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Making the Connection: NEPA Processes for National Environmental Policy

Ted Boling*

INTRODUCTION

The National Environmental Policy Act (“NEPA”) is the nation’s charter for structured decision-making to promote sustainable development and protection of the environment. It establishes policy, sets goals,¹ and provides procedural means for carrying out the policy.² The public, the president, federal agencies, and courts all share responsibility for enforcing NEPA. Its purposes are stated succinctly:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.³

Upon enactment, Congress succeeded in its first and last purposes. The second and third purposes remain unfulfilled, but there are examples of both notable success and programmatic failings.⁴

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1. National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2006).

2. *Id.* § 4332.

3. *Id.* § 4321.

4. In its twenty-five-year study of NEPA’s effectiveness, the Council on Environmental Quality (“CEQ”) found that NEPA’s requirements to consider alternatives and involve the public and other agencies have both advantages and disadvantages. COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY

The text of the statute reveals a larger vision for the sum of NEPA's mandates and authorizations:

It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.

. . . .

The committee believes that America's capacity as a nation to confront these conditions and deal more effectively with the growing list of environmental hazards and problems resulting from these conditions can be improved and broadened if the Congress clarifies the goals, concepts, and procedures which determine and guide the programs and activities of Federal agencies. Moreover, this can be done with the reasonable prospect that State, local, and private action will also be favorably influenced.⁵

The goals of NEPA's sponsors were transformational: to integrate environmental protection and sustainable development considerations into all decisions made regarding federal agency action.

ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS ix (1997), <http://www.nepa.gov/nepa/nepa25fn.pdf> [hereinafter NEPA: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS]. These requirements make it easier to discourage poor proposals, reduce the amount of documentation during implementation, and support innovation. However, they also lack effective means of confirming analyses and mitigation. *Id.* These conclusions were confirmed by the 2003 NEPA Task Force report to CEQ, which found that collaborative approaches to engaging the public and assessing the impacts of federal actions under NEPA can improve the quality of decision-making and increase public trust and confidence in agency decisions. *See* THE NEPA TASK FORCE, EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION xiii-xiv (2003), <http://ceq.hhs.doe.gov/ntf/report/frontmats.pdf>. As this Article goes to press, the Council on Environmental Quality has issued draft guidance on mitigation and monitoring to encourage agencies to adopt effective means of confirming analyses and mitigations. *See* CEQ DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING (Feb. 18, 2010), http://ceq.hhs.doe.gov/nepa/regs/Mitigation_and_Monitoring_Draft_NEPA_Guidance_FINAL_02182010.pdf.

5. S. REP. No. 91-296, at 4, 6 (1969). *See also* H.R. REP. No. 91-378, at 7 (1969) (describing functions of the CEQ as including environmental auditing "to develop meaningful environmental policies at the lower decisionmaking [sic] levels of government, before the policy choices to be made by their chief executive officers have become so circumscribed by internal momentum that the complete range of alternatives is no longer available to them").

NEPA section 102(2) contains action-forcing provisions that provide authority and mandates to translate this transformational policy into action.⁶ The primary means of forcing action is environmental impact assessment with alternative analysis and interagency coordination on decisions regarding federal agency actions that may significantly affect the quality of the human environment. Such major federal actions typically involve important decisions with broad ramifications for policy at both national and regional levels. As such, NEPA processes and decision-specific environmental documents were intended to manage and direct federal agencies based on a framework for collaboration between the agencies and those who bear the environmental, social, and economic impacts of their decisions. NEPA's procedural mandates have influenced federal activities, as well as state, local, and private actions. However, the statute still stands as a challenge to more effectively respond to "environmental problems and crises" such as climate change, loss of biological diversity and ecosystem services, and the need for sustainable redevelopment of community infrastructure.

Part I of this Article reviews NEPA's provisions implementing this transformation mandate. Part II evaluates those purposes against the current state of NEPA implementation. Part III concludes with proposals for improving the promotion of actions that (1) prevent or eliminate environmental damage; (2) stimulate health and welfare; and (3) increase understanding of the relationship between personal well-being and ecological systems and natural resources.

I. THE STRUCTURE OF NEPA: AMBITIOUS PURPOSES, TRANSFORMATIONAL GOALS, SUPPLEMENTAL AUTHORITY, AND ACTION-FORCING PROCEDURES

The primary purpose of NEPA was achieved upon its enactment: the articulation of a national statement of policy for the environment. Section 101 of NEPA established the policy goal "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other

6. 42 U.S.C. § 4332(2).

requirements of present and future generations of Americans.”⁷ Equally important are the means described to achieve these lofty goals: “[I]n cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance.”⁸ The purposes of the authorities and procedures established in NEPA are to “improve and coordinate Federal plans, functions, programs, and resources” to further the national policy.⁹ These three aspects—(1) an overarching goal of productive harmony, (2) achieved through coordination of federal activities, and (3) garnering the support of other public and private organizations—are the essence of the statute and its vision for transformation of the nation.

In order to carry out the policy established in NEPA, the statute provides all federal agencies with supplemental authority and a mandate “to use all practicable means, consistent with other essential considerations of national policy”; to achieve enumerated goals of trusteeship for the environment, beneficial surroundings, beneficial uses, historic and cultural preservation, and balanced resource use; and to maximize recycling of resources that are being depleted.¹⁰ The

7. *Id.* § 4331(a).

8. *Id.*

9. *Id.* § 4331(b).

10. *Id.* The enumerated goals are to:

[I]mprove and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

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

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

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

statute further mandates that all policies, regulations, and laws of the United States “*shall* be interpreted and administered in accordance with the policies set forth.”¹¹ Finally, section 105 of NEPA confirms that the “policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.”¹² NEPA’s role as supplemental authority was a central aspect of congressional debate, which was resolved in conference by granting NEPA the broadest application of NEPA’s mandates possible.¹³

But its procedural requirements, enforced to “the fullest extent possible,”¹⁴ are the reason that NEPA remains the foundation of federal environmental law. NEPA requires that a “detailed statement” on the significant environmental effects of a proposal for agency action “accompany the proposal through the existing agency review processes.”¹⁵ Section 102’s requirement that the detailed statement “accompany” a proposal through agency review means more than physical proximity and the physical act of passing papers to reviewing officials.¹⁶ The statement is the project-specific articulation of section 102’s provisions for a broader agency system that integrates science into planning and decisions.¹⁷ The statement

11. *Id.* § 4332(1) (emphasis added).

12. *Id.* § 4335.

13. In the House, Representatives Dingell, Miller, and others introduced a bill to provide for the establishment of a Council on Environmental Quality. H.R. 12549, 91st Cong. (1969). Senate bill 1075 was held by the Speaker, avoiding referral to Representative Aspinall’s Interior Committee until the House passed bill 12549. 115 CONG. REC. 26569-90 (1969). Representative Aspinall’s floor amendments expanded the scope of H.R. 12549 from fish and wildlife to the “environment” while protecting his committee’s jurisdiction. 115 CONG. REC. 26589 (1969) (“Nothing in this Act shall increase, decrease, or change any responsibility or authority of any Federal official or agency. . .”). The conference committee rejected Representative Aspinall’s limitation of federal agency responsibility, requiring compliance with NEPA’s action-forcing provisions “to the fullest extent possible.” 115 CONG. REC. 40418 (1969).

14. *See, e.g.*, *Dubois v. USDA*, 102 F.3d 1273, 1287 (1st Cir. 1996); *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (“The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible. . . .” But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to “the fullest extent possible.” (quoting *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972))).

15. 42 U.S.C. § 4332(c) (2006).

16. *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1117–18 (D.C. Cir. 1971).

17. Section 102(2)(A) requires federal agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the

ensures that unquantified environmental values are considered along with the quantified economic and technical considerations that otherwise determine decisions.¹⁸ It is also designed to inform those who may be affected by the environmental effects of decisions. Those potentially affected include federal agencies, states, counties, cities, institutions, and individuals, all of whom may participate in public decision-making or use the statement's information in their own decision-making.

Analysis of alternative courses of action, the heart of the environmental impact statement ("EIS") in section 102(2)(C), is also an independent requirement for decisions regarding "any proposal which involves unresolved conflicts concerning alternative uses of available resources," including those that will not significantly affect the quality of the human environment.¹⁹ Council on Environmental Quality ("CEQ") regulations for the implementation of the procedural provisions of NEPA were "designed to make the environmental impact statement process more useful to decisionmakers [sic] and the public."²⁰ These regulations require each agency to adopt procedures that conform decision processes to the NEPA regulations.²¹ They are also intended to distinguish between those categories of actions that typically involve significant environmental impacts and therefore require an EIS and those that do not.²²

In implementing section 102, the CEQ regulations created three levels of environmental documentation. First, for those action proposals that require an EIS, the CEQ regulations provide detailed procedures for content and development, including requirements for interagency coordination and public involvement to support the

environmental design arts in planning and in decisionmaking." 42 U.S.C. § 4332(2)(A).

18. Section 102(2)(B) requires federal agencies to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." *Id.* § 4332(2)(B).

19. *Id.* § 4332(2)(E). Section 102(2)(E) calls on agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.*

20. Exec. Order No. 11,514, 35 Fed. Reg. 4,247 (Mar. 5, 1970), *as amended in* Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

21. *See* 40 C.F.R. § 1507.3(a) (2009).

22. *Id.* § 1501.4.

quality of the analysis and its use in decisions.²³ Second, for actions that may require an EIS, CEQ regulations provide for an Environmental Assessment (“EA”), a “concise public document” to assist agencies in determining whether an EIS is necessary and, if one is not, help them document their decision not to prepare an EIS.²⁴ The third category of environmental documentation is the designation, in agency NEPA procedures, of a “category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.”²⁵ These Categorical Exclusions (“CEs”) were designed to avoid repetitive analysis of actions that normally do not involve significant impacts, while still providing for circumstances that warrant the analysis of an EA or EIS. They serve as the counterpoint to the agency’s identification of actions that normally involve significant environmental impacts requiring an EIS.²⁶ Regardless of whether actions normally require an EIS or normally qualify for a CE, however, all agency programs and decisions should be considered in the context of NEPA’s goals and procedures.

The CEQ regulations reinforce the connection between the three categories of environmental documentation and the policies and purposes of NEPA by requiring that agency implementing procedures include provisions “to achieve the requirements of sections 101 and 102(1)” of NEPA and “[d]esignat[e] the major decision points for the agency’s principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.”²⁷ The CEQ regulatory scheme attempts to ensure that decision-makers actually consider the significant environmental effects of their decisions.²⁸ CEQ reserves an opportunity to review

23. *See id.* §§ 1501–03, 1505, 1508.

24. The EA is defined as a concise public document that serves to briefly provide evidence and analysis for determining whether to prepare an EIS. *Id.* § 1508.9. It should aid in an agency’s compliance with NEPA when no EIS is necessary and facilitate the preparation of an EIS if one is necessary. *Id.*

25. *Id.* § 1508.4.

26. *See id.* § 1501.4(a).

27. *Id.* § 1505.1(a)–(b).

28. *See id.* § 1505.1(d)–(e) (“Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so

these procedures for conformity with NEPA and the CEQ regulations.²⁹ However, the CEQ definition of “significantly” allows agencies to decide which actions have a significant effect on the human environment.³⁰

II. THE STATE OF NEPA IMPLEMENTATION

According to NEPA and CEQ regulations, agency implementing procedures and their revisions to accommodate new authorities and new information regarding the effects of agency actions should provide for effective management of an agency’s environmental program and environmental effects of agency decisions. Forty years after the enactment of NEPA, a survey of federal programs and activities reveals significant improvement attributable to NEPA’s vision. Departments and agencies that previously had not considered environmental protection and sustainable development as part of their missions now have environmental programs and goals.³¹ For some federal agencies, the NEPA process is so intertwined with the agency’s formal decision-making structure that the two are synonymous.

Federal agencies typically file more than five hundred draft, final, and supplemental EISs each year.³² By statute, the Environmental Protection Agency (“EPA”) is charged with reviewing and commenting on every EIS.³³ CEQ regulations require the EPA to provide public notice when an EIS has been filed with the EPA and is

that agency officials use the statement in making decisions” and “that the alternatives considered by the decisionmaker [sic] are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker [sic] consider the alternatives described in the environmental impact statement”).

29. *Id.* § 1507.3(a).

30. *Id.* § 1508.27 (defining “significantly” as used in NEPA as a product of the context and intensity of an action’s environmental effects).

31. CEQ’s NEPA website includes links to most agency environmental program websites. Agency NEPA Web Sites, <http://www.nepa.gov/nepa/agencies.cfm> (last visited Feb. 25, 2010).

32. *See* EPA, All EISs Since 2004, <http://yosemite.epa.gov/oeca/webeis.nsf/viEIS01?OpenView> (last visited Feb. 25, 2010). *See also* Calendar Year 2008 Filed EISs, http://www.nepa.gov/nepa/Calendar_Year_2008_Filed_EISs.pdf (listing the total number of EISs filed in 2008 as 543).

33. *See* 42 U.S.C. § 7609(a) (2006).

made available to the public.³⁴ The information maintained by the EPA shows that the majority of EISs are filed for federal land management decisions (i.e., those made by the Department of Agriculture's Forest Service and the Department of the Interior's Bureau of Land Management), water resources development decisions, or transportation project decisions (i.e., those made by the United States Army Corps of Engineers and Department of Transportation).³⁵

For years conventional wisdom held that the number of EAs produced annually by federal agencies was approximately one hundred times the number of EISs produced.³⁶ More recently, in reporting the status and progress of NEPA analysis for projects funded through the American Recovery and Reinvestment Act ("ARRA"), fifteen departments and nine independent agencies reported that they were able to make funding decisions based on EAs in over 7300 actions or an existing EIS in over 800 actions.³⁷ For project decisions that lacked NEPA analysis, the ratio of EISs to EAs used is more conventional; approximately forty-five EISs are currently in progress compared to almost 1000 EAs.³⁸ The vast majority of these EAs will likely result in a finding of no significant impact ("FONSI") with mitigation to avoid any impacts that may be significant.

34. See Environmental Protection Agency Filing System Guidance for the Implementation of 1506.9 and 1506.10 of the CEQ Regulations Implementing the Procedural Provisions of the NEPA, 54 Fed. Reg. 9592 (Mar. 7, 1989).

35. See, e.g., Calendar Year 2008 Filed EISs, *supra* note 32.

36. See NEPA: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS, *supra* note 4, at 19 (citing a 1993 CEQ survey stating that an average of 508 EISs and 50,000 EAs were produced annually).

37. COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, THE FIFTH REPORT ON THE NATIONAL ENVIRONMENTAL POLICY ACT STATUS AND PROGRESS FOR AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 ACTIVITIES AND PROJECTS 3-4 (2010), http://www.nepa.gov/nepa/attachments/may2010/CEQ_ARRA_NEPA_Report_May_03_2010.pdf [hereinafter REPORT ON NEPA STATUS AND PROGRESS]. The number of projects based on an EIS does not reflect the number of EISs completed. By "tiering" to a programmatic EIS, multiple projects may be funded with little additional analysis. See, e.g., *id.* at Attachment 3F(1): Explanatory Note for Natural Resources & Conservation Service ("NRCS") Report, http://www.nepa.gov/nepa/attachments_Aug2009.htm (identifying 289 projects for floodplain easement restoration that tier to the Programmatic Environmental Impact Statement for the Emergency Watershed Program).

38. REPORT ON NEPA STATUS AND PROGRESS, *supra* note 37, at 4.

This “mitigated FONSI” approach has become a generally accepted means of complying with NEPA while avoiding the full EIS process.³⁹ An important aspect of the viability of this approach to NEPA compliance is its effect on the opportunity for environmental agencies and the affected public to confirm findings. CEQ requires federal agencies to involve environmental agencies and the public “to the extent practicable” in preparing an EA.⁴⁰ This requirement allows the agency flexibility in providing for public involvement. It does not necessarily require issuing a draft for public comment, but it does mandate a substantive opportunity for public participation in the assessment of the environmental consequences of agency decisions.⁴¹ In addition, it provides that, for actions that are unprecedented or that normally require an EIS, the public must be provided a thirty-day comment period.⁴²

More striking is the number of ARRA projects funded through CE application. As of March 31, 2010, over 157,500 of the approximately 165,600 reported ARRA-funded projects and activities had been finalized based on a CE.⁴³ Of the approximately 2750 pending decisions examined, 1600 were identified as likely to be completed with a CE.⁴⁴ Quantified assessments of the extent of CE use are difficult to obtain because existing CEs were adopted without

39. See Memorandum from Council on Env'tl. Quality to Agencies: Questions and Answers About the NEPA Regulations, No. 40, 46 Fed. Reg. 18,026 (Mar. 16, 1981) (based on regulations codified at 40 C.F.R. §§ 1500–08 (1987)), available at <http://ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#40> (last visited Feb. 26, 2010) (stating that courts have disagreed with CEQ's position that “[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal”).

40. 40 C.F.R. § 1501.4(b) (2009).

41. *Compare* Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (reprimanding the Federal Communications Commission for “providing the public with a hollow opportunity to participate in NEPA procedures” by giving notice of tower construction only after approving it), *and* Citizens for Better Forestry v. USDA, 341 F.3d 961, 970 (9th Cir. 2003) (“It is evident, therefore, that a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations.”), *with* Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 511 F.3d 1011, 1025 (9th Cir. 2008) (finding that circulation of a draft EA for a gold mining project was not required under NEPA because the CEQ regulations did not compel such formality).

42. 40 C.F.R. § 1501.4(e)(2).

43. REPORT ON NEPA STATUS AND PROGRESS, *supra* note 37, at 4.

44. *Id.*

detailed procedures for monitoring their implementation. However, available information indicates that the ARRA experience is typical. For example, under the Federal Highway Administration (“FHWA”) procedures for decision-making and environmental impacts assessments,⁴⁵ the Ohio Department of Transportation (“ODOT”) has implemented a CE programmatic agreement that enables it to use a CE to document nearly ninety-five percent of its approximately one thousand projects each year.⁴⁶ The ODOT Programmatic Categorical Exclusion Agreement with FHWA created four levels of CEs based upon context and intensity of the environmental impacts.⁴⁷ It also identified types of projects that are exempt from environmental documentation.⁴⁸ These numbers confirm a new conventional wisdom: after years of reliance on mitigated FONSI, the great majority of agency NEPA practice has become the application of a CE with a review of the applicable category and certification that no “extraordinary circumstances” require further NEPA analysis.

This extensive use of CEs may represent the maturation of NEPA programs. Program developers may have learned from their EA or FONSI experiences and may no longer need EAs to document effects already deemed insignificant. Expanded use of CEs was encouraged by CEQ guidance in 1983.⁴⁹ At that time some agencies were using CEs for categories of activities that clearly did not affect the environment.⁵⁰ The documentation of these activities in agency NEPA procedures reduced the effectiveness of the NEPA process.⁵¹ Agencies responded to CEQ’s encouragement by expanding their categories to the point where CE promulgation and use has become controversial. To address these concerns, CEQ has again issued draft

45. 23 C.F.R. § 771.105 (2009).

46. Ohio Department of Transportation, Environmental Policy Section: NEPA Documentation, http://www.dot.state.oh.us/Divisions/TransSysDev/Environment/NEPA_policy_issues/NEPA_Documentation (last visited Feb. 26, 2010).

47. *Id.*

48. *See id.*

49. *See* Memorandum from A. Alan Hill, Chairman, Council on Env’tl. Quality, to Heads of Fed. Agencies, 48 Fed. Reg. 34,263 (July 28, 1983), *available at* <http://www.nepa.gov/nepa/regs/1983/1983guid.htm>.

50. *Id.*

51. *Id.*

guidance on the creation of new CEs and the revision of those already in existence.⁵²

In a few cases, the courts have taken a hard look at agency development and application of their CEs and found them lacking.⁵³ Among these, the Ninth Circuit's decision in *Sierra Club v. Bosworth* stands out for its focus on the threshold considerations necessary to support an agency's judgment that a particular category of actions does not have significant environmental effects.⁵⁴ In that case, the U.S. Forest Service and Department of Agriculture (collectively referred to as the "Forest Service") defended a CE for "hazardous fuels reduction" activities that allowed the use of prescribed fire over an area of up to 4500 acres and fuel reduction projects, including cutting and thinning trees, over an area of up to one thousand acres.⁵⁵ The Forest Service had developed this CE based on an assessment of approximately 2500 hazardous fuels reduction projects nationwide, which the Forest Service stated represented a reasonable projection of the use of the CE on 2.5 million acres over two years of National Forest management.⁵⁶ However, the Forest Service failed to convince the panel that its project-specific review was sufficient to address the requirements of cumulative effects analysis.⁵⁷ The Ninth Circuit Court of Appeals found that comments on the CE proposal from federal and state wildlife agencies raised significant issues regarding regional and ecological differences in the effect of actions allowed

52. Proposed Guidance from the Council on Env'tl. Quality on Establishing, Revising, and Using Categorical Exclusions Under the National Environmental Policy Act (Sept. 14, 2006), http://www.nepa.gov/nf/Proposed_CE_guidance_91406.pdf.

53. CEs must be adopted through agency procedures identifying actions that do not require an EA or EIS. 40 C.F.R. § 1507.3(b) (2009). If an existing category does not fit, the agency cannot claim one *post hoc*. *Pub. Citizen v. Dep't of Transportation*, 316 F.3d 1002, 1029 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004). Adoption of CEs may be challenged. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (providing an example of a successful challenge by the Sierra Club); *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2000).

54. *Sierra Club*, 510 F.3d at 1027–32. Less noteworthy is the opinion's application of EIS scoping requirements to CE development. *Id.* at 1026–27.

55. *Id.* at 1018.

56. *Id.* at 1018, 1028.

57. *Id.* at 1028–29 (“A proper consideration of the cumulative impacts of a project requires some quantified or detailed information.” (quoting *Klamath-Siskiyou Wildlands Ctr. v. B.L.M.*, 387 F.3d 989, 993 (9th Cir. 2004))).

under this nationwide CE.⁵⁸ Finally, the Forest Service's lack of specificity, both in its drafting of the CE and on the "extraordinary circumstances" limitation that prevents unintended environmental effects, required remand of this CE.⁵⁹

This hard look at the programmatic implications of a Forest Service CE is extraordinary because litigation over the development and application of CEs is extraordinarily rare. The annual CEQ NEPA Litigation Survey shows that on average about 129 lawsuits are filed challenging NEPA compliance each year, approximately eight of which involve a challenge to agency application of a CE.⁶⁰ In the past four years, agencies have won thirty-one of these decisions and had their CE decisions reversed only fifteen times. Thus, agencies face a relatively low chance of having their use of CEs challenged at all, and a lower chance still of being reversed on their judgment that a proposal for agency action qualifies for a CE and does not present extraordinary circumstances requiring more rigorous environmental documentation. These odds stand out among the NEPA litigation survey information showing that agencies already face a relatively low risk of litigation, given the number of NEPA decisions made annually, and that agencies generally avoid reversal or injunction against their decisions on NEPA grounds.

58. *Id.* at 1031–32.

59. *Id.* at 1032–33. The Forest Service had separately amended its list of "extraordinary circumstances" to allow its decision-makers greater discretion in their assessment of whether the "mere presence" of a circumstance—such as a threatened or endangered species or its habitat—would render a CE inapplicable. *Id.* at 1020–21.

60. NEPA Litigation Surveys for 2001 through 2008 are available at <http://www.nepa.gov/nepa/nepanet.htm>. The full surveys identifying every case with a NEPA count filed in federal court are available upon request at CEQ's FOIA Requester Service Site. Council on Environl. Quality, Executive Office of the President, CEQ FOIA Requester Service Site, <http://www.whitehouse.gov/administration/eop/ceq/foia/> (last visited Feb. 26, 2010).

III. IMPLEMENTATION OF NEPA TO PROMOTE ACTIONS THAT
PREVENT OR ELIMINATE ENVIRONMENTAL DAMAGE AND
STIMULATE HEALTH, WELFARE, AND UNDERSTANDING OF
ECOLOGICAL SYSTEMS AND NATURAL RESOURCES

The effect of CE-dominated NEPA programs on federal agencies' implementation of NEPA raises broader concerns regarding the implementation of NEPA's goals of public involvement and informed agency action. In the ARRA, Congress reaffirmed NEPA's utility in public decision-making by finding that NEPA "protects public health, safety and environmental quality . . . by ensuring transparency, accountability and public involvement in federal actions and in the use of public funds," that NEPA "provided the 'direction' for the country to 'regain a productive harmony between man and nature,'" and that NEPA "helps to provide an orderly process for considering federal actions and funding decisions and prevents litigation and delay."⁶¹ These purposes and NEPA's goals are not furthered by NEPA compliance that is limited to isolated, project-specific evaluation of an action for "extraordinary circumstances." To fit within an environmental program that meets the goals and purposes of NEPA, agency CE implementation logically requires monitoring by both the agency and the public to ensure that the bases for the CE remain valid and the terms are applied in a consistent manner.

NEPA implementation that is dominated by CEs reduces an agency's NEPA program to a documentation procedure that fails to make the NEPA process more useful to decision-makers and the public. Agency NEPA procedures typically lack requirements to functionally integrate their EIS and EA processes for environmental documentation with agency decisions at a strategic and programmatic level. Decisions at these levels do not necessarily require NEPA analysis, though they determine and guide the programs and activities of federal agencies, because the Supreme Court has granted federal agencies broad discretion at the program level to determine the appropriate scope and timing of NEPA documentation and

61. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-15, § 1609(a), 123 Stat. 115.

supplementation.⁶² Congress has generally gone along with this trend, and even codified it in the surface transportation context by providing for metropolitan transportation planning to meet NEPA's goals but limiting the NEPA process to project implementation.⁶³ The result has been NEPA processes that have often lacked connection with NEPA's transformational goals and purposes.

For many agencies, NEPA compliance programs are a reminder of NEPA's initial driving force: litigation. For environmental lawyers, this is a storied legacy in which a lofty environmental statute—lacking substantive standards capable of judicial enforcement—became the means of stopping agency action with significant beneficial environmental effects. For agency decision-makers, the back-story of this legacy is how agencies recovered from these setbacks through compliance governed by assessments of litigation risk. NEPA compliance, therefore, was viewed by some as a means to satisfy agency counsel, and the scope and implementation of agency NEPA programs are based on that assessment of litigation risk. Where litigation risk is low, as has been shown by use of broadly worded CEs, NEPA compliance can be reduced to a paperwork exercise that is disconnected from the statute's core purposes.

In these reactive NEPA programs, the decisions most likely to wind up in court are those that draw NEPA program attention—not for purposes of improving the environmental outcomes but for improving the agency's litigation outcomes. While improvements in the latter may come from improvements in the former, the result is a coincidental win/win perceived by agency counsel and environmental professionals. The relationship between these NEPA decisions and the environmental significance of agency programs is governed by the vulnerability of the agency decisions to judicial review. Agency

62. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72–73 (2004) (finding that increased off-road vehicle use did not require a “hard look” review of the current EIS and noting that supplementation is required only where major federal action needs to occur).

63. The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005 requires that the metropolitan planning process consider projects and strategies that will “protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns.” 23 U.S.C. § 134(h)(1)(E) (2006). Project-specific NEPA documentation is limited to the implementation of this planning process, including its narrowed range of alternatives.

decisions and programs that lack vulnerability to litigation, either through the structure of the decision-making or lack of public controversy and litigants, are apt to receive little NEPA analysis.

In this case, nationally significant uses of federal resources may receive no comprehensive, programmed evaluation under the decision-making discipline of the NEPA process because the litigation risk is low and the benefits of NEPA analysis are outweighed by the perceived costs. These countervailing costs may be direct outlays for hiring environmental experts, the costs in terms of time and effort to manage the NEPA process and respond to the issues raised in the course of evaluating alternatives, and the risk associated with calling public attention to environmental aspects of agency implementation of programs that otherwise escape comprehensive review.

NEPA decisions that respond to requests from outside the agency are particularly reactive. Courts have emphasized the need to consider the objectives of the permit applicant⁶⁴ but have also reemphasized the requirement for the agency to exercise independent judgment as to the objective purpose and need.⁶⁵ The agency must legitimately assess the relative merits of reasonable alternatives before making its decision and ensure that the public is fairly presented with the alternatives that form the basis for the agency decision.⁶⁶ NEPA requires that agencies not only identify and study reasonable alternatives on their own initiative but also analyze significant alternatives suggested by other agencies, organizations, communities, and citizens.⁶⁷

To some extent, applicant-driven NEPA processes are necessarily reactive because federal agencies must respond to issues as they are presented. Broader issues of the public interest in agency approval of a given application may be subsumed by questions regarding the limits of agency authority to require mitigation. The applicant may seek to limit the agency's NEPA process to consideration of the

64. *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982).

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

66. *Dubois v. USDA*, 102 F.3d 1273, 1286–87 (1st Cir. 1996).

67. *Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n*, 598 F.2d 1221, 1230 (1st Cir. 1979).

applicant's preferred alternative and alternatives that are less preferable from the standpoint of environmental impacts or other elements of the public interest. Broader considerations of alternatives, including alternatives that would require a very different application or are beyond the scope of agency authority, are likely to be discouraged in these circumstances.

Perhaps more significant to the agency decision-making process in an era of declining federal capacity are the outside contractors selected by the agency and paid for by the applicant who have become the principal source of environmental impact assessment expertise. In providing for the minimum level of agency expertise necessary to exercise oversight of contractor-lead NEPA processes, agencies may lack the environmental leadership necessary to consider alternatives beyond application-specific issues. Instead of addressing the broader significance of the effects of agency action, these issues may be addressed as scoping issues relegated to NEPA appendices.

A central focus of NEPA, specifically in sections 101 and 102, is coordination between agency programs—at all levels of government—and private interests. Formal coordination, through public distribution of documents without substantive engagement on environmental issues, is the legal minimum for NEPA compliance. However, it may be alienating and even counter-productive to NEPA's purposes. Substantive engagement and effective coordination may be seen as costly, time-consuming, and even risky where potential litigation issues are embedded in the coordination process. The response from many agencies is to add more formality to the NEPA process through their written restatement and response to comments, indirectly increasing the barriers to substantive coordination of goals, priorities, and mitigation.

As NEPA enters its fortieth year, the central challenge remains that of integrating NEPA's goals and purposes within agency decision-making practices, authorities, and program realities. Paradoxically, to get ahead of the litigation curve, agencies may need to shift focus from preparation for litigation to making decisions that may be litigated. Where agency decisions are made in the context of a comprehensive agency environmental program, their consequences are considered, communicated, and, consequently, more defensible. In a well-designed environmental program, even a loss on NEPA

grounds is more manageable. Where a federal court finds a specific NEPA decision to be deficient under the standards of the Administrative Procedure Act, the implications of this process failure can be assessed and addressed by the agency environmental program rather than through ad hoc judgments of litigation risk. An effective environmental program can respond to litigation developments nimbly by providing supplemental analysis as needed.

But the larger purpose of such an environmental program is to ensure that the environmental consequences of every agency decision are known to the decision-maker and communicated to the public. As a matter of expert assessment of the environmental consequences of agency decisions, courts must ultimately defer to a well-designed agency environmental program that ensures adequate consideration of the environmental consequences of agency action.

The cornerstone of any agency program aiming to assess effects on human environment is effectively involving the public. While public involvement is an essential element of the NEPA process, it is not a procedural requirement of the statute. Rather, it is a means of ensuring that agency NEPA compliance meets the substantive purposes of the statute. In this regard, the NEPA process relies on public quality control of agency work and agencies need to actively support high-quality review of their analyses.

The public involvement requirements of the statute are minimal. A restrictive reading of the statute could have led to implementing regulations that require no more than public availability of final EISs. Section 102(2)(C) references the Freedom of Information Act (“FOIA”),⁶⁸ but the reference is limited to a requirement that agencies make available to the public the final statement that is the result of interagency coordination.⁶⁹ That cross-reference to FOIA has been interpreted by agencies and the courts as carrying with it the full spectrum of exemptions from FOIA’s general requirement of public disclosure, allowing agencies to withhold deliberative interagency communications from the development of a draft or final EIS, but

68. 5 U.S.C. § 552 (2006).

69. 42 U.S.C. § 4332(C) (2006).

since NEPA's enactment, FOIA has been interpreted to re-enforce proactive agency disclosure of agency records.⁷⁰

CEQ has interpreted NEPA and its cross-reference to FOIA as requiring greater openness in the development of environmental documents. The requirements of public scoping, public involvement in the development of an environmental assessment, public comment on a draft EIS, and public availability of a FONSI or Record of Decision are all regulatory requirements based on CEQ's interpretation of the statute. Forward-leaning as they are, they are rooted in the procedures and means of communication available thirty years ago. Since that time, FOIA has been amended to include provisions requiring access to documents by electronic means.⁷¹ Such means of transparency and access to environmental information, such as dense EISs and myriad judgments captured in CE evaluations for extraordinary circumstances, may do more to further NEPA's goals than any development since CEQ adopted its implementing regulations.

Ultimately, to focus decision-makers on the environmental significance of their authority, NEPA practice will have to become more transparent and encourage more effective communication. Web-based information that is available on demand tends to fill the gaps in policy processes that do not wait for the development of an EIS. Online, programmatic information—useful in scoping NEPA documents and as applied to the rigors of the NEPA process—could help increase the responsiveness of NEPA programs to the needs and expectations of decision-makers. A NEPA program that provides timely and authoritative information can promote actions that prevent or eliminate environmental damage, stimulate health and welfare, and improve understanding of the nation's ecological systems and natural resources.

70. Most recently, the President has directed agencies to “take affirmative steps to make information public” without waiting for FOIA requests and to “use modern technology to inform citizens about what is known and done by their Government.” Memorandum from the President to the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

71. 5 U.S.C. § 552(a)(2).