

KEYNOTE ADDRESS

MODERNIZING THE NATIONAL ENVIRONMENTAL POLICY ACT: BACK TO THE FUTURE

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INTRODUCTION

Thanks to Dick Stewart and good morning everybody. Dick laid out a whole series of activities that the President's Council on Environmental Quality (CEQ) should focus on and be involved with. This conference is about one of the bedrock issues—the challenge and opportunity of environmental review. This discussion, and the forum pulled together by the *New York University Environmental Law Journal*, could not be more timely. We are at a point in time in the United States where we are on the cusp of fully realizing what the environmental review process can deliver. I do not think we have fully realized it yet. The title of my remarks is about modernizing the National Environmental Policy Act (NEPA) process,¹ but a subtitle of these remarks could

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¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2000)).

be “Back to the Future.” We are back to the idea of NEPA at its core and how we can carry that idea forward into the future, building upon the experiences we have had over the past thirty years.

But first, I want to share a story with you. Governor Mike Leavitt of Utah² is a very good friend of mine. He recounted to me that one day, while approaching one of those broad, flat intersections in Salt Lake City, he saw two pickup trucks going in opposite directions. And he noticed that each of the pickup trucks had a bumper sticker on the back. On the back of one it read “Earth First: We’ll Mine the Rest of the Solar System Later.” On the back of the other pickup truck, the sticker read “Save the Earth: Kill Yourself.” His reflection on that, of course, is that our discussion lies somewhere between those two extremes. The issue of NEPA, and of environmental review, is getting at that balance. NEPA is about understanding the marriage between economic activity and aspirations—our social aspirations and our aspirations for the present and future in terms of environment and resource protection.

What is interesting about that notion is that Congress got it right in 1969 when it articulated the national goal under NEPA. Most of you are law students or affiliated with the legal profession—I hope you have already read § 101 of NEPA, but I will read it for you anyway:

[t]he Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can

² Michael O. Leavitt was confirmed as EPA Administrator by the United States Senate on October 28, 2003. 149 CONG. REC. S13,326, S13,340 (daily ed. Oct. 28, 2003).

exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.³

This could not be more true today. What is fabulous, however, is that it was true then, thirty years ago. In my view, NEPA is the first sustainable development statute, before the term “sustainable development” even entered the lexicon.⁴ It articulates well the very set of issues that you will be talking about here today, and that we talked about intensively in August 2002, at the World Summit on Sustainable Development in Johannesburg.⁵

Let me give you a little more background before I get into some specifics of NEPA. What was fascinating about Johannesburg—and why I think we are on the cusp of a new future for this whole idea of environmental review and integrated environmental planning and decision-making—is that it institutionally realized the aspiration that Congress set out for us thirty years ago. It was the first conference where you had environment ministers, finance ministers, trade ministers, development ministers, foreign ministers, and energy ministers, all in the same place, talking about development, their respective roles in development, and what they do in relation to the environment and natural resources.⁶ In the past, these conferences have been dominated by environmental advocates—who are very important to have at the table, as they are the ones driving these goals and concerns. These other actors, however, actually have the operational responsibility for implementing development plans and

³ National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4331(a) (2000).

⁴ See John C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking*, 10 IND. J. GLOBAL LEGAL STUD. 247, 262 (2003) (noting that the 1980 World Conservation Strategy “first developed the intellectual framework for sustainable development”); Lawrence D. Roberts, *Ensuring the Best of All Possible Worlds: Environmental Regulation of the Solar System*, 6 N.Y.U. ENVTL. L.J. 126, 152 & n.81 (1997) (“The doctrine of sustainable development has arisen over the past two decades to incorporate the needs of future generations into the decision process of current policymakers.”) (citing Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a “Republican” Superagency*, 5 N.Y.U. ENVTL. L.J. 444 (1996)).

⁵ See generally REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, U.N. Doc. A/CONF.199/20*, U.N. Sales No. E.03.II.A.1 (2002), http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf.

⁶ See *id.* at 74-79.

goals and are responsible for solving some of these very difficult environmental and natural resource challenges. Bringing these actors together to discuss sustainable development alongside environmental advocates was the unheralded and unsung aspect of the Johannesburg Summit.

Now, another trend I have seen is that the environmental review idea has grown up. It has infused everything that federal government operations do. Several states have a counterpart to the NEPA process,⁷ and dozens of countries around the world have effectively copied our system of environmental review.⁸ These countries—though some of them are just beginning to erect the sort of environmental regulatory infrastructure that we now enjoy in the United States—have recognized that environmental review is a fundamental backstop for good government planning and decision-making.

Remember, NEPA was passed thirty years ago, before the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.⁹ NEPA was the only game in town for a little while. Now government officials must understand NEPA in relation to this whole legislative infrastructure.

The government is not the only actor dealing in the realm of environmental review, however, as the private sector also performs

⁷ *E.g.*, California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21777 (West 2002); New York State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2003); Wisconsin Environmental Protection Act, WIS. STAT. § 1.11 (1994).

⁸ *E.g.*, Canadian Environmental Assessment Act, ch. 37, 1995 S.C. 617 (1992) (Can.); Environment Protection and Biodiversity Conservation Act, ch. 2 (1999) (Austl.). *See also* Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83, 89 (2000); CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 1 (1995).

⁹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2000)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (2000)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6986 (2000)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)).

environmental review. Advocates of environmental review now have this great energy into which to tap, because today, unlike thirty years ago, every major private organization that does a merger, for example, does an environmental review.¹⁰ Every major organization that is expanding or contracting its facilities also does an environmental review.¹¹ These organizations are quite aggressive about it. Interestingly, the private sector side of environmental review is the same as the government side—it is an emerging development, of which I do not think we have realized the full potential.

So let's start with the core of NEPA. About ninety-nine percent of activities in the federal government are largely non-controversial.¹² These activities move forward, the people go about their business, the environmental reviews get done, people are comfortable with the way they are done, and the process is great. So if it's not broken, don't fix it. There is a one or two percent factor that tends to draw heat and attention to NEPA. That, I think, will be much of what your discussion today will be about.¹³ However, I want to make sure that we are paying attention to what has worked well, even as we are paying attention to what can be improved.

I. INCREASED STAKEHOLDER COOPERATION

I'll start at the top—if you recall from the congressional mandate of § 101 of NEPA, one of the key points is the need to cooperate with state and local governments and other concerned public and private organizations.¹⁴ Many of the complaints I first

¹⁰ Mitchell H. Bernstein, *Environmental Due Diligence Reviews in the Merger and Acquisition Context*, in *THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 1990*, 189 (1991).

¹¹ *See id.*

¹² *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 *COLUM. L. REV.* 903, 920 & nn.73-74 (2002) (“Only about 500 EISs are performed annually, and EAs now outnumber EISs by a factor of at least 100 to 1.”).

¹³ *See, e.g.*, James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 *N.Y.U. ENVTL. L.J.* 74 (2003); Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 *N.Y.U. ENVTL. L.J.* 18 (2003).

¹⁴ National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4331(a) (2000).

heard when I came into this job (which, as you know, includes exercising oversight over NEPA) were from states, localities, citizen groups, and environmental groups, all complaining about the federal government telling people what was good for them.

And whether in the context of federal resource agencies or federal action agencies, the overwhelming visceral reaction of these groups was that there has not been enough public involvement early in the planning processes when it comes to environmental review—and they are right.¹⁵ One of the first things I did when I came on board at CEQ was issue guidance directed from the White House to federal agencies, notifying agencies that they should offer and consider giving cooperating agency status to any entity that comes forward and qualifies for such status.¹⁶ To me, that seemed logical and reasonable, but it was apparently novel to many of the federal actors. This idea of up-front cooperation is actually the answer to getting rid of end-of-the-day controversy and litigation.¹⁷

The whole idea of NEPA is that NEPA should serve as a planning decision-making tool, engaging people from the get-go to find out what their issues are and begin to work through those issues from the inception of project planning.¹⁸ What happened over time, however, is that NEPA looked more like a regulatory tool, and became a burden to agencies—an add-on (again I am talking about this one percent range).¹⁹ So what we need to do in this area of cooperation is to get back to the vision of NEPA, front-

¹⁵ See generally Tripp & Alley, *supra* note 13; GEN. ACCOUNTING OFFICE, HIGHWAY INFRASTRUCTURE: PERCEPTIONS OF STAKEHOLDERS ON APPROACHES TO REDUCE HIGHWAY PROJECT COMPLETION TIME 11-12 (2003) (ninety percent of stakeholders identified that public participation earlier in the planning process would reduce delays in the environmental review process), <http://www.gao.gov/new.items/d03398.pdf>.

¹⁶ Memorandum from James Connaughton, Chair, Council on Environmental Quality, to Heads of Federal Agencies (Jan. 30, 2002), reprinted in NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION app. A (2003) [hereinafter NEPA TASK FORCE], <http://ceq.eh.doe.gov/ntf/report/finalreport.pdf>.

¹⁷ See Tripp & Alley, *supra* note 13, at 91-92.

¹⁸ 40 C.F.R. §§ 1500.5(a) (2003) (“Agencies shall reduce delay by . . . integrating the NEPA process into early planning”), 1501.2 (integration with other planning shall occur “at the earliest possible time”); See Tripp & Alley, *supra* note 13, at 90-91.

¹⁹ FED. HIGHWAY ADMIN., DEP’T OF TRANSP., SUCCESSFUL EFFORTS IN ENVIRONMENTAL STREAMLINING: EIGHT CASE STUDIES IN PROJECT DEVELOPMENT (2003), <http://environment.fhwa.dot.gov/strmlng/casestudies>. See also Tripp & Alley, *supra* note 13, at 81-84.

loading the planning process with stakeholder participation and deepening that participation. Such a process necessarily demands larger amounts of resources. Currently, resources devoted to environmental review are largely focused at the back end. So we have to make a transition. I hope you will discuss this today—how we can transition to more up-front planning processes and cooperation, as a way of dampening the resources that are spent at the back end. That is a real policy and institutional challenge for agencies with finite resources. I look forward to the outcome of your discussion today on that.

II. MODERNIZING NEPA—THE NEPA TASK FORCE

The other thing CEQ has done over the course of the last ten years has been to canvass the range of activities—a lot of individual pockets of activity—in order to explore ways to modernize the environmental review process. CEQ identified many isolated examples of improvements to the environmental review process without much programmatic work: a lot of issue-identification but not a lot of follow-through. So CEQ convened a NEPA Task Force²⁰—we have a CEQ web site and you can get all the information you need on it²¹—consisting of some top individuals from the federal agencies most involved and familiar with NEPA.²² For several months, CEQ put members of this NEPA Task Force in one set of offices to pull together these individual pieces of NEPA improvements and to come forward with recommendations as to how to improve the environmental review process on a system-wide level.

The process has been very intensive, involving a lot of outside consultation. Later this summer, the NEPA Task Force will issue their findings and recommendations.²³ There will be a whole list of things that the federal government and state agencies

²⁰ Memorandum from Horst G. Greczmiel, Associate Director for NEPA Oversight, to James L. Connaughton, Chairman, Council on Environmental Quality (Apr. 10, 2002), <http://ceq.eh.doe.gov/ntf/20020410memo.html>.

²¹ Council on Env'tl. Quality, Council on Environmental Quality, *at* <http://www.whitehouse.gov/ceq> (last visited Dec. 2, 2003).

²² For a list of members of the NEPA Task Force, see NEPA Task Force, Council on Env'tl. Quality, About the CEQ NEPA Task Force, *at* <http://ceq.eh.doe.gov/ntf/bios.html> (last visited Dec. 2, 2003).

²³ See generally NEPA TASK FORCE, *supra* note 16.

undertaking federally-funded projects can do to improve the process of environmental review and the NEPA Task Force will be identifying some priorities for action. The challenge for the NEPA Task Force was to modernize the NEPA process, focusing on practical, commonsense ideas. We do not need to throw anything out: the CEQ and agency regulations provide a huge history of experience and guidance. However, there is a need to modernize the application of those regulations and the NEPA process generally. The vision of the modernization should come from commonsense ideas based on practical, field-based experience.

A. *Technology and Information Management*

The NEPA Task Force is paying particular attention to a few areas, one being technology and information management.²⁴ In the federal government, we have a NEPA platform that still looks the same as it did when I was in law school, it is as if we were still operating from a DOS platform to operate today's computers. We have much to do to modernize the NEPA technology architecture so that environmental review information can be used, maintained, and mined again and again and again to create data-rich sets that can be carried forward into the future and prove information useful to future environmental reviews.²⁵ A lot of NEPA work is still done pen-on-paper or on a computer printing out big paper volumes that go on shelves and remain unused in other contexts—we need to bring to the fore the newest technology and database information management opportunities we have in front of us.²⁶

B. *Intergovernmental Coordination*

Another area the NEPA Task Force has focused on is intergovernmental coordination.²⁷ I am a musical theater fan, and the lyrics that always come into my head when I am involved in these inter-agency and intergovernmental discussions is “[t]he farmer and the cowman should be friends.”²⁸ One frequently encounters institutional and cultural differences as to how

²⁴ *Id.* at 5-23.

²⁵ *See also* Gerrard & Herz, *supra* note 13, at 26-27.

²⁶ *See id.*

²⁷ NEPA TASK FORCE, *supra* note 16, at 24-34.

²⁸ Richard Rodgers and Oscar Hammerstein II, *The Farmer and the Cowman*, in OKLAHOMA! VOCAL SCORE (Williamson Music 1943).

environmental reviews should occur—just within the federal government there is this conflict—that is before involving state governments or members of the public, who have vastly different visions of how environmental review should proceed. We need to come up with better frameworks for collaboration.²⁹ The NEPA Task Force is identifying some of the best actors, and the best processes, to improve such collaboration efforts, and will make this information available in an open database for everyone's reference. In order to make such collaborative frameworks possible, however, leadership must emerge—we need to shine a light on those leadership successes to inspire better collaboration.

C. Programmatic Analysis and Planning

The NEPA Task Force has identified programmatic analysis and tiered environmental impact statements (EISs) as some of the best, but underdeveloped, opportunities for creating collaborative frameworks.³⁰ The United States has had a fabulous thirty years of risk assessment and a fabulous thirty years of environmental assessment. The question we must find an answer to now is how to pull environmental and risk assessments together in such a way to create a more programmatic view of planning and development, and then tailor such a vision to specific operations, making concurrent environmental and risk assessment a living process.³¹ Finding an answer to that question has been a real challenge for agencies involved in environmental review, though now agencies have a technological and human resource capacity to create change that did not exist thirty years ago. Agencies must take greater advantage of this new capacity.

D. Adaptive Management and Monitoring

Adaptive management and monitoring is another area identified by the NEPA Task Force as an area for improvement.³²

²⁹ See FED. HIGHWAY ADMIN., DEP'T OF TRANSP., COLLABORATIVE PROBLEM SOLVING: BETTER AND STREAMLINED OUTCOMES FOR ALL: GUIDANCE ON MANAGING CONFLICT AND RESOLVING DISPUTES BETWEEN STATE AND FEDERAL AGENCIES DURING THE TRANSPORTATION PROJECT DEVELOPMENT AND ENVIRONMENTAL REVIEW PROCESS (2002), <http://environment.fhwa.dot.gov/strmlng/adrguide/adrtoc.htm>.

³⁰ NEPA TASK FORCE, *supra* note 16, at 35-43.

³¹ See Tripp & Alley, *supra* note 13, at 89-97.

³² NEPA TASK FORCE, *supra* note 16, at 44-56.

Adaptive management means different things to different people, and clarity must be brought to the concept.³³ To me, it is simple—this idea of environmental review should never end. NEPA is not a project—environmental review is not a project. It is a way of doing business—it is a way of operating, a mindset—that requires one to constantly re-think and revisit the situation.

Many people complete their volumes of NEPA and then they say, “Let’s go to court.” That is not the way environmental review should be handled. Environmental review should include a continual flow of information that is constantly updated and reviewed, with decision-making evolving and moving according to new information, capable of adapting to new information. This adaptive management is different from the typical “notice and comment” rule—when everybody comments, the comments go into a black box, and then a government solution is handed down from on high. I am talking about a different vision, a vision of a constantly evolving discussion. In order to make adaptive management a possibility, open public participation is required. That public participation cannot be of the thirty-year classic dialogue that provides stakeholders only a couple of shots at participating in the environmental review process. Instead, it must be a much more forward-looking and continuous dialogue. This new vision of stakeholder participation and adaptive management is something CEQ is pushing very aggressively, especially in relation to ongoing federal operations—military bases and land management operations, for example. Federal agencies should be moving toward a much more ongoing scheme of management and environmental review. And I am going to give you my own prescription on how to do that better in a moment.

E. *More Effective Use of “Categorical Exclusions”*

The NEPA Task Force is also focusing on more effective use of “categorical exclusions”—a fascinating 1970s-type term.³⁴

³³ “The process of adaptive management allows decisions to be modified as experience warrants. It admits the realities of an uncertain milieu of changing natural conditions, multiple variables, and uncertain data.” David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 627 (1997). See also Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. (forthcoming March 2004).

³⁴ NEPA TASK FORCE, *supra* note 16, at 57-63.

Categorical exclusions are overarching determinations and reviews which produce a decision that a certain category of actions do not create significant environmental impacts.³⁵ While these categories of actions that do not significantly impact the environment are termed “exclusions,” that term is really a misnomer in so far as it is misconstrued to mean “exemption from NEPA.” The creation of a categorical exclusion is one of the tools available to comply with NEPA. It is critical to ensure that the environmental review to support categorical exclusion provides sufficient assurances that the actions will not result in a significant environmental impact. Sometimes the determination is obvious and warrants little or no discussion; in other instances, more analysis and discussion may be warranted. Given the professional experience, rich history of analysis, and database resources in existence today, this category-based review process can be used much more effectively and appropriately than thirty years ago. CEQ is trying to reinvigorate that review process. The appropriate and effective use of categorical review can, in a world of limited resources, allow agencies to dedicate their resources to more thorough environmental reviews and engage in higher quality decision-making and planning processes for proposed projects that may result in environmental issues of some consequence.³⁶ Every agency has limited NEPA resources. Focusing limited NEPA resources where they matter is good government.

F. *Moving Forward*

The NEPA Task Force received comments on numerous other

³⁵ 40 C.F.R. § 1508.4 (2003) (“‘Categorical Exclusion’ means 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.”).

³⁶ See Dean B. Suagee, *The Application of the National Environmental Policy Act to “Development” in Indian Country*, 16 AM. INDIAN L. REV. 377, 398 (1991).

It is understandable and completely appropriate for agencies to include as many categories of actions within categorical exclusions as can reasonably be made to fit. Given the constraints on both financial and human resources within which all agencies function, it makes little sense to devote resources to preparing EAs on a great multitude of actions that are highly unlikely to result in significant environmental impacts.

Id.

issues, which are a matter of public record.³⁷ All the comments received will be incorporated into the NEPA Task Force's recommendations. The recommendations will not be the end of the NEPA modernization process. They will be tested and implemented to determine the most ideal NEPA reforms. The NEPA Task Force will indicate which ones it would like to carry forward, beginning a dialogue with the interested parties that have been so constructive to date.

III. OTHER BUSH ADMINISTRATION INITIATIVES

Let me now highlight a few other NEPA modernization activities—focused on specific subjects—with which CEQ is involved. I am going to focus on the administration's efforts with major transportation projects to enhance environmental stewardship and make the environmental component of the decision-making process more efficient and timely, as well as our efforts to improve forest health while reducing the threat of catastrophic wildfires.

A. *Environmental Stewardship in Transportation*

One program that was recently initiated by the Bush administration is streamlining transportation project planning and environmental review. The President recently signed Executive Order 13,274 related to environmental stewardship in transportation infrastructure project reviews.³⁸ Transportation infrastructure is a critical component of our national policy and our future.³⁹ Transportation infrastructure projects typically follow a serial decision-making process which requires a lot of planning, time, and resources.⁴⁰ The administration identified approximately

³⁷ CEQ TASK FORCE, REVIEW OF THE NEPA PROCESS: SUMMARY OF PUBLIC COMMENT (2002), <http://ceq.eh.doe.gov/ntf/comments/comments.html>.

³⁸ Exec. Order No. 13,274, 3 C.F.R. 250 (2003).

³⁹ See F. Kaid Benfield & Michael Replogle, *The Roads More Traveled: Sustainable Transportation in America—Or Not?*, 32 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,633 (2002).

⁴⁰ See FED. HIGHWAY ADMIN., DEP'T OF TRANSP., EVALUATING THE PERFORMANCE OF ENVIRONMENTAL STREAMLINING: PHASE II, <http://environment.fhwa.dot.gov/strmlng/baseline/phase2rpt.htm> (last modified Dec. 3, 2003); Fed. Highway Admin., Dep't of Transp., Environmental Streamlining National Memorandum of Understanding, July 20, 1999, <http://environment.fhwa.dot.gov/strmlng/nmou4.htm> (last modified Dec. 3,

ten of the biggest, most difficult projects that faced unintended roadblocks or were just starting,⁴¹ to re-create, or to create up-front, a more integrated and concurrent decision-making process.⁴² Historically, the planners do their thing, then the resource people weigh in after the project planning has occurred, and then citizens weigh in.⁴³

The administration wants to bring some high level attention to these big projects that have enormous environmental consequences, both positive and negative. These projects will relieve vehicular congestion, but they will also have some adverse environmental impacts. We want to review those impacts, both good and bad, in a more integrated planning framework with concurrent review.⁴⁴ The belief is that if these projects are successful, then integrated planning and concurrent review may be replicated in future projects. These projects will provide a resource base for future projects and will provide empirical proof of what can or cannot be achieved in integrated resources and development planning.

B. *Healthy Forests Initiative*

Another recent administration initiative designed to modernize the environmental review process is the Healthy Forests Initiative.⁴⁵ The Healthy Forests Initiative addresses the problem of catastrophic wildfires occurring as a result of unnatural buildup of tree density, especially in fire-adapted ecosystems in the West.⁴⁶ The administration has a series of activities underway, all of which are oriented toward getting the right environmental review of certain forest management activities done in the right place, on the right timeline.⁴⁷ Managing the forest—by reducing hazardous

2003).

⁴¹ Dep't of Transp., Environmental Stewardship and Transportation Infrastructure Project Reviews, at <http://www.fhwa.dot.gov/stewardshipeo/projects.htm> (last visited Dec. 3, 2003).

⁴² See Exec. Order No. 13,274, 3 C.F.R. 250 (2003).

⁴³ See Tripp & Alley, *supra* note 13, at 87-88.

⁴⁴ *Id.* at 90-91.

⁴⁵ HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES (2002) [hereinafter HEALTHY FORESTS INITIATIVE], http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf.

⁴⁶ See Gordon R. Alphonso et al., *Fire, Wood and Water: Trends in Forest Management Requirements*, 18 Nat. Resources & Env't (ABA) 18 (2003).

⁴⁷ HEALTHY FORESTS INITIATIVE, *supra* note 45, at 13-16.

fuels through forest thinning, or clearing out forest debris and undergrowth that feed and intensify fires, and by restoring areas ravaged by fires—merits our attention. The goal of thinning projects is to get the forests back to their more natural stand densities and therefore decrease the likelihood of a catastrophic fire and improve ecological health. It is now well established, after many years of experience and numerous projects, that there is a net environmental benefit to many of these efforts.⁴⁸

First, for relatively small thinning projects, we should be able to do a categorical assessment to determine that a categorical exclusion is appropriate and get that work going more quickly. If these projects are delayed, the risk of catastrophic forest fire increases. The uncontrolled forest fire that does not mimic nature's cycle can bring on the death of part or all of the forest. There are public notice and comment rulemakings underway for several such categorical exclusions to avoid this unhappy scenario.⁴⁹

Second, CEQ is looking at situations where a more complicated environmental assessment is required, but where it remains unclear whether review of the proposed activity will result in a finding of no significant impact or will require an EIS.⁵⁰ CEQ is therefore trying to leverage the experience base in the Forest Service to get environmental assessments done using more consistent procedures.⁵¹ CEQ is then going to use these situations to create a model environmental assessment that should assist agencies in conducting more effective environmental reviews.⁵²

⁴⁸ *Id.* at 8-12. See also David L. Renner & Fred C. Martin, *Using the Fuels and Fire Effects (FFE) and Economic (ECON) Extensions To the Forest Vegetation Simulator (FVS) to Evaluate the Impacts of Silvicultural Regimes*, in SECOND FOREST VEGETATION SIMULATOR CONFERENCE 97, 102 (Dep't of Agric. Proceedings RMRS-P-25, Feb. 12-14, 2002) (noting that a two-fire forest thinning treatment has proven effective in reducing the potential for crown fires for several decades), http://www.fs.fed.us/rm/pubs/rmrs_p025/rmrs_p025_097_103.pdf.

⁴⁹ For the new categorical exclusions and public comments, see National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814 (Jun. 5, 2003).

⁵⁰ 40 C.F.R. § 1508.9(a)(1).

⁵¹ *Id.*

⁵² Memorandum from James L. Connaughton, Chairman, Council on Environmental Quality, to Ann M. Veneman, Secretary of Agriculture and Gale A. Norton, Secretary of the Interior (Dec. 9, 2002), at http://www.whitehouse.gov/ceq/guidanceforenvironmental_assessmentsofforest_

The goal is to assist agencies in preparing an environmental assessment quickly and effectively, the result being a twenty page (or shorter) document that analyzes either that there is *not* a significant environmental impact—or even that there would be a significant net *benefit*—or that an EIS is necessary. Therefore, under the Healthy Forests Initiative, a departure is made from what has become, for some agencies, their standard NEPA practice: agencies will not follow the traditional choice between doing an environmental assessment (EA) or an EIS; instead, agencies will use the EA to decide whether an EIS is necessary. While such a process is novel for many practitioners, CEQ is seeking to ensure that agencies follow this process more systematically.

Third, for those situations that trigger the more intensive EIS process, CEQ is working very aggressively to create a technological architecture—a “turbo-NEPA”—where a more consistent protocol for decision-making criteria and needed information will be located.⁵³ Hopefully, over time, it will be populated with some of these data sets that I have talked about, making the whole process even more efficient. The “turbo NEPA” would be accessible to the public and should create greater stakeholder confidence in the NEPA process, as stakeholders are provided a mechanism by which to hold agencies accountable to a protocol designed to address all the various issues. Such a protocol will become increasingly useful in assuring compliance with all of the substantive laws that govern these projects. Of course, none of these laws are going to be substantively affected by the NEPA protocol—NEPA is the tool that organizes agency analysis of compliance with those substantive laws.

CONCLUSION

I am going to close with my main challenge for this group to explore. I did a lot of work in the environmental management realm before I came into this job. The way an environmental management system (EMS) works is that it provides for the identification of all the environmental issues associated with a project, environmental issue- and liability-related planning, and increased understanding of the legal obligations associated with

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⁵³ *Id.* at 9-11.

environmental risks.⁵⁴ Managers, using this information, then implement operational controls to make sure their organizations satisfy all of those obligations. Managers also have monitoring processes that check whether their organizations are meeting the planned environmental objectives and targets.⁵⁵ Finally, EMSs have a reaction process, an auditing process, and continuous improvement review.⁵⁶ I cannot tell you how many people in the NEPA world have told me, “we need that kind of a process.” Well, we have the tool. It exists. In fact, it has been internationally standardized.⁵⁷ It is being adopted around the world by public and private organizations. I would love to see a marriage of NEPA and EMS. CEQ is experimenting with such an environmental review strategy, but I invite you to consider what that sort of model might look like.

In a nutshell, a combined NEPA/EMS system would mean that once a transportation planning project is completed, environmental review and improvement of the project would not cease—rather, a living EMS for the project would remain, taking advantage of all of the information that was collected in the environmental review process. For the private sector, after due diligence on a merger has been completed, all of that great consultant time that has been spent on the merger is not wasted, but results in a product that lives beyond the merger—a modernized, upgraded EMS.

Modernizing NEPA processes to provide for more effective environmental reviews will require a number of institutional and structural changes, some of which have been outlined briefly here based upon preliminary NEPA Task Force findings. These

⁵⁴ For a general discussion of EMS, see Allison F. Gardner, *Beyond Compliance: Regulatory Incentives to Implement Environmental Management Systems*, 11 N.Y.U. ENVTL. L.J. 662 (2003); Stepan Wood, *Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance*, 10 BUFF. ENVTL. L.J. 129 (2003); Keith Pezzoli, *Environmental Management Systems (EMSs) and Regulatory Innovation*, 36 CAL. W. L. REV. 335 (2000); Christopher L. Bell, *The ISO 14001 Environmental Management Systems Standard: A Modest Perspective*, 27 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,622 (1997); Christopher L. Bell, *ISO 14001: Application of International Environmental Management Systems Standards in the United States*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,678 (1995).

⁵⁵ See Gardner, *supra* note 54, at 664-66.

⁵⁶ See *id.*

⁵⁷ See, e.g., INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO 14001 (1996).

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changes will inevitably be based on the original goals and purposes of NEPA—to minimize adverse environmental impacts of development and to instill an environmental ethic into planning. To do this, stakeholder participation must occur earlier in the planning process—a process based on coordinated and integrated review and programmatic analysis of development projects, utilizing techniques of adaptive management and building upon lessons learned from prior reviews. Modernizing NEPA will be no easy task. Some pilot projects initiated by CEQ have shown that such a modernized environmental review process can be successful, if done correctly. The questions that remain are: 1) what form should such a process take in order to be successful; and 2) how can environmental planning via an EMS be integrated into decision-making after environmental review has concluded? These are the teasers I want to leave with you for discussion today.