STREAMLINING NEPA'S ENVIRONMENTAL REVIEW PROCESS: SUGGESTIONS FOR AGENCY REFORM

JAMES T.B. TRIPP* & NATHAN G. ALLEY**

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* General Counsel, Environmental Defense; L.L.B., 1966, Yale University; M.A. (philosophy), 1966, Yale University.
** Legal Intern, Environmental Defense; J.D. Candidate, 2004, New York University School of Law.

INTRODUCTION

For over three decades, the National Environmental Policy Act of 1969[1] (NEPA or the Act) has been a pillar of environmental law. It has been hailed as a benchmark of the administrative revolution and has instilled an environmental conscience in the federal government.[2] Now, despite this position as one of the most fundamental and ubiquitous federal environmental statutes, NEPA is under fire from all sides.

NEPA has always been a fertile source of debate. Few people have argued that the Act should be rescinded, but commentators and the agencies bound by its requirements have often decried the Act as a time- and resource-consuming annoyance.[3] Project stakeholders have tested the efficacy of the NEPA process since

[1] National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2000).

[2] *See, e.g.*, LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE 145 (1998) (NEPA "has had a significant influence on public policy in the United States and abroad"); Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL'Y F. 9, 24 (1998); COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS iii (1997) ("Overall, what we found is that NEPA is a success—it has made agencies take a hard look at the potential environmental consequences of their actions, and it has brought the public into the agency decision-making process like no other statute."), http://ceq.eh.doe.gov/nepa/nepa25fn.pdf; Oliver A. Houck, *Of BATs, Birds and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403, 437-38 & n.145 (1994).

[3] *See, e.g.*, Sharon E. Riley, *The Wolf at the Door: Competing Land Use Values on Military Installations*, 153 MIL. L. REV. 95, 126 (1996); Ray Clark, *The National Environmental Policy Act and the Role of the President's Council on Environmental Quality*, 15 ENVTL. PROF. 4 (1993); Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision-Making*, 20 ENVTL. L. 703, 732 (1990) (arguing that wider public participation makes environmental review process more time-consuming); Edward V.A. Kussy, *Wetland and Floodplain Protection and the Federal-Aid Highway Program*, 13 ENVTL. L. 161, 260 (1983).

1970.[4] Environmentalist stakeholders generally appreciate the aims of NEPA—to integrate environmental values into agency decision-making and to identify less environmentally harmful alternatives to agency actions[5]—but sharp criticisms are being lobbed at NEPA from the environmentalist camp as well.

This Article generally refers to two groups: proponents of the NEPA process, usually environmentalists, and opponents of NEPA's demands, who may or may not care about the environment, but are generally more concerned with economic and project goals. NEPA's supporters claim that the courts have effectively weakened the Act.[6] This is because the courts have traditionally thought of NEPA's substance as, paradoxically, its process.[7] Some environmentalists have argued that the Act places substantial restrictions on agency decision-making and that it is not merely a procedural hurdle to agency action.[8] To that end, many

[4] *See, e.g.*, San Antonio Conservation Soc. v. Texas Highway Dep't, 400 U.S. 968, 969-72 (1970) (Black, J., dissenting) (noting NEPA's requirement of a study of environmental effects before major Federal actions); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Or. 1970) (denying land owners' request for preliminary injunction against new power transmission line under NEPA).

[5] *See* 42 U.S.C. § 4332(2)(B), (C).

> [A]ll agencies of the Federal Government shall . . . 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 . . . [and shall] 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 . . . alternatives to the proposed action . . . .

Id.

[6] *See, e.g.*, Bruce Ledewitz, *Establishing a Federal Constitutional Right To a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565, 624 (1998) ("[W]hile there have been calls to amend NEPA, there is nothing wrong with the Act that a court sympathetic to the environment could not cure."); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RES. & ENVTL. L. 245, 260 (2000) ("[I]n *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, the Supreme Court effectively squashed any possibility of judicial enforcement of NEPA's substantial goals.").

[7] *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998) (stating that NEPA "simply guarantees a particular procedure, not a particular result"); Ackerman, *supra* note 3, at 260.

[8] *See* Lindstrom, *supra* note 6, at 260. *See also* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980), *rev'g per curiam*, Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978). The Court rejected the

of NEPA's advocates have called upon the courts to re-imagine their approaches to the Act and to provide more substantive review of agency actions.[9] Many of NEPA's critics—proponents and opponents alike—propose substantive changes to the Act's body and text. Much of the academic literature suggests that legislative amendment is the only cure.[10] Some authors call for changes to NEPA's substantive language. For example, some officials would stretch NEPA's exception clauses to require the preparation of fewer environmental impact statements (EISs).[11] Others propose substantial overhauls of NEPA's procedural elements.[12]

This body of criticism illustrates that NEPA is not functioning as it was originally intended. For environmentalists, NEPA represented a safeguard. For agencies, the Act purported to be a valuable tool in planning processes. Instead, environmentalists worry that NEPA has been rendered an impotent guard, while the agencies find the Act more hindrance than help.

Some measure of reform is therefore necessary. However, this Article posits that neither legislative amendment nor the promulgation of new agency rules or regulations is necessary or desirable—meaningful reform can be accomplished from within the existing statutory and regulatory framework. Part I illustrates that it is possible to make NEPA function efficiently—to "streamline" NEPA for the benefit of federal agencies while preserving the facets of NEPA that appeal to various interest groups.

Part II argues that, to be successful, this streamlining effort

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appellate court's reliance upon NEPA as a substantive standard, noting that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences . . . ." *Strycker's Bay Neighborhood Council*, 444 U.S. at 227-28.

[9] *See, e.g.*, Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 548-49 (1990) (arguing for application of substantive standard as required by NEPA §§ 101 and 102(1)).

[10] *See* Lynton K. Caldwell, *Beyond NEPA: Further Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 220 (1998) (noting frequency of suggestions to strengthen NEPA via statutory amendment).

[11] Sandy Hornick, Remarks at the New York University Environmental Law Journal Colloquium, New Approaches to Environmental Review (Apr. 10, 2003).

[12] *E.g.*, Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 971 (2002).

must encourage a concurrent planning and environmental review process. Such a process would carry out NEPA's vision of fostering real consideration of less environmentally harmful alternatives early in any planning process. This Article draws from the field of negotiated rulemaking to suggest that the NEPA process should offer parallel opportunities for public participation. Part II examines potential reform mechanisms, including the 1978 NEPA Regulations (CEQ Regulations) promulgated by the President's Council on Environmental Quality (CEQ or Council). This Article argues that the language of the CEQ Regulations is a sufficient foundation for necessary internal administrative reforms, obviating the need for legislative or regulatory amendment.

Part III highlights the practical applications of this argument by offering real-world examples of agency projects that triggered the NEPA process and, through successful application of concurrent planning and review, accommodated the Act's requirements and goals without creating undue delay or hardship to the lead agency.

In sum, this Article suggests that the path to successful NEPA reform should not manifest itself through the courts or Congress. Instead, the agencies that are called upon to implement the Act must be the source of its improvement. NEPA is one of the most important laws fashioned in the 20th century—its spirit and letter have been emulated at the state and local levels in this country, and at all levels of government in countries across the globe.[13] It is time to re-imagine how federal agencies can reform NEPA practices in a manner that fulfills the original goals of the Act[14] while meeting the needs of the multifarious NEPA critics.

[13] *See* 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); CALDWELL, *supra* note 2, at 145; CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 1 (1995).

[14] This Article's primary focus will be NEPA's call for agencies' real consideration of project alternatives. *See* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2)(C)(iii) (2000).

I. A BRIEF RE-INTRODUCTION TO NEPA AND THE AIMS OF REFORM

A. *Overview of the NEPA Process*

NEPA requires an examination of environmental impacts of major actions taken by federal agencies.[15] This requirement serves two purposes. First, NEPA requires agencies to identify less adverse alternatives to proposals that may have a significant impact on the human health and the environment.[16] Second, through the imposition of the review process, NEPA is intended to instill federal agencies with some degree of environmental awareness.[17] Today, this latter goal has almost certainly been reached. While environmental groups may complain that agencies do not always consider environment protection to be a priority, after more than three decades of dealing with the Act, those agencies are at least aware on a general level that environmental protection is an option.[18]

The NEPA process itself is straightforward. Agencies must include in every recommendation or report regarding 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.[19]

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[15] *Id*. § 4332(2)(B)-(C).

[16] *Id*. § 4332(2)(C)(iii).

[17] *See id*. § 4321, 4332(1).

[18] *See, e.g.*, FISH AND WILDLIFE SERV., FISH AND WILDLIFE SERVICE NEPA REFERENCE HANDBOOK (2003) [hereinafter FWS NEPA HANDBOOK], http://www.fws.gov/r9esnepa/NEPA%20Handbook%20TOC.pdf.

[19] 42 U.S.C. § 4332(2)(C).

The "detailed statement" is the EIS. If, as is often the case,[20] an agency believes that its proposed action will not have a significant effect on the environment, that agency may prepare an environmental assessment (EA).[21] The EA, which is like a mini-EIS, results either in a decision to prepare a full EIS or in a finding of no significant impact (FONSI).[22] When an agency presents a FONSI, it must justify the decision not to prepare an EIS.[23] Agencies often produce FONSIs in the EA process—it is one strategy for avoiding the strictures of the EIS.[24] For example, the EA has been criticized for reducing public participation in the NEPA process, as the EA does not include several of the review stages involving the public.[25]

If an agency decides to continue with an EIS, it will issue a notice of intent (NOI) which informs other agencies and the public of the agency's intention to prepare an EIS.[26] After the NOI, officials will conduct a scoping process to identify potential impacts, project alternatives, and issues that will require further analysis in the EIS.[27] The scoping process is an early opportunity for public participation, as interested parties are given the chance to comment on what impacts and alternatives should be analyzed in the EIS.[28] When a project has been scoped, the agency prepares a draft EIS and presents it for public comment.[29] After a formal public participation period, the final EIS is prepared and submitted for additional comments.[30] When the agency has considered and

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[20] Karkkainen, *supra* note 12, at 920 & nn.73-74.

[21] *See* 40 C.F.R. § 1501.3 (2003).

[22] *Id*. § 1501.4.

[23] *Id*. § 1508.13. *See also* Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93, 127 (1999).

[24] Karkkainen, *supra* note 12, at 919.

[25] Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 279 (1999).

[26] 40 C.F.R. § 1508.22. *See also* NAT'L NUCLEAR SEC. ADMIN., NATIONAL ENVIRONMENTAL POLICY ACT: MODERN PIT FACILITY (2003) [hereinafter NNSA NEPA FACT SHEET], http://www.mpfeis.com/PDFs/MPFfs_2.pdf.

[27] 40 C.F.R. § 1508.25. *See also* NNSA NEPA FACT SHEET, *supra* note 26.

[28] 40 C.F.R. §§ 1501.7, 1508.25. *See also* Julie Teel, *International Environmental Impact Assessment: A Case Study in Implementation*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,291,10,297 (2001).

[29] 40 C.F.R. §§ 1502.9, 1503.1-.4. *See also* NNSA NEPA FACT SHEET, *supra* note 26.

[30] 40 C.F.R. §§ 1502.9, 1503.1(b). *See also* NNSA NEPA FACT SHEET,

responded to significant comments, it will make a final decision on the proposed action and then issue a record of decision (ROD).[31]

B. *Criticisms of the NEPA Process*

Critics charge that the NEPA process breaks down at various points. Preparation of an EIS is time-consuming, as there are often a multitude of interested stakeholders who want to take part in the process. Those stakeholders, in turn, approach NEPA reform from different angles. The various goals of NEPA reform can be separated into three categories: federal agency- and industry-desired reforms, environmental group-desired reforms, and reforms welcomed by all interested parties. The next sections will identify the criticisms and goals of agencies (generally defined as NEPA opponents above) and environmentalists (representative of NEPA's proponents), in order to focus on the goals that are shared by both groups.

1. *Agency Criticisms and Goals*

Today's typical agency decisionmaker will have to deal with NEPA in some form or another. Often these agency officials regard the NEPA process as more of an annoyance than as the valuable policy tool that it is.[32] These officials complain that conducting an adequate environmental review takes too much time and costs too much money.[33] Since the courts have long been unwilling to invest the NEPA process with more reviewability,[34] the paperwork that results from these reviews is often ignored or irrelevant. Not surprisingly, then, agencies often claim that NEPA has lost its way, and that it needs to be pared down or deflated—in

supra note 26.

[31] 40 C.F.R. § 1505.2. *See also* NNSA NEPA FACT SHEET, *supra* note 26.

[32] *See, e.g.*, FED. HIGHWAY ADMIN., DEP'T OF TRANSP., SUCCESSFUL EFFORTS IN ENVIRONMENTAL STREAMLINING: EIGHT CASE STUDIES IN PROJECT DEVELOPMENT (2003) [hereinafter FHWA CASE STUDIES] (noting the "perception that NEPA is the culprit for the majority of project development delays and associated cost increases that have occurred since its creation."), http://environment.fhwa.dot.gov/strmlng/casestudies.

[33] *E.g.*, Ackerman, *supra* note 3, at 732.

[34] *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 548 (1978) ("[U]nwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress."). *See also* Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1284 (1996).

other words, streamlined.

Agencies are required to start the NEPA process when an action has been proposed.[35] It often seems that, in reality, an extensive project plan with a list of preferred alternatives already exists before the NEPA process is initiated. Instead of performing an EA or EIS well before the commitment of any serious agency resources, agencies often wait until they have already engaged in costly project development stages.[36] By this point in time, the agency has developed a solid vision of what it hopes to accomplish and how it will accomplish it. The EIS becomes little more than a rubber stamp that can later be used as a defense in court.[37]

For decisionmakers poised to implement or continue a project, the EA/EIS stage is simply a waiting period. Officials can also feel burdened by NEPA's public participation requirements,[38] which provide notice and opportunity for public comment when the lead agency takes certain actions.[39]

Once the EIS is complete and the agency feels free to continue its planning and project implementation, the adequacy of the document may be challenged in court[40] or the agency may be charged with making an arbitrary and capricious decision in the course of choosing project alternatives.[41] This arbitrary and

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[35] National Environmental Policy Act of 1969 §102(c), 42 U.S.C. § 4332(2)(C) (2000).

[36] Oliver A. Houck, *Is That All? A Review of* The National Environmental Policy Act, An Agenda for the Future, *by Lynton Keith Caldwell*, 11 DUKE ENVTL. L. & POL'Y F. 173, 186-87 (2000) (book review).

[37] *Id*.

[38] *See supra* notes 27-31 and accompanying text.

[39] *See, e.g.*, Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974).

[40] *See, e.g.*, Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073, 1078 (9th Cir. 2002) (finding the Bureau of Land Management's EIS and EA inadequate because they did not sufficiently analyze or address the impacts of a site-specific project); Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 981 (N.D. Cal. 2002) (finding the Forest Service's Fuels Reduction Project Phase 1 EIS in violation of NEPA because of failures to disclose and analyze certain impacts and scientific opinions).

[41] *See, e.g.*, Davis v. Mineta, 302 F.3d 1104, 1122 (10th Cir. 2002) (finding that the Federal Highway Administration acted arbitrarily and capriciously when it dismissed project alternatives "in a conclusory and perfunctory manner"); San Francisco Baykeeper v. U.S. Army Corps of Eng'rs, 219 F. Supp. 2d 1001, 1020-21 (N.D. Cal. 2002) (finding that the Army Corps of Engineers' conclusions with respect to mitigation were not arbitrary because its identification and discussion of alternative mitigation measures were sufficient to support a conclusion that these alternative techniques were unnecessary and not feasible).

capricious review is the foundation of judicial review under NEPA. Even though the Act does not require agency action other than the preparation of an EIS, agencies are generally open to attack under the Administrative Procedure Act (APA)[42] and other administrative laws.[43]

Agencies will seek to protect EISs from legal challenges by producing piles of paperwork that exhaustively discuss every potential impact of the proposed action—creating a "bullet-proof" EIS. Agencies may experience prolonged delays in the production of a bullet-proof EIS.[44] Meanwhile, significant and probable harms may go unnoticed or deemed less important amid the clutter. This practice may cut down on litigation costs in the long run, but it does not comport with the purposes of NEPA or an agency's efforts at efficiency.

Even if an agency feels it has fully complied with NEPA and created a bullet-proof document, controversial projects will still be the targets of litigation, whether based on violations of NEPA or other statutes. It is true that these suits may not succeed against a particularly comprehensive EIS,[45] but courts have the power to issue an injunction against an agency until litigation is finished.[46] In all, agencies can expect at least three potentially substantial periods of delay in the NEPA process: the scoping/public participation phase, the EIS phase, and the potential courtroom phase.

An additional problem that confronts agency decisionmakers is a division of loyalties. Officials may see themselves as "environmentalists"[47] but, due to the frustrations felt as a result of

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[42] 5 U.S.C. §§ 551-559, 701-706 (2000).

[43] Lindstrom, *supra* note 6, at 261 ("[T]he only role for the courts is to enforce a nebulous 'consideration' of environmental values and insure that agencies reach their decision in accord with the APA's 'arbitrary and capricious' test.").

[44] *See, e.g.*, Kevin Preister & James A. Kent, *Using Social Ecology to Meet the Productive Harmony Intent of the National Environmental Policy Act*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 235, 242 (2001) ("The motivation of many agency staff is to avoid the cost and disruption of court involvement in their affairs by bulletproofing their NEPA work . . . .").

[45] *See, e.g.*, *supra* note 34 and accompanying text.

[46] *E.g.*, Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003).

[47] *See, e.g.*, Paul A. Sabatier & Matthew A. Zafonte, *The Views of Bay/Delta Water Policy Activists on Endangered Species Issues*, 2 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 131, 138-40, 143 (1995) (noting that some federal and state resource and environmental agencies exhibit views similar to environmental

NEPA's problems or due to the frustration of NEPA by various actors, they may find themselves opposing environmental groups over interpretations of the Act's requirements.[48] The public participation requirements embedded within NEPA provide an indication that NEPA was meant to facilitate cooperation, both among the various agencies and between the agencies and the public.[49] Thus, when agency officials are thrown into direct contention with environmental groups, one of NEPA's goals has been frustrated.

Overall, agencies have four primary incentives for streamlining the NEPA process—to minimize: 1) intrusion into the planning process; 2) delay in project implementation; 3) potential for litigation at the end of the process; and 4) generation of fragmented environmental review documents that are not useful to a project's planning process.

2. *Environmentalist Criticisms and Goals*

Environmental interest groups are also advocates of NEPA reform.[50] Environmentalists do not describe the Act as a paper tiger. However, they recognize that while federal agencies are concerned with proper NEPA compliance, agencies are more often concerned with project implementation.[51] Environmental groups have three primary incentives for reform—to increase: 1) consideration of project alternatives (by lead agencies); 2) public participation in the NEPA process; and 3) to provide heightened judicial scrutiny of environmental review documents.

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groups).

[48] *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 240 (1997) ("It has also been observed that, rather than encouraging dialogue and a reflexive examination of citizen preferences, the EIS process breeds distrust and cynicism about government, encouraging even more selfishness and strategic behavior on behalf of participants.").

[49] *See supra* notes 27-31 and accompanying text. *See also* National Environmental Policy Act of 1969 §§ 101-102, 42 U.S.C. §§ 4331-32 (2000).

[50] *See, e.g.*, Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 71-73 (2003).

[51] *E.g.*, DEFENDERS OF WILDLIFE, ATTACKS ON NEPA 1-4 (2002), http://www.defenders.org/forests/forest/nepa2.pdf.

a. *Consideration of Project Alternatives*

First and foremost, environmentalists would like to strengthen NEPA's mandate to consider less environmentally harmful alternatives.[52] A project "needs and goals" statement should always incorporate generic alternatives, such as "no action" alternatives. Due in part to the unwillingness of the courts to read more substantive requirements into NEPA, agencies are not bound by the alternatives analyses that result from preparation of an EIS.[53]

For example, consider an adequately prepared EIS that suggests two alternative action proposals—A and B. Suppose that alternative A is considerably less harmful to the environment. Some environmentalists, reading NEPA as a holistic document, suggest that the lead agency has a *duty to select* alternative A.[54] However, as the law currently stands, decisionmakers may select the more environmentally harmful alternative B.[55] The courts have determined that the agency has the ultimate discretion to select among more harmful alternatives. So long as the agency has complied with NEPA's procedural requirements, it is assumed that no inherent bias toward either alternative exists.[56]

The agency in the above scenario is further limited by

[52] *See, e.g.*, Preister & Kent, *supra* note 44, at 236 ("The systematic use of science at the forefront of analysis and consideration of alternatives has been recognized as significant to making better [agency] decisions."); Yost, *supra* note 9, at 548-49; Letter from Nick J. Rahall, II, Ranking Member, House of Representatives Committee on Resources, & John D. Dingell, Ranking Member, House of Representatives Committee on Energy and Commerce, to the President 2-3 (Oct. 21, 2002), *at* http://www.defenders.org/forests/forest/nepa2.pdf.

[53] One commentator ranks the substantive impact of NEPA at the bottom of a list of important environmental statutes that require alternatives analysis. Houck, *supra* note 2, at 444 ("At the bottom, we have NEPA, applicable to all major federal actions, and therefore the least stringent, requiring only that alternatives be fully considered. As the history of NEPA compliance bears witness, however, even this requirement is an agony for agencies historically committed to programs with severe environmental impacts."). *See also* Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) ("The Secretary [of the Interior] has *not disregarded* conservation alternatives, and we have no warrant to insist on more particulars from him," given a showing that the nation's energy needs "call for" the proposed action of outer continental shelf leasing.) (emphasis added).

[54] Yost, *supra* note 9, at 548-49.

[55] *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

[56] *E.g.*, *id*.

arbitrary and capricious review, though so long as its decision-making record is complete and reasonable, the agency is generally protected.[57] Given the inherent difficulty that interest groups face when lobbying for environmentally preferable alternatives after an ROD is issued, environmentalists desiring to revise NEPA often seek a process that would assure real consideration of project alternatives—a review prior to the investment of significant agency resources in project planning and development.[58] This early identification of project alternatives is also suggested by both NEPA and the CEQ Regulations.[59]

b. *Public Participation*

Early alternatives analysis can only happen if the public is given a greater stake in the planning and review processes, when the lead agency is actively considering alternatives. It has been and probably will remain the role of interest groups—not the agencies—to lobby for project alternatives that are better for the environment. Agencies will continue to be concerned with project costs and efficient project implementation. However, those same agencies are still bound by the broad purpose of NEPA—to further a national environmental policy. Agencies, therefore, should in theory welcome the environmental perspective as a tool for better planning.

c. *Heightened Judicial Scrutiny*

Many environmental advocates have suggested that NEPA compliance should be ensured through heightened judicial scrutiny of agency determinations.[60] Referring back to the example

[57] *See, e.g.*, *id*. at 227.

[58] *See supra* note 51 and accompanying text.

[59] National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000); 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").

[60] *E.g.*, Yost, *supra* note 9, at 539-40.

> [T]he Supreme Court, starting with a basic lack of commitment to the Act as conceived by Congress and constrained by a dominant allegiance to traditional legal doctrines that undermined Congress's intent to superimpose NEPA upon those doctrines, early employed unduly restrictive dicta to characterize NEPA's role and then became the captive of its own earlier dicta. The result has been to truncate the development of NEPA's substantive impact and deprive the nation of the full reach of Congress's purpose in enacting the statute.
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> *Id*.

above,[61] environmentalists would like the courts to read a preference for less environmentally harmful alternatives. If the NEPA process incorporates proper avenues for public participation, interested stakeholders will be able to push for environmentally preferable alternatives. A complete discussion of judicial review is beyond the scope of this Article. Since one the shared goals listed below is a reduction in delay-causing litigation, it is assumed that the current system of review will only be augmented by the proposals made in this Article.

3. *Shared Criticisms and Goals*

There are three primary goals that agencies and environmentalists share: 1) making the NEPA process more meaningful; 2) avoiding costly legislative or regulatory amendments; and 3) reducing the need or opportunities for litigation.

a. *A More Meaningful NEPA*

Both agencies and environmentalists would like to see the NEPA process become more efficient and meaningful. Boilerplate environmental review may be enough to satisfy judicial review but is worth little in the overall planning process.[62] Agencies often wait until a project plan is well underway before even contemplating NEPA. Then, at some point on the project timeline, when an EA or EIS is finally prepared, the review process causes the planning gears to grind to a halt. Agency officials, who by now have a detailed picture of the proposed major action, feel that they must cover every bullet point in the plan with a paper shield. As a result, more information goes into the EIS than is really necessary. Ultimately, decisionmakers are left with an unwieldy document that is of little help in practical planning because useful details become lost amid the clutter.[63] Both agencies and

[61] *See supra* Part II.B.2.a.

[62] *See supra* Part I.B.1.

[63] *See, e.g.*, 40 C.F.R. § 1500.1(b) (2003) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."); Rossi, *supra* note 48, at 224-28 (arguing that too much information creates opportunities for strategic behavior and interferes with deliberative democratic decision-making, making it likely that decisionmakers will "miss the forest for the trees"). The U.S. Environmental Protection Agency (EPA) also recognizes this potential difficulty; in a report on consideration of cumulative impacts in NEPA documents, EPA

environmentalists should therefore share an interest in initiating the NEPA scoping process early enough in the planning stage of a major project. Consequently, NEPA review will not delay project implementation and public input can seriously affect agency action for the better.

b. *Avoiding Costly Reform*

Both groups may want to avoid legislative action as well, since changing NEPA would require a huge investment of political capital. Environmentalists may not have the resources to lobby effectively for legislative reform, and it takes time for agencies to comply with new legislation or craft new regulations.

Agencies may grumble about NEPA, but after thirty years they have adapted to it.[64] This Article proposes reforms that can happen organically. When agencies have to adapt to new legislative changes they must invest time and human capital, and they must deal with new scuffles over judicial interpretation. Environmentalists are wary of amending environmental statutes, as a political backlash may result in environmental protections becoming weaker, rather than stronger.[65]

Even if the groups are not satisfied with the current state of judicial review, its boundaries have mostly been tested. Both should therefore have an interest in working toward administrative reforms in practice that open up the planning process to public review while the agency is still actively considering the scope of its action and alternative ways of achieving project goals.

c. *Avoiding Litigation*

Avoiding litigation is also a shared goal of the interested

suggests ways to ensure that an EIS does not become unwieldy. EPA, CONSIDERATION OF CUMULATIVE IMPACTS IN EPA REVIEW OF NEPA DOCUMENTS sec. 4.2 (1999) ("EPA reviewers should recommend that the proper spatial scope of the analysis include geographic areas that sustain the resources of concern. Importantly, the geographical boundaries should not be extended to the point that the analysis becomes unwieldy and useless for decision-making."), http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf.

[64] *See, e.g.*, FWS NEPA HANDBOOK, *supra* note 18.

[65] *See, e.g.*, Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 59 (2001) ("Democrats in Congress, generally supportive of strong environmental regulation, pressured EPA not to bring enforcement actions, fearing a political backlash that could lead to amendments that would weaken the Act.").

parties. NEPA is an oft-litigated statute, and, since its inception, NEPA has appeared at or near the center of at least twenty-four Supreme Court decisions.[66] Lawsuits drain time and resources from both sides of a controversy and, since the Act is largely procedural, litigation often does not guarantee anything more than increased delay. This delay, however, has been pursued by both environmental and industry groups to advance their interests. It is perhaps significant that environmental groups' use of delay tactics are often aimed at stopping harmful project alternatives. Since lawsuits increase the time and costs involved in a project, they may serve to make an otherwise questionable project not worth the continued investment of project proponents. Of course, if these environmentally harmful alternatives were not preferred by the agency, there would be less need for delay-causing litigation.

II. FOUNDATIONS FOR REFORM

To accomplish these shared goals, this Article suggests that environmental review should become an integrated part of the planning process for every major agency action covered by NEPA. In order to do this, the NEPA scoping process should be initiated at the earliest possible point in the planning process. In turn, environmental review should be initiated early in the planning process—before the agency has selected preferred alternatives. The NEPA process should aid decisionmakers in their choices of project alternatives—it should not be a justification for the choice of a single alternative.

An environmental review process that runs concurrently with or at least overlaps with that part of the planning process specifically addresses the goals for reform upon which all NEPA stakeholders should agree—increased efficiency and better information for planning, less litigation as a result of greater opportunities for public participation, and avoiding costly

[66] *E.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978); Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989) (determining "whether information developed after the completion of the EIS requires that a supplemental EIS be prepared"). A LEXIS search conducted by the authors produced 2,933 hits using the search term "NEPA." Averaged over the Act's thirty-year history, almost 100 NEPA-related law suits are filed each year.

amendments to NEPA or the CEQ Regulations.[67] Concurrent review ensures that environmental review is fully integrated into a planning process and, most importantly, that the public can participate in environmentally relevant phases of planning.

A. *Improving Planning and Efficiency Through Concurrent Review*

An environmental review process that operates concurrently with a significant portion of the planning process reduces the delay that has become commonplace in current NEPA practice.[68] If environmental review is conducted as part of a planning process, rather than as a corollary to planning, NEPA can aid decisionmakers in their duties, and they can avoid the delays associated with post hoc environmental reviews.[69] For instance, NEPA is not the only environmental statute that agencies have to follow. Agencies are substantively bound by the Endangered Species Act,[70] the Clean Water Act,[71] and the Clean Air Act,[72] to name a few. A proper EA or EIS should address how an agency project interacts with each of the other environmental statutes.

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[67] *See supra* Part I.B.3.b.

[68] For example, one federal agency report notes that, in Alaska:

> The federal NEPA process and all environmental permitting processes (federal, state, and local) run concurrently. This practice was put into effect with a one-year transition. It means that coordination with permitting agencies effectively begins at the start of the NEPA process. During scoping, the [Federal Aviation Administration] and airport sponsor get a fairly clear indication from scoping comments of which permits will be required. Since resource agencies now concurrently conduct NEPA and permit reviews, their comments tend to be more focused earlier in the NEPA process when there is more opportunity to modify project planning and to address permitting agencies' concerns. (Prior to this practice, resource agencies would frequently wait until the permit stage to provide substantive comments, rather than during the NEPA review.) Draft permits are included in draft NEPA documents, whether EISs or Environmental Assessments, and final permits are included in final NEPA documents.

FED. AVIATION ADMIN. & NAT'L ASS'N OF STATE AVIATION OFFICIALS, FEDERAL AND STATE COORDINATION OF ENVIRONMENTAL REVIEWS FOR AIRPORT IMPROVEMENT PROJECTS 22 (2002), http://www2.faa.gov/arp/app600/5054a/EIS_FAA_NASAOreport.rtf.

[69] *See supra* Part I.B.3.c.

[70] Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

[71] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

[72] 42 U.S.C. §§ 7401-7671 (2000).

NEPA informs decisionmakers on a policy level, too. Though NEPA does not limit the project alternatives available to agencies, it is intended to steer them away from actions that harm the environment.[73] Agencies should, in theory, want to minimize impact to the environment through application of environmental review. Incorporating the NEPA review process earlier into the project planning phase can help improve environmental planning and reduce overall costs of environmental compliance.[74] It is also apparent that the number of environmentalist lawsuits based upon improper NEPA application would decrease.

B. *Minimizing Litigation Through Negotiated Rulemaking*

One of the most important aspects of concurrent review is substantial public involvement. This involvement satisfies the agency goal of avoiding costly delays in the scoping and draft EIS phases and it reduces potential litigation after the ROD.[75] Environmental and other public interest groups have long supported consistent public involvement.[76]

The CEQ Regulations require agencies to "encourage and facilitate public involvement in decisions which affect the quality of the human environment."[77] In order to further this goal, agency officials might model NEPA's public participation process upon the discipline of negotiated rulemaking.[78] The negotiated rulemaking process is sometimes used to aid agencies in the development and promulgation of rules and regulations. In the context of environmental review, a negotiating process might lead

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[73] For further discussion on this point, see *supra* note 5 and accompanying text.

[74] *See* MARK GINSBURG, CURTIS & GINSBERG ARCHITECTS LLP, ENVIRONMENTAL REVIEW (2002), http://nynv.aiga.org/pdfs/NYNV_EnvironmentalReview.pdf; Press Release, United States House Committee on Transportation and Infrastructure, Bill to Streamline Review Process of Highway & Transit Projects Receives Strong Support of Transportation Officials & Community (Oct. 8, 2002), http://www.house.gov/transportation/press/press2002/release371.html.

[75] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1439 (1992).

[76] *E.g.*, Trustees for Alaska v. Hodel, 806 F.2d 1378, 1380 (9th Cir. 1986).

[77] 40 C.F.R. § 1500.2(d) (2003).

[78] For a discussion of negotiated rulemaking, see Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U. ENVTL. L.J. 32 (2000); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

to a more careful balancing of agency and public preferences for project alternatives.

Negotiated rulemaking is unique because it offers a formal public consultation process in advance of a normal notice and comment process before the agency has formulated a full proposal.[79] A notice is issued, informing the public of the proposed rulemaking, and interested stakeholders may apply for a position at the negotiating table. Representative stakeholders are selected and become integral players in planning and other decision-making.

The negotiated rule that results is usually well-informed and represents a positive cost-benefit calculus.[80] Because the decision-making process is highly structured and efficient, the rulemaking costs less in terms of time and political capital.[81] Part III of this Article will highlight some examples of complex, large-scale planning initiatives which have been incorporating similar kinds of "stakeholder committees" at early stages of project planning and environmental review, involving stakeholders in the NEPA scoping and EIS review processes well before a specific proposed or preferred plan of action is selected.[82] This committee process is similar to a negotiated rulemaking because it will result in substantive decision-making by both the involved agencies and the public.

C. *Implementing NEPA Reform Through the CEQ Regulations*

Since NEPA's stakeholders in general should like to see reform accomplished without legislative or regulatory amendment—given the cost (and potential costs) of such massive

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[79] McGarity, *supra* note 75, at 1438-39.

[80] *See generally* Freeman & Langbein, *supra* note 78. *See also* Siobhan Mee, Comment, *Negotiated Rulemaking and Combined Sewer Overflows (CSOS): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213 (1997). *But see* McGarity, *supra* note 75, at 1439 & n.261 (noting difficulty in reaching negotiated outcomes in environmental context); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001).

[81] McGarity, *supra* note 75, at 1439 (noting, *inter alia*, that successful negotiated rulemaking can result in "substantial cost and time savings," while "litigation can be avoided").

[82] *See* COMPREHENSIVE PORT IMPROVEMENT PLAN, PLAN PARTICIPANTS, *at* http://www.cpiponline.org/plan/participants_stake.html (last visited Dec. 4, 2003).

reform efforts—it is important to identify existing sources of authority that can sustain the suggested reforms. These include concurrent review—initiation of the NEPA scoping process while the planning process is underway—and negotiated rulemaking—obtaining early input from informed and interested stakeholders into alternative regulatory proposals before the agency has formally proposed regulations. Such authority does indeed exist—NEPA and the complementary CEQ Regulations both allude to and specifically call for concurrent review and the insertion of environmental review into the early planning process.[83] Quite simply, NEPA says that all agencies of the federal government shall "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 . . . ."[84]

Title II of NEPA created CEQ,[85] which is charged with reporting to and advising the President on issues pertaining to the quality of the environment.[86] CEQ may also promulgate regulations that are "binding on all federal agencies and provide formal guidance to the courts for interpreting NEPA requirements."[87] In 1978, almost a decade after NEPA was passed into legislation, the Council promulgated the CEQ Regulations, which refined and augmented agency duties under NEPA.[88]

One of the primary purposes of the CEQ Regulations was to create a more effective and efficient NEPA.[89] The CEQ Regulations encapsulate the projected reforms of agencies and interest groups alike.[90] The binding nature of the CEQ Regulations

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[83] *See* National Environmental Policy Act of 1969 § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii) (2000); 40 C.F.R. §§ 1500.5(a), 1501.2 (2003). See also James L. Connaughton, *Modernizing the National Environmental Policy Act: Back To the Future*, 12 N.Y.U. ENVTL. L.J. 1 (2003).

[84] 42 U.S.C. § 4332(2)(B).

[85] 42 U.S.C. § 4342.

[86] 42 U.S.C. §§ 4342, 4344.

[87] Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986).

[88] *See* National Environmental Policy Act—Regulations, 43 Fed. Reg. 55, 978 (Nov. 29, 1978) (to be codified at 40 C.F.R. pt. 1500).

[89] *See* 40 C.F.R. § 1500.1(a) (2003) (The purpose of the CEQ Regulations is "to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act."), (b) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

[90] *See* 40 C.F.R. § 1500.2 (2003). The regulation requires agencies to the

is referenced in their text[91] and has been reaffirmed in the courts.[92] However, the requirements of the CEQ Regulations are not always followed and, interestingly, there has been little litigation over their enforcement upon agencies.

1. *Pertinent CEQ Regulations*

The CEQ Regulations address agency complaints of NEPA insignificance and delay, environmentalists' aspirations to consider alternatives and increase public participation, and this Article's recommendations for early and concurrent environmental review. This section identifies relevant language in the CEQ Regulations related to each of these issues.[93]

Making NEPA more useful:

40 C.F.R. § 1502.1. Purpose. . . . An [EIS] is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.5. Timing. . . . The [EIS] shall be prepared

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"fullest extent possible:"

> (b) [i]mplement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork . . . ; and to emphasize real environmental issues and alternatives. . . .
> (c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.
> (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.
> (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.
> (f) Use all practicable means . . . to . . . avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

Id.

[91] 40 C.F.R. § 1500.3 (2003) ("[These] regulations [are] binding on all Federal agencies for implementing the procedural provisions of [NEPA] . . . . The provisions of [NEPA] and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law.").

[92] *Trustees for Alaska*, 806 F.2d at 1382 ("The CEQ regulations are binding on all federal agencies and provide formal guidance to the courts for interpreting NEPA requirements."). *See also* Sierra Club v. Watkins, 808 F. Supp. 852, 870 (D.D.C. 1991) ("The CEQ's implementing regulations must be read in the same spirit as NEPA, the statute which created the CEQ.").

[93] 40 C.F.R §§ 1500-1508 (2003).

early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made. . . .

Reducing delay:

40 C.F.R. § 1501.1. Purpose. The purposes of this part include: (a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay. . . .

Consideration of alternatives:

40 C.F.R. § 1502.14. Alternatives including the proposed action. This section is the heart of the environmental impact statement.

40 C.F.R. § 1506.1. Limitations on actions during the NEPA process. (a) Until an agency issues [an ROD] . . . no action concerning the proposal shall be taken which would . . . (2) Limit the choice of reasonable alternatives.

Public participation:

40 C.F.R. § 1506.6. Public involvement. Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. . . .

Implementing early and concurrent environmental review:

40 C.F.R. § 1500.5. Reducing delay. Agencies shall reduce delay by: (a) Integrating the NEPA process into early planning . . . (f) Preparing [EISs] early in the process . . . (g) Integrating NEPA requirements with other environmental review and consultation requirements . . . .

40 C.F.R. § 1501.1. Purpose. The purposes of this part include . . . [i]ntegrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

40 C.F.R. § 1501.2. Apply NEPA early in the process. Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. . . .

2. *Agency Application of CEQ Regulations*

The CEQ Regulations make clear that a thorough and fair evaluation of alternatives is the critical core of the EA or EIS process. This increases the likelihood that an alternative that minimizes adverse environmental impacts could become the agency's preferred plan. However, the review of alternatives in most EA or EIS processes is often perfunctory. If the NEPA review commences after the agency has decided on a specific proposal, that agency has, as a practical matter, considered and rejected other alternatives.

In addition, by the end of the planning process, an agency generally will have developed a project "needs and purpose" statement that often precludes alternatives for achieving the basic purpose of a project. If the agency initiates NEPA review at this stage, one can understand why that agency may see review as merely a legal hurdle that inevitably brings unwanted delay. Thus, if the vision of the CEQ Regulations is to be achieved, the environmental review process has to begin early enough in the planning process to allow the agency to fully consider alternative project alternatives.

The CEQ Regulations envision triggering the NEPA scoping process early in the planning process.[94] Agencies, however, seldom do this. If NEPA scoping is to commence earlier than it has traditionally, what do agencies that want to "streamline" NEPA by initiating the scoping process "early" in the planning process have to do? Agencies may prefer to postpone the NEPA review process until they have worked out the major elements of a specific project proposal.[95] After all, NEPA refers to a "proposal" for a major federal action as the trigger for environmental review.[96] If an agency has a set of alternative courses of action for a project, it may reason that it does not have a "proposal."

Yet one could imagine initiating a scoping process at a time when the agency has identified major alternatives and an overall project purpose or need, even while the agency may still not have

[94] *See supra* text accompanying note 93.

[94] *Cf.* Houck, *supra* note 2, at 444.

[95] Daniel R. Mandelker, *Environmental Assessment and the Planning Process*, *in* ENVIRONMENTAL LAW 519 (A.L.I.-A.B.A. Course of Study, Feb. 11 1998), WL SC56 ALI-ABA 519.

[96] National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000).

selected a preferred alternative as a "proposal." The agency could then seek public comment on the scope of alternatives and impacts to be reviewed and on the precise formulation of the project's purpose and need. The agency could then continue the planning process, look at reasonable alternatives that the public may have proposed in commenting on the draft scoping document, and, after it has decided on a preferred action, release a draft EIS or EA. Consistent with NEPA and the CEQ Regulations, an agency could even release a draft EIS at a time when it has not settled on a specific alternative, although it could indicate a preference.[97]

Another reason why some agencies may be hesitant to initiate NEPA scoping early in the planning process is that doing so would open up the planning process to the public scrutiny—with its attendant delay—provided under NEPA. Agencies with a history of avoiding public scrutiny are more likely to initiate NEPA later in the planning process, but NEPA review at such a late stage may stall the planning process.

Therefore, the NEPA streamlining envisioned by the CEQ Regulations creates a tradeoff for agencies. Agencies can avoid post-planning delays in the environmental review process and minimize the likelihood that environmental groups will challenge the agency's consideration of alternative purposes, needs, and strategies only if they open their planning processes to public scrutiny and its attendant delay. Then the public can examine the project's purposes and needs and suggest alternative approaches that agencies might not otherwise be inclined to pursue.

If this is implemented correctly, two public benefits would follow. The planning and environmental review processes, by running concurrently, would take less time than if they were run sequentially. Second, if public participation occurs at a phase when the agency is really open to outside comments about alternative strategies, the agency might end up with a project that is better from both a planning and environmental perspective. This is the vision of the CEQ Regulations.[98]

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[97] *See supra* text accompanying note 93.

[98] *See id*.

III. NEPA REFORM: IMPLEMENTING A CONCURRENT REVIEW PROCESS

A number of agencies have taken steps to implement concurrent review or are investigating ways to improve the NEPA process. In some cases, agencies that want to have a more open planning process have initiated NEPA review at an earlier stage than has been customary. But even recalcitrant agencies that have a cynical view of NEPA can use the NEPA process to give valuable structure to planning processes and provide a framework for incorporating public participation.

Agencies that design and implement federally-funded highway projects, in particular the Federal Highway Administration (FHWA) and state departments of transportation (state DOTs), are looking at ways to streamline NEPA.[99] NEPA streamlining efforts may seek to minimize project delay by fostering opportunities for public involvement and by initiating environmental review early in project planning. However, streamlining efforts can produce negative consequences for the environment when they, either by design or effect, limit the extent of public comment. Therefore, in order to further the goals of NEPA, the motivation for streamlining must come from a sincere desire to improve the efficiency of environmental review—not to do away with such review altogether.

A. *Transportation Projects*

Transportation projects in particular often run into snags in the NEPA process.[100] FHWA and most of the state DOTs have not historically encouraged public involvement early in the planning process.[101] Hard project decisions are made before interested

[99] *See, e.g.*, FHWA CASE STUDIES, *supra* note 32 ("[E]nvironmental streamlining procedures have been implemented for federally-funded highway projects on an ad hoc bases for a number of years, even before the official introduction of the concept in TEA-21 in 1998.").

[100] *See* Eagle Found., Inc. v. Dole, 813 F.2d 798, 804 (7th Cir. 1987) ("America's highways present examples of delay [and] cost overruns . . . .").

[101] The "commonly voiced concern that projects are halted late during environmental review because previously unrecognized environmental impacts are brought to light" is a clear symptom of public participation late in the planning process. GEN. ACCOUNTING OFFICE, HIGHWAY INFRASTRUCTURE: PERCEPTIONS OF STAKEHOLDERS ON APPROACHES TO REDUCE HIGHWAY PROJECT COMPLETION TIME 11-12 (2003), http://www.gao.gov/new.items/d03398.pdf. To avoid the delays and halted projects, ninety percent of respondents questioned by

private parties become aware of project proposals. This is a serious concern for environmentalists, as highway construction often implicates the development of previously unspoiled land[102] and, even when it does not, may require contentious re-zoning or the exercise of eminent domain.[103]

Major highway expansion projects or major new highways can do considerable amounts of direct damage to environmental resources. More importantly, these highway projects may promote accelerated decentralized development, which can often be harmful to urban and suburban environments.[104] Forest lands, watersheds, wetlands, and farmland can all be implicated by road expansion. Transportation expansion projects also may induce more automobile use. Rising vehicular miles traveled (VMT) has attendant consequences for air pollution, energy consumption, and emissions of greenhouse gases.[105]

Unfortunately, transportation officials often see

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the General Accounting Office "rated establishing early partnerships and early coordination as highly important to reducting the time needed to complete a highway project." *Id*. at 11. However, only three percent of transportation projects are determined to have environmental impacts significant enough to require the preparation of an EIS, thereby significantly limiting the ability of the public to shape transportation policy. *Id*. at 6.

[102] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 404 (1971).

[103] *See, e.g.*, Hecton v. People *ex rel*. Dep't of Transp., 58 Cal. App. 3d 653 (1976).

[104] *See, e.g.*, Press Release, EPA, EPA Announces Action Plan for Combating "Sprawl" in New England (Feb. 2, 1999) (stating EPA's commitment to "smart growth principles" and opposition to "projects that contribute to sprawl" such as "environmentally damaging highway projects"), *at* http://www.epa.gov/region1/pr/1999/020299.html (last visited Dec. 4, 2003). *See also* Lewis Goldshore & Marsha Wolf, *Agricultural Preservation, Suburban Sprawl and Urban Revitalization: Where Do They Stand?*, 166 N.J. L.J., Oct. 22, 2001, at 291.

[105] *See, e.g.*, STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADM'RS (STAPPA) & ASS'N OF LOCAL AIR POLLUTION CONTROL OFFICIALS (ALAPCO), REDUCING GREENHOUSE GASES AND AIR POLLUTION: A MENU OF HARMONIZED OPTIONS: EXECUTIVE SUMMARY AND CASE STUDIES 5 (1999), http://www.4cleanair.org/comments/execsum.pdf.

> The mobile source sector is responsible for more than a quarter of all [greenhouse gas (GHG)] emissions in the United States. High levels of motor vehicle ownership, sprawling land use patterns, limited public transit service, subsidies to the oil industry and low gasoline prices have been major factors in increasing vehicle miles traveled (VMT), and as a result, GHG emissions over the past decade.

Id. *See also* TRANSP. AIR QUALITY CTR., EPA, IMPROVING AIR QUALITY THROUGH LAND USE ACTIVITIES (2000), http://www.epa.gov/otaq/transp/trancont/f00047.pdf.

environmental review as a painful process and frequently look for ways to make the process easier.[106] As discussed above, the CEQ Regulations provided guidance for streamlining efforts in 1978.[107] Federal transportation officials, having the "perception that NEPA is the culprit for the majority of project development delays and associated cost increases that have occurred since its creations,"[108] no doubt welcomed passage of the Transportation Equity Act for the 21st Century (TEA-21) in 1998.[109] TEA-21 addresses highway project implementation planning and environmental review by "develop[ing] and implement[ing] a coordinated environmental review process for highway construction and mass transit projects."[110]

Similarly, in 2002, President George W. Bush signed Executive Order 13,274—Environmental Stewardship and Transportation Infrastructure Project Reviews (E.O. 13,274).[111] E.O. 13,274 seeks to "enhance environmental stewardship and streamline the environmental review and development of transportation infrastructure projects."[112]

E.O. 13,274 contemplates a list of projects that the Secretary of Transportation must target for expedited environmental review.[113] The Order also created the Transportation Infrastructure Streamlining Task Force (Task Force),[114] which is required to submit reports to the President describing the results of expedited reviews and detailing "those procedures and actions that proved to be most useful and appropriate in coordinating and expediting the review of the projects."[115]

The Task Force has approved nine priority projects[116] and is

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[106] *See, e.g.*, FHWA CASE STUDIES, *supra* note 32.

[107] *See supra* Part II.C.

[108] *See, e.g.*, FHWA CASE STUDIES, *supra* note 32.

[109] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998), *amended by* Pub. L. No. 105-206 §§ 9001-16, 112 Stat. 685, 834-68 (1998).

[110] *Id*. § 1309(a)(1).

[111] Exec. Order No. 13,274, 3 C.F.R. 250 (2003), *reprinted in* 49 U.S.C.A. § 301 (2003).

[112] 3 C.F.R. at 250.

[113] *Id*. § 2(c).

[114] *Id*. § 3(a).

[115] *Id*. § 4(a).

[116] Dep't of Transp., Priority Project List, *at* http://www.fhwa.dot.gov/stewardshipeo/pplist.htm (last visited Dec. 4, 2003).

expected to report to the President by the end of 2003.[117] One of the priority projects is the Lower Manhattan Recovery Effort, which includes at least three separate transportation projects.[118] At this time, the responsible agencies have not structured their expedited review processes and it is too early to get a sense of how they will initiate NEPA early in the process or how that process will focus on alternatives and impacts.

FHWA recently prepared a report on its own streamlining efforts, which was produced independent of the reports prepared by the Task Force.[119] Each of the eight transportation projects highlighted in the report involved the preparation of a complete EIS in thirty-three months or less,[120] a reduction of ten months from the average length of time spent on an EIS for FHWA projects.[121] The report examined various mechanisms that had been used to expedite the reviews but does not give a contextual picture of the environmental consequences of the highlighted projects.[122] In other words, while the reviews may have been expedited, it is not clear to what extent the reviews helped agencies minimize environmental harms.

The FHWA report highlighted the benefits of concurrent review and other streamlining strategies. In part, the report borrows directly from the CEQ Regulations. Specifically, it identifies four CEQ directives for agencies: "to engage in cooperative consultation, integrate the NEPA process into early project planning and review activities, identify significant issues early in the process and place appropriate time limits on the EIS process."[123] FHWA integrated these directives into the transportation projects that it highlights in the report; two of the important "lessons learned" from the report are to "[i]nitiate NEPA-type studies in advance of the formal NEPA process"[124] and

[117] *See* Interagency Transp. Infrastructure Streamlining Task Force, Dep't of Transp., Task Force Agency Representatives Meeting Minutes sec. III, V (May 20, 2003) (discussing status of priority projects and preparation of Task Force reports to President), *at* http://www.fhwa.dot.gov/stewardshipeo/030520minutes.htm (last visited Dec. 4, 2003).

[118] Dep't of Transp., *supra* note 116.

[119] FHWA CASE STUDIES, *supra* note 32.

[120] *Id*.

[121] *See id*.

[122] *Id*.

[123] *Id*.

[124] *Id*.

to "[i]mplement early and continuous public involvement programs in an aggressive fashion."[125]

Environmentalists can hope that FHWA and state DOTs will seriously follow these "lessons learned" and conclude that the best way to reduce delay is to involve the public and conduct NEPA studies of alternatives and impacts early in the planning process. Although the report did not expressly recommend that FHWA find better ways of "integrating the NEPA process with other planning at the earliest possible time," as the CEQ Regulations require,[126] this is the takeaway message from the report.

There is good reason to promote this kind of integration for the development of highway projects. If project purposes and needs are properly defined in terms of useful transportation and associated land use goals, environmental groups will have an early opportunity to suggest alternatives to traditional highway expansion projects. Agencies can achieve mobility goals by internalizing this advice. Alternative strategies include working with local governments to consider changes in future land use planning or to foster development patterns that reduce VMT. In other cases, state initiatives to promote use of van pools might alter demand forecasts. These are just a few of the strategies that environmental and community groups might suggest to protect environmental resources in transportation projects. The best time to have discussions of alternative strategies is early in the planning process—before those resources are placed in jeopardy.

B. *New York City Comprehensive Port Improvement Plan*

At the end of 1999, the U.S. Army Corps of Engineers (Corps of Engineers) completed a Harbor Navigation Study (Harbor Study) for the Port of New York and New Jersey (Port) that proposed deepening the major federal channels in the Port to fifty feet in order to accommodate the increase in draft and size of container ships. The Harbor Study concluded that "unmet cargo demand projected for the [Port] may necessitate [additional] improvements of volume capacity above what is currently planned."[127]

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[125] *Id*.

[126] 40 C.F.R. § 1501.2 (2003).

[127] COMPREHENSIVE PORT IMPROVEMENT PLAN, SUMMARY CPIP—PLAN SCOPE OF WORK [hereinafter SUMMARY CPIP], http://www.cpiponline.org/plan/

In response to this recommendation and in light of the potential impacts of other port improvements, such as terminal expansions and on-land transportation projects, that might be associated with growing trade activity, the Corps of Engineers, Port Authority of New York and New Jersey (Port Authority), the States of New York and New Jersey, New York City, and EPA signed a Memorandum of Understanding specifying the parties responsible for the preparation and administration of a Comprehensive Port Improvement Plan (CPIP) for the Port of New York and New Jersey. [128] The CPIP agencies are looking at terminal and on-land transportation needs that would logically be needed to accommodate larger ships using the expanded navigation channels as well as the impacts associated with such an expanded transportation infrastructure.[129] Stakeholders have recognized that past Port development, justified because of economic and transportation needs, caused significant stress on the harbor estuary environment.[130] These stakeholders now argue that state-of-the-art technologies and planning approaches might allow for the handling of increasing ship traffic without significant filling of harbor wetlands and shallow water habitats.[131]

To address these problems, the CPIP agencies agreed to structure its investigations so that the CPIP planning process and an EIS process would operate concurrently to a significant degree.[132] Although the CPIP agencies retained the services of a port plan consultant before it awarded a contract to the EIS consultant and therefore began the planning process prior to the environmental review process, the coalition nevertheless initiated the NEPA review process early in the CPIP planning process.[133] Indeed, the incorporation of the NEPA review process early in the planning process probably has encouraged the CPIP agencies to involve non-government stakeholder representatives on the CPIP Steering Committee and subcommittees, such as the CPIP

documents.html (last visited Dec. 4, 2003).

[128] *See* Comprehensive Port Improvement Plan, Memorandum of Understanding for a Comprehensive Port Improvement Plan for the Port of New York and New Jersey, *at* http://www.cpiponline.org/plan/documents/cpip_mou.htm (last visited Dec. 4, 2003).

[129] *See id*.

[130] *Id*.

[131] *See id*.

[132] *See id*. at 3-9.

[133] *See* SUMMARY CPIP, *supra* note 127.

Transportation Work Group, and to establish stakeholder advisory groups as well.[134] In addition, the early initiation of NEPA review is designed to encourage the development of alternative, green port strategies at a time when they can be pursued as part of the planning process, rather than considered in a more perfunctory fashion after the planning work is largely completed.[135] As a result, separate planning and environmental review documents are now being prepared using an integrated, concurrent process.[136] While the CPIP planning process is not without its own difficulties, the willingness of the CPIP agencies to pursue genuinely concurrent planning and environmental review processes is a significant development.

The integrated CPIP process is a model for this Article's streamlining recommendations. Its EIS serves two important functions—"as a planning tool in the development of the CPIP Plan"[137] and to fulfill the requirements of NEPA.[138] It is interesting that the CPIP agencies decided to list the planning function of the EIS before its NEPA function. This sentence construction vividly illustrates the true purpose of NEPA's requirements—that EISs not be prepared as boilerplate, but as valuable tools to aid agency decisionmakers.

C. *Restoration of the Mississippi Delta*

In the Mississippi River delta, federal and state agencies are currently constructing a plan to restore extensive areas of the delta environment that have been altered and damaged by invasive development.[139]

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[134] *Id*.

[135] *See* COMPREHENSIVE PORT IMPROVEMENT PLAN, PRELIMINARY GOALS & OBJECTIVES, *at* http://www.cpiponline.org/plan/overview_goals.html (last visited Dec. 4, 2003).

[136] *See* SUMMARY CPIP, *supra* note 127.

[137] COMPREHENSIVE PORT IMPROVEMENT PLAN, EIS OVERVIEW, *at* http://www.cpipeis.com/eis/overview/default.asp (last visited Dec. 4, 2003).

[138] *Id*.

[139] *See, e.g.*, CORPS OF ENG'RS., *Grounds for Hope Against a Rising Tide of Loss*, *in* WATERMARKS: LOUISIANA COASTAL WETLANDS PLANNING, PROTECTION AND RESTORATION NEWS NO. 24, at 8-9 (2004) [hereinafter WATERMARKS NO. 24], http://www.lacoast.gov/watermarks/2004-01/watermarks-2004-01.pdf. For information regarding the plan, see NAT'L WETLANDS RESEARCH CENTER, U.S. GEOLOGICAL SURVEY, LOUISIANA COASTAL WETLANDS RESTORATION PLAN [hereinafter LA. RESTORATION PLAN], http://www.lacoast.gov/cwppra/reports/RestorationPlan/index.htm (last visited Dec. 23, 2003).

The delta, created over thousands of years by sediments that the Mississippi River has carried to the Gulf of Mexico, has lost 1900 square miles of wetlands in the last eighty years. This is an area roughly the size of Delaware and more than twenty percent of the four million acres that existed early in the twentieth century.[140] It could lose another five to seven hundred square miles of wetlands before 2050.[141] These losses are primarily caused by flood control and navigation levees that the Corps of Engineers has built along the river. These levees, along with tens of thousands of miles of oil and gas pipeline and equipment canals, block the movement of sediment into the deltaic wetlands during high river stages.[142] Given the importance of this coastal region for navigation, fisheries, and oil and gas operations in the Gulf, the continuing loss of this resource has huge economic and ecological implications for the nation.[143] A restoration plan will be commensurately expensive and technically and politically complex.

Since August 2001, when the Governor of Louisiana hosted a Coastal Summit, the Corps of Engineers and the State have been jointly working on the preparation of a delta restoration feasibility study, known as the Louisiana Coastal Area plan, building on a 1998 reconnaissance-level report.[144] While the Corps of Engineers has been working on a draft of this plan, it has held numerous

[140] LA. COASTAL WETLANDS CONSERVATION & RESTORATION TASK FORCE & WETLANDS CONSERVATION & RESTORATION AUTH., LA. DEP'T OF NATURAL RES., COAST 2050: TOWARD A SUSTAINABLE COASTAL LOUISIANA 31 (1998) [hereinafter SUSTAINABLE LOUISIANA], http://www.lacoast.gov/Programs/2050/MainReport/report1.pdf; CORPS OF ENG'RS., *Once Gone, Gone Forever: Louisiana's Continuing Crisis of Land Loss*, *in* WATERMARKS NO. 24, *supra* note 139, at 3; COALITION TO RESTORE COASTAL LA., NO TIME TO LOSE: FACING THE FUTURE OF LOUISIANA AND THE CRISIS OF COASTAL LAND LOSS 2 (rev. ed. 2000) [hereinafter NO TIME TO LOSE], http://www.crcl.org/no_time_to_lose.pdf.

[141] *See* SUSTAINABLE LOUISIANA, *supra* note 140, at 48-5; LA. COASTAL WETLANDS CONSERVATION & RESTORATION TASK FORCE & WETLANDS CONSERVATION & RESTORATION AUTH., LA. DEP'T OF NATURAL RES., COAST 2050: TOWARD A SUSTAINABLE COASTAL LOUISIANA, AN EXECUTIVE SUMMARY 3 (1998) ("[B]y 2050, [Louisiana] will lose more than 600 square miles of marsh and almost 400 square miles of swamp. Consequently, nearly 1,000 square miles of Louisiana's wetlands will become open water."), http://coast2050.gov/reports/execsumm_.pdf.

[142] *See* NO TIME TO LOSE, *supra* note 140, at 39; LA. RESTORATION PLAN, *supra* note 139, at 25; SUSTAINABLE LOUISIANA, *supra* note 140, at 38.

[143] NO TIME TO LOSE, *supra* note 140, at 11-24.

[144] SUSTAINABLE LOUISIANA, *supra* note 140, at 38.

public hearings outside of the formal NEPA context. Despite NEPA's formal absence the Act has certainly encouraged the early engagement of key stakeholders and the public.[145]

Unfortunately, these public hearings revealed few details about the project alternatives that the Corps of Engineers was considering for the delta restoration. Consequently, four environmental organizations that are involved in delta restoration planning submitted a memorandum to the Corps of Engineers and the State of Louisiana.[146] The memorandum urged the Corps of Engineers to release a preliminary draft of the restoration plan and accompanying EIS, with a full discussion of coast-wide restoration alternatives.[147]

The groups specifically requested that the information be provided before the Corps of Engineers had settled on a preferred plan.[148] The memorandum identified a sense of urgency in the agencies overseeing the restoration. Agencies are, after all, institutions designed for action.[149] Despite the complaints of bureaucratic "red tape" or agency "ossification,"[150] agencies are implementation organizations. This may pressure officials to select preferred plans before necessary stakeholders are involved in discussion, or before there is sufficient scientific input, but it is

[145] *See* CORPS OF ENG'RS., *WRDA Funding: A Crucial Step in Saving Louisiana's Coast*, *in* WATERMARKS: LOUISIANA COASTAL WETLANDS PLANNING, PROTECTION AND RESTORATION NEWS NO. 19, at 8-9 (2001) (describing public participation), http://lacoast.gov/watermarks/2001-10/watermarks_2001-10.pdf. For information regarding the feasibility study, see Nat'l Wetlands Research Center, U.S. Geological Survey, Coast 2050 Feasibility Study, *at* http://www.coast2050.gov (last visited Dec. 23, 2003).

[146] Memorandum from Coalition to Restore Coastal Louisiana et al., to Corps of Engineers & the State of Louisiana (Aug. 19, 2003) (on file with authors) [hereinafter CRCL Memo].

[147] *Id*.

[148] *Id*.

[149] More acutely, agencies rely on congressional funding, which is generally granted for projects and other active pursuits.

[150] *E.g.*, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Siobhan Mee, *supra* note 80, at 241-45; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN L. REV. 59 (1995); McGarity, *supra* note 75.

counter-productive.[151]

Draft EISs need not include a preferred plan.[152] In fact, nothing in the CEQ Regulations suggests that inclusion of a preferred plan is necessary. Based on inputs in the draft EIS process, as well as additional scientific and planning work, agencies could release a supplemental draft EIS with a description of the preferred plan and reasons for its selection. Additional public review of the preferred plan could then take place before release of the final programmatic EIS. Although this schedule is not without its own challenges, it offers enormous benefits. The Corps of Engineers has agreed to depart from its standard procedures to allow public review of the various alternatives to the Lousiana Coastal Area Comprehensive draft report before a preferred plan is selected.[153]

D. *Redevelopment of Lower Manhattan*

Another enormous, multi-billion dollar state and federal action is the redevelopment of the World Trade Center site in lower Manhattan. The State and City of New York and the federal government, as well as the public, have a shared interest in expeditious planning for the reconstruction of this site.[154] The Lower Manhattan Development Corporation (LMDC), organized by Mayor Bloomberg and Governor Pataki, gradually realized that accelerated planning and redevelopment could occur only with early public involvement at frequent phases in the site and memorial planning processes. Major stakeholders such as the Civic Alliance, a coalition of numerous environmental, planning, architectural, and other organizations, have participated in these important planning processes.[155]

Opportunities for public input have come in three forms.

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[151] *See* CRCL Memo, *supra* note 148.

[152] *Id*.

[153] News Release, Corps of Eng'rs, Corps/State to Release LCA Report: Selection of Preferred Plan Postponed Until Public Review Complete (Sept. 3, 2003), http://www.coast2050.gov/press/nrLCAstudy.pdf.

[154] *See* LMDC, WORLD TRADE CENTER MEMORIAL AND REDEVELOPMENT PLAN: DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT 1-1 to 1-3(2004) [hereinafter WTC EIS], http://www.renewnyc.com/plan_des_dev/environmental_impact_contents.asp.

[155] *See* CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK, A PLANNING FRAMEWORK TO REBUILD DOWNTOWN NEW YORK (2002), http://www.civic-alliance.org/pdf/0906Planningframework2.pdf.

First, LMDC and the Port Authority, which owns the land at the site, have provided numerous informal channels for public input, including: a hearing attended by some five thousand individuals at the Jacob Javits Center in July 2002; a display of nine site redevelopment proposals by seven architectural groups in late 2002 and early 2003 at the Winter Garden; and, later, similar opportunities to comment on the final proposals for a memorial.[156]

Second, LMDC established advisory groups for the environmental review process.[157] The formal NEPA process—still in progress—is the third opportunity. While the first two public input processes were not dictated by NEPA, they were certainly consistent with and fostered by NEPA and its purposes.

In mid-2002, the Civic Alliance urged an early initiation of the NEPA scoping process before LMDC and Port Authority had agreed on a specific proposal or preferred plan.[158] LMDC did not initiate that process as early in the planning process as the Civic Alliance had proposed, and in fact waited until it had opted for a specific redevelopment plan before LMDC released a draft scoping document.[159] Even at that time, in mid-2003, many elements of the redevelopment were very much up in the air. These included

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[156] *See* CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK, LISTENING TO THE CITY: REPORT OF THE PROCEEDINGS (2002), http://www.civic-alliance.org/pdf/0920FinalLTCReport.pdf. For more information about public participation opportunities, see LMDC, Participate (2002), http://www.renewnyc.com/Participate/default.asp.htm.

[157] For information regarding the Advisory Councils, see LMDC, Advisory Councils (2002), http://www.renewnyc.com/aboutus/advisory/index.shtml.htm.

[158] *See* CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK, PLANNING FRAMEWORK: A REPORT OF THE CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK 58-60 (2002), http://www.civic-alliance.org/pdf/0906Planningframework2.pdf.

[159] *See* LMDC, DRAFT SCOPE: WORLD TRADE CENTER MEMORIAL AND REDEVELOPMENT PLAN GENERIC ENVIRONMENTAL IMPACT STATEMENT (2003), http://www.renewnyc.com/content/pdfs/WTCDraftScope.pdf. *See also* James T.B. Tripp & Ramon J. Cruz, Testimony at the Hearing on Positive Declaration and Draft Scope for the World Trade Center Memorial and the Redevelopment Plan Generic Environmental Impact Statement, LMDC (July 23, 2003) (on file with authors).

> [Environmental Defense] had urged LMDC and the Port Authority to initiate a NEPA/SEQRA scoping process at the earliest possible opportunity so that the environmental review process could be used to shape public review of real alternatives for the rebuilding of the public spaces, the transportation systems and structures at and adjacent to the site. Releasing a draft scope now is a useful step in that direction.

Id.

the resolution of serious differences between the design put forward by the planning studio and the design of the site's private developer. LMDC released its final scoping document in November 2003 and the draft programmatic EIS in early January 2004.[160] It appears that these formal and informal opportunities for public input and vigorous public dialogue have increased the likelihood that Governor Pataki's goal of initiating construction in 2004 will be realized.

CONCLUSION

The call for NEPA reform is not new. The insistent nature of the debate makes it clear that reform efforts are also not stale. Until now, much of the academic discussion about NEPA concentrated on finding its practical efficacy. These discussions have led to criticism of NEPA's apparent lack of a substantive environmental mandate. This criticism, adjudged by many NEPA's critics to render the statute ineffective, is also levied by the agencies and industries who rail against NEPA's few demands.

The typical agency position on NEPA was articulated by FHWA:

> [i]n its role as an "umbrella" process that binds together a host of other regulatory requirements, NEPA can be used to facilitate the overall environmental process when implemented successfully. However, it is typical that the NEPA "umbrella" can become mired in the myriad of regulatory controls and responsibilities that exist, thereby creating the *perception* that NEPA is the culprit for the majority of project development delays and associated cost increases that have occurred since its creation.[161]

NEPA itself is not the root of the agency problem. Rather, it is the agencies' typical application of the Act, with the initiation of the NEPA review process often occurring at a time when the agency has already decided on a preferred course of action in its planning process, that has transformed NEPA into a burden and limited the Act's effectiveness.

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[160] LMDC, FINAL SCOPE: WORLD TRADE CENTER MEMORIAL AND REDEVELOPMENT PLAN GENERIC ENVIRONMENTAL IMPACT STATEMENT (2003), http://www.renewnyc.com/content/pdfs/WTC_GEIS_Final_Scope.pdf. *See generally* WTC EIS, *supra* note 154.

[161] FHWA CASE STUDIES, *supra* note 32 (emphasis added).

The power to reform NEPA successfully lies primarily with agency decisionmakers. If agencies are willing to take the risk of making NEPA a real part of project planning, they will find that the Act is a help instead of a hindrance, developing agency actions that are well-informed with public support. This change in agency attitudes must be encouraged and aided by interest groups who wish to be authorized players in a cooperative review scheme. Agencies may find guidance in implementing concurrent NEPA review and planning processes in a number of places. As this Article illustrates, such guidance is readily available from the original text and purpose of NEPA itself, the CEQ Regulations, and the study of successful, existing agency projects.

The spirit and structure of NEPA do not need to be altered to effectuate the reform goals shared by environmentalists, agency officials, and other NEPA critics. To accomplish these reform goals, the NEPA process need only be streamlined and better-integrated into agency planning. This will ultimately result in more informed decision-making, more efficient planning and project implementation, and closer adherence to the original purpose of NEPA itself—to protect the state of the human environment.