulatory design and enforcement.”).

259. See Kenneth S. Weiner, *No Little NEPA Is an Island: Integrating Environmental Review Efficiently with Decisions*, American Bar Association Section of Environmental, Energy, and Resources (2005) (powerpoint presentation) (asking the question “what’s left for Little NEPA’s to do?” and answering that they fill gaps, ensure that overlaps are considered, create a “comprehensive picture” with meaningful public involvement; ensure agency coordination, and assure accountability (on file with author)). Jay Wickersham, *Mitigation Measures: Definitions, Enforcement, Monitoring, and Effectiveness*, Am. Bar Assn. Section on Env’t, Energy and Resources (2005).

can be technologically complex and focus rigidly on certain specific issues.²⁶⁰ A SEPA analysis also will highlight environmental effects that do not fall within the bureaucratic boundaries of the principal pollution control systems. And it will examine long-term environmental trends which the regulatory process, oriented toward the short-term only, may miss.

The Use of the Document: The less certain issue is whether this information is used in a way that positively protects the environment. As discussed at length above,²⁶¹ the primary outcome of the SEPA analytic process is the imposition of mitigation measures on the project. In some cases, public agencies have avoided the requirement of mitigation by claiming that the environmental impacts are too uncertain to be mitigated.²⁶² In most cases, however, agency staffs now routinely propose conditions on the project attempting to mitigate environmental impacts.

However, two aspects to this process are troubling. First, the routinization of mitigation may allow public agencies to avoid larger issues, such as cumulative impacts. Impacts like these may require denials of projects when a certain level of environmental degradation had been reached. Instead, the tendency is to impose mitigation measures on the project and then approve the project on the basis that its environmental impacts have been mitigated.²⁶³ The outcome may be soothing but not necessarily environmentally effective.

The second problem is even more significant: are these mitigation measures actually doing any good? Some attention is now being paid to this issue. A few states have begun to monitor the mitigation measure imposed on projects.²⁶⁴ While this effort is largely oriented to ensuring

260. See, e.g., Chelsea H. Congdon *et al.*, *Economic Incentives and Nonpoint Source Pollution*, 2 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 185, 217 (1995) (noting that "the ability to monitor and enforce pollution discharge limits is central" to tradable permits and traditional permit systems).

261. See *supra* text accompanying notes 193–200.

262. *Sacramento Old City Ass'n v. City Council of Sacramento*, 229 Cal. App. 3d 1011 (1991) (rejecting plaintiffs' claim that a lack of specification in the parking mitigation measures rendered the EIR invalid).

263. *Laurel Hills Homeowners Ass'n v. City Council of Los Angeles*, 83 Cal. App. 3d 515 (1978) (finding that city had mitigated project to an "acceptable level" without specifically determining that an environmentally superior alternative identified in the EIR was infeasible).

264. See CAL. PUB. RES. CODE § 21081.6 (West 2006) (requiring monitoring of mitigation measures); Governor's Office of Planning and Research, *Tracking CEQA Mitigation Measures Under AB 3180* (1996).

that conditions imposed on projects are actually carried out, it will also begin to document whether the mitigation measures are achieving their goals.

Such data is needed. While a couple of studies have been carried out to analyze the effects of mitigation measures to date, their outcomes are inconclusive.²⁶⁵ Without that data, the ultimate usefulness of the SEPA endeavors can be questioned.

Finally, we now have thirty years experience with the SEPAs, and yet the cries of undue delay during SEPA preparation still exist. Much of the background environmental work for the preparation of EISs, in all but unusual cases, has certainly been done in the past. A strong suspicion arises that too much "reinventing the wheel" goes on in EIS preparation.

IV. Conclusion

The SEPAs continue to be something of a grand experiment. States are free to take them in new directions, to focus them on certain issues, and to change them so as to ensure their usefulness.

This article has pointed out ten areas in which SEPAs have evolved. Those areas testify to the idea that state experimentation in environmental law is useful. They demonstrate the extent that, in comparison to thirty years ago, environmental analysis has become institutionalized to an extent that hardly seemed possible at that time.

265. Mitigation Measures, *supra* note 194, at 8–9 (discussing ad hoc mitigation reporting and monitoring in Massachusetts).

