

# AMENDING THE NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ENVIRONMENTAL PROTECTION IN THE TWENTY-FIRST CENTURY

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## I. INTRODUCTION

The environment as a concept in law and policy began to take shape thirty-five years ago.<sup>1</sup> Following World War II, individuals began to recognize the adverse impact of humanity on the environment. Works such as Rachel Carson's *Silent Spring*,<sup>2</sup> Aldo Leopold's *A Sand County Almanac*,<sup>3</sup> and Stewart Udall's *The Quiet Crisis* embodied this recognition.<sup>4</sup> The resulting rise in consciousness catapulted the issue of environment into the national arena, and by the mid-1970s, the United States Congress had

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1. See Lynton K. Caldwell, *Environment: A New Focus for Public Policy?*, 23 PUB. ADMIN. REV. 132, 132 (1963).

2. RACHEL CARSON, *SILENT SPRING* (1962).

3. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949).

4. STEWART L. UDALL, *THE QUIET CRISIS* (1963).

enacted an unprecedented volume of federal legislation to protect the environment.<sup>5</sup> The cornerstone of this national effort to protect the environment is the National Environmental Policy Act (NEPA).<sup>6</sup>

The passage of NEPA signaled a movement from dependence on common law to public law to promote environmental protection.<sup>7</sup> The development of public law to protect the environment has evolved significantly since NEPA's emergence in 1970. However, according to a number of leading scholars in the field, the foundation on which the current federal statutory scheme for environmental protection rests is weak. A. Dan Tarlock writes, "To use a rainforest analogy, environmental law is a dense canopy with shallow roots. The past twenty-five years have produced a lush but weak legal regime of environmental protection."<sup>8</sup> Identifying the positive and negative aspects of environmental law and policy, Rosemary O'Leary writes, "The primary source of the problem is our nation's incremental approach to environmental law making."<sup>9</sup> Lynton K. Caldwell suggests, "Implementation of the environmental protection features of the Federal Land Policy and Management Act, the Forest Management Act, and other policy directive acts is handicapped by the absence of an unambiguous referent in fundamental law."<sup>10</sup> Finally, in a

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5. See Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2373-74 (1996).

6. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4345 (1994)). For the complete text of NEPA, see *infra* Appendix.

7. See Lettie McSpadden Wenner, *The Courts and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 238, 242 (James P. Lester ed., 2d ed. 1995) [hereinafter Wenner, *The Courts and Environmental Policy*]; see also Lettie M. Wenner, *Environmental Policy in the Courts*, in ENVIRONMENTAL POLICY IN THE 1990S 145 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994) (discussing the shift to federal environmental controls in terms of efficiency using a cost-benefit analysis).

8. A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 162, 164 (Lawrence MacDonnell & Sarah Bates eds., 1993).

9. Rosemary O'Leary, *The Progressive Ratcheting of Environmental Laws: Impact on Public Management*, 12 POL'Y STUD. REV., Autumn/Winter 1993, at 118, 133.

10. Lynton K. Caldwell, *A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need*, 31 ENV'T, Dec. 1989, at 6, 11.

symposium on the twentieth anniversary of NEPA, participants identify the need for efforts to improve upon the current system of federal environmental law.<sup>11</sup> All of these commentators call for the amendment of NEPA or the Constitution to strengthen the public law basis of federal environmental protection efforts.<sup>12</sup>

This article analyzes the evolution of NEPA and the need for reform as we enter the twenty-first century. Part II traces the evolution of the environmental movement and the creation of NEPA from the beginning of the twentieth century until NEPA's final passage by Congress in 1969.<sup>13</sup> In Part III, the focus is on the framers' intent in passing NEPA. Part IV examines the interpretation of NEPA by both the courts and the executive branch. Part V includes an assessment of NEPA in its present state and examination of possible paths to reform the Act, while Part VI provides conclusions about the need for a strong commitment to NEPA in the future.

## II. CREATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA and subsequent national legislation to protect the environment were the products of an incremental process of issue formation and development. Despite assertions to the contrary, environmentalism emerged gradually.<sup>14</sup> Generally, state law preceded federal law, and both were preceded by scientific advancements concerning human/environment relations. In fact, the roots of the environmental movement may be traced back to the

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11. See *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990).

12. James Krier has argued that the Constitution can be interpreted to include a right to environmental quality. See James E. Krier, *The Environment, the Constitution, and the Coupling Fallacy*, 32 LAW QUADRANGLE NOTES, Spring 1988, at 35, 35. For a critique of the proposal to amend the Constitution to include a statement of environmental rights, see J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T, Winter 1997, at 46, 46.

13. For a more detailed account of the origins of NEPA, see Terrence T. Finn, *Conflict and Compromise: Congress Makes a Law—Passage of the National Environmental Policy Act* (1972) (unpublished Ph.D. dissertation, Georgetown University).

14. See Henry Caulfield, *The Conservation and Environmental Movements: An Historical Analysis*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 13, 19 (James P. Lester ed., 1989).

conservation and preservation movements that arose at the turn of the twentieth century.<sup>15</sup>

The conservation movement was based upon the controlled use of resources or multiple-use resource management, while the preservationist movement was concerned primarily with the preservation of natural resources, as the name implies.<sup>16</sup> Underlying conservationist notions was the economic assumption that resources exist for the benefit of society.<sup>17</sup> However, conservationists recognized resource limits and therefore believed that resources should be used wisely, not wastefully. Preservationists, on the other hand, believed that nature has intrinsic worth. Adherents to the preservationist movement focused on those aspects of nature having an ethical or aesthetic value that should not be destroyed by indifferent human action.<sup>18</sup> Many of the moral imperatives of preservationists stemmed from the works of transcendentalists such as Ralph Waldo Emerson and Henry David Thoreau.<sup>19</sup>

Under the administration of President Theodore Roosevelt, the conservation movement dominated, popularizing the ideas of multiple-use and sustained yield.<sup>20</sup> The movement was led by Gifford Pinchot who was chief of the United States Forest Service under Roosevelt.<sup>21</sup> John Muir, the founder of Sierra Club in 1892, led the preservationists in their battles against the conservation movement but was unable to stand up to the politically powerful resource development interests in most cases.<sup>22</sup>

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15. See generally SAMUEL HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959) (tracing the early history of the movement with respect to water, forestry, and public land conservation).

16. See JOSEPH PETULLA, *AMERICAN ENVIRONMENTAL HISTORY: THE EXPLOITATION AND CONSERVATION OF NATURAL RESOURCES* 217-35 (1977).

17. See GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 42-50 (1910); see also HAYS, *supra* note 15, at 2-4.

18. For an explanation of the views of preservationists and conservationists, see PETULLA, *supra* note 16, at 228-30.

19. See RALPH WALDO EMERSON, *NATURE* (1836); HENRY DAVID THOREAU, *MAINE WOODS* (1878); HENRY DAVID THOREAU, *WALDEN* (1880).

20. See HAYS, *supra* note 15, at 271.

21. See *id.* at 271-73; see also PINCHOT, *supra* note 17, at 40.

22. See PETULLA, *supra* note 16, at 232-34.

The conservation movement of the early 1900s and the environmental movement of the 1960s both stressed a common goal—the achievement and maintenance of a sustainable long-term relationship between humankind and the environment.<sup>23</sup> Two critical distinctions however may be drawn between the two movements. First, the environmental movement may be viewed as a grass roots or “bottom-up” movement, while the conservation movement was a “top-down” effort.<sup>24</sup> As such, the environmental movement may be characterized as a popular or mass-based movement, whereas the conservation movement was driven by a small number of high level government officials and their counterparts in schools of agriculture, forestry, and mining, and by some farsighted industrialists.<sup>25</sup>

Secondly, one aspect of the environmental movement that separated it from the conservation movement was its concern with a larger set of issues. Unlike the conservation movement, the concerns of which were essentially the wise and prudent use of natural resources, the emphasis of the environmental movement was on ecological relationships between humans and nature and on the protection and preservation of the environment.<sup>26</sup> Environment, as understood today, had very limited meaning prior to the 1960s. Americans generally viewed the natural world as a storehouse of raw materials intended for human economic purposes.<sup>27</sup>

Between the 1930s and the 1960s, scientific advances began to lay a foundation for political action to protect the environment. In 1956, a lengthy report of an international symposium on *Man's Role in Changing the Face of the Earth*<sup>28</sup> was published, and in 1965, Harvard University Press reprinted a book written a century earlier

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23. See Caulfield, *supra* note 14, at 19.

24. W. Douglas Costain & James P. Lester, *The Evolution of Environmentalism, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE* 15, 26 (James P. Lester ed., 2d ed. 1995).

25. See *id.* at 26-27.

26. Roderick Nash states that while the conservation movement believed in a “gospel of efficiency,” the environmental movement subscribes to a “gospel of ecology.” RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 9 (1989).

27. See *id.*

28. INTERNATIONAL SYMPOSIUM ON MAN'S ROLE IN CHANGING THE FACE OF THE EARTH, *MAN'S ROLE IN CHANGING THE FACE OF THE EARTH* (1956).

by George Perkins Marsh titled *Man and Nature*.<sup>29</sup> Also, in 1965, the Conservation Foundation convened a conference on Future Environments of North America and published the proceedings in 1966.<sup>30</sup> A number of high profile books further contributed to increased public awareness of an endangered environment.<sup>31</sup> Although aesthetic and ethical values tended to dominate the popular literature of environmental protest, science was more frequently invoked, as scientific instrumentation and methods permitted increasingly refined analyses of human-induced environmental degradation.<sup>32</sup>

Congress began to react to scientific and popular concern for the environment in the late 1950s and early 1960s. In 1959, Senator James Murray of Montana introduced a predecessor of NEPA titled the Resources and Conservation Act.<sup>33</sup> This bill included a number of provisions that eventually found their way into NEPA, including a declaration of policy, the creation of an environmental organization in the Executive Office of the President, and an annual report.<sup>34</sup>

Environmental science was integrated into proposals for legislation beginning in 1965 with the introduction of Senator Gaylord Nelson's Ecological Research and Surveys Act.<sup>35</sup> This bill did not come to a vote, but some of its principles were incorporated into title II, sections 201-05 of NEPA. In 1966, both Senator Henry Jackson and Representative John Dingell introduced legislation to establish an environmental advisory council similar to that proposed by Senator Murray in 1959.<sup>36</sup> The Task Force on Environmental Health and Related Problems recommended to the Secretary of Health, Education, and Welfare that a council of

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29. GEORGE PERKINS MARSH, *MAN AND NATURE* (Harvard University Press 1965) (1864); see PETULLA, *supra* note 16, at 220-21.

30. *FUTURE ENVIRONMENTS OF NORTH AMERICA: BEING THE RECORD OF A CONFERENCE CONVENED BY THE CONSERVATION FOUNDATION IN APRIL, 1965, AT AIRLIE HOUSE, WARRENTON, VIRGINIA* (F. Fraser Darling & John P. Milton eds., 1966).

31. See *supra* notes 2-4.

32. See PETULLA, *supra* note 16, at 359.

33. S. 2549, 86th Cong. (1959).

34. See *id.*

35. S. 2282, 89th Cong. (1965).

36. See *supra* note 33 and accompanying text.

ecological advisors be created.<sup>37</sup> The Task Force, chaired by Ron Linton, urged the President to submit a proposal to Congress for an Environmental Protection Act.<sup>38</sup>

By the late 1960s, the environment had become a major legislative issue. Of the 695 bills signed into law during the 91st Congress (1969-70), 121 were listed by the Congressional Research Service as "environment oriented."<sup>39</sup> Meanwhile, several congressional committees issued a number of reports on environmental policy.<sup>40</sup>

In 1969 Senator Jackson reintroduced a bill addressing national environmental protection.<sup>41</sup> The only Senate hearing on this bill occurred on April 16.<sup>42</sup> It was at this point that the concept of an Environmental Impact Statement (EIS) was integrated into the

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37. See TASK FORCE ON ENVIRONMENTAL HEALTH AND RELATED PROBLEMS, A STRATEGY FOR A LIVABLE ENVIRONMENT 6, 48 (1967).

38. See S. 1075, 91st Cong. (1969).

39. ENVIRONMENTAL POL'Y DIV., CONG. RES. SERVICE, LIBRARY OF CONG., 92D CONG., CONGRESS AND THE NATION'S ENVIRONMENT: ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS 245 (Comm. Print 1971) (prepared at the request of Henry M. Jackson, Committee on Interior and Insular Affairs, United States Senate).

40. The Subcommittee on Science, Research, and Development, chaired by Emilio Q. Daddario, issued a report on June 17, 1968 that did not propose specific legislation but summarized previous hearings, comments of staff and advisors, and listed the principle relevant legislative proposals before Congress. See SUBCOMM. ON SCIENCE, RES. & DEV., HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., MANAGING THE ENVIRONMENT (Comm. Print 1968).

On July 11, 1968, a report written by Lynton K. Caldwell was issued to the Senate Committee on Interior and Insular Affairs making the case for a national environmental policy. See SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 90TH CONG., A NATIONAL POLICY FOR THE ENVIRONMENT: A SPECIAL REPORT (Comm. Print 1968).

A Joint House-Senate colloquium was subsequently held on the topic of a "National Policy for the Environment" on July 17, 1968. It was designed to avoid conventional committee jurisdiction limitations and to bring together members of Congress with executive branch heads and leaders of industrial, commercial, academic, and scientific organizations. The colloquium helped to raise congressional awareness of the environmental policy issue and to legitimize it as a congressional concern rather than just an exclusive jurisdictional interest of specific committees. A congressional "white paper" published in October 1968, reported the proceedings of the colloquium and documented the broadening of legislative concern. See SENATE COMM. ON INTERIOR & INSULAR AFFAIRS & HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT (Comm. Print 1968).

41. See S. 1075, 91st Cong. (1969) (introduced Feb. 18 1969).

42. *National Environmental Policy: Hearing before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

bill.<sup>43</sup> The need for an action-forcing provision to obtain compliance from the federal agencies had been recognized by commentators on environmental protection legislation.<sup>44</sup> During the hearing, in response to a question by Senator Jackson, Lynton K. Caldwell testified that a declaration of environmental policy must be operational to be effective—written so that its principles could not be ignored.<sup>45</sup> Caldwell declared that “a statement of policy by the Congress should at least consider measures to require federal agencies, in submitting proposals, to contain within those proposals an evaluation of their effect upon the state of the environment.”<sup>46</sup> William Van Ness and Daniel A. Dreyfus, both of whom were staff members of the Committee on Interior and Insular Affairs, drafted detailed language for the impact statement requirement.<sup>47</sup>

### III. THE INTENTION OF THE FRAMERS

The legislative history of NEPA provides a clear indication of the framers' intent when they drafted the Act. From a macro perspective, the framers intended NEPA to be the most important piece of environmental legislation in the history of the United States. According to the Senate sponsor of the law, Senator Jackson, NEPA “is the most important and far-reaching environmental and conservation measure ever enacted by the Congress.”<sup>48</sup> Dr. Lynton K. Caldwell, a consultant to the Senate Committee on Interior and Insular Affairs and one of the architects of NEPA, asserts that “the purpose of NEPA, as the Act declares, was to adopt a national policy for the environment within the

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43. See S. 1075, 91st Cong. (1969) (reported on July 9, 1969 with amendments concerning the EIS).

44. See *National Environmental Policy: Hearing before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116-17 (1969).

45. See *id.*

46. *Id.* at 116.

47. See RICHARD A. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH* 17 (1976).

48. 115 CONG. REC. S40,416 (Dec. 20, 1969) (statement of Sen. Jackson).

context of the planetary biosphere. The intent of the legislation is general, but hardly vague . . . .”<sup>49</sup>

NEPA provisions were designed to accomplish four goals. First, the Act includes a statement of national environmental policy.<sup>50</sup> According to Senator Jackson:

A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer to it [sic] for guidance in making decisions which find environmental values in conflict with other values.<sup>51</sup>

The Act’s statement of policy is designed to provide federal decisionmakers with a statutory referent when they are confronted with a situation in which they must balance competing economic, environmental, political, and social concerns.

Second, the Act includes an action-forcing provision designed to ensure that the policies and goals of the Act are carried out by the federal government.<sup>52</sup> This action-forcing provision, the Environmental Impact Statement (EIS) was designed to improve decisionmaking by forcing the federal agencies to consider the environmental implications of their activities.<sup>53</sup> Section 102(2)(C) of NEPA applies to “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>54</sup>

According to Caldwell, who is credited with the creation of the EIS concept,<sup>55</sup> section 102(2)(C) is designed to promote better planning and decisionmaking.<sup>56</sup> The authors of NEPA decided to include an action-forcing provision in order to ensure that the

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49. Lynton K. Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, 6 THE ENVTL. FORUM, Nov.-Dec. 1989, at 17, 19.

50. See 42 U.S.C. § 4331 (1994).

51. 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

52. See 42 U.S.C. § 4332 (1994).

53. 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

54. 42 U.S.C. § 4332(2)(C).

55. See Caldwell, *supra* note 49, at 17.

56. See *id.* at 20.

statement of national environmental policy could be implemented and would not be ignored.<sup>57</sup>

Third, the Act establishes a Council on Environmental Quality (CEQ).<sup>58</sup> The CEQ, according to Senator Jackson, was established to provide: (1) a locus at the highest level for the concerns of environmental management; (2) objective advice to the President and a comprehensive, integrated overview of Federal actions as they related to the environment; and (3) a system for monitoring the state of the environment.<sup>59</sup>

The CEQ was purposely placed in the Executive Office of the President (EOP) and not the White House to lessen the President's control over the Council.<sup>60</sup> The design of the CEQ is based on the design of the Council of Economic Advisers (CEA).<sup>61</sup> In order to understand the logic behind the creation of the CEA and the CEQ, the historical context in which the CEA was proposed must be examined. The Brownlow Report to the President, which preceded the creation of the CEA, provides significant insights into important changes in the Executive Branch that were considered and made under President Franklin D. Roosevelt.<sup>62</sup> The drafters of the Brownlow Report envisioned an executive characterized by a distinction between politics and administration.<sup>63</sup> The purpose of

57. See LIROFF, *supra* note 47, at 16.

58. See 42 U.S.C. § 4342 (1994).

59. See 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

60. See Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RESOURCES & ENV'T, Fall 1995, at 3, 4.

61. See *id.* at 71; 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson); see also LIROFF, *supra* note 47, at 52-54. The CEA was established under the Employment Act of 1946, 15 U.S.C. §§ 1021-1025 (1994).

62. The Brownlow Report is named for its author, Louis Brownlow, who headed the President's Committee on Administrative Management. See PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) [hereinafter Brownlow Report].

63. See *id.* The Brownlow Report states:

Our Presidency unites at least three important functions. From one point of view the President is a political leader . . . . From another point of view he is head of the Nation in the ceremonial sense of the term . . . . From still another point of view the President is the Chief Executive and the administrator within the Federal system and service.

*Id.* at 1-2.

creating a White House staff separate from the Executive Office of the President was to institutionalize the politics/administration distinction.

Fourth, the Act requires that the President submit to Congress an annual environmental quality report.<sup>64</sup> This report provides Congress and the people with an assessment of the state of the environment.

#### IV. INTERPRETATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

On January 1, 1970, President Nixon signed NEPA into law.<sup>65</sup> This moment signaled the beginning of a new chapter in the history of NEPA as the focus shifted from formulation to implementation. Two questions arose regarding: (1) the role that the CEQ would play in national environmental protection efforts (and specifically, the President's interactive role with the CEQ); and (2) the interpretation and implementation of NEPA by federal agencies and courts.

##### A. *The Council on Environmental Quality*

Section 202 of NEPA establishes that the CEQ is not a regulatory agency but instead, a multi-member council set up to provide the presidential administration with timely information about human/ environment relations.<sup>66</sup> In addition, the CEQ has

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The recommendations called for by the President's Committee on Administrative Management include expansion of the White House staff and a strengthening of the management arms of the Chief Executive. See *id.* at 46. For a further discussion on politics and administration, see Donald Kettl, *Public Administration: The State of the Field*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 407 (Ada Finifter ed., 1993); Herbert Kaufman, *The End of an Alliance: Public Administration in the Eighties*, in PUBLIC ADMINISTRATION: THE STATE OF THE DISCIPLINE 483 (Naomi Lynn & Aaron Wildavsky eds., 1990); Terry M. Moe, *Politics and Theory of Organization*, 7 J. L. ECON. & ORG. 106 (1991); Francis Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539 (1992). For a discussion on the politics/ administration distinction, see Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

64. See 42 U.S.C. § 4341 (1994).

65. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4345 (1994)). For the complete text of NEPA, see *infra* Appendix.

66. See 42 U.S.C. § 4342.

the task of developing guidelines for formulating EISs.<sup>67</sup> The three members of the Council, including a chairman, are appointed by the President for indefinite terms with the advice and consent of the Senate.<sup>68</sup> The first chairman of the CEQ, Russell Train, helped to shape national environmental policy.<sup>69</sup> Initially, the CEQ played a critical role in the implementation of NEPA through the process of promulgating detailed regulations to guide agency decisions regarding the need to file an EIS and the steps necessary to adequately prepare the document.<sup>70</sup>

Under President Nixon, and initially under President Carter, the CEQ had an important policymaking role. In 1977, President Carter's staff contemplated eliminating the CEQ but was unable to do so because it is statutorily created.<sup>71</sup> Since the election of Reagan, presidential support for the CEQ further declined. In 1981, Reagan unsuccessfully attempted to abolish the CEQ.<sup>72</sup> While he failed to abolish the CEQ, Reagan was able to shrink and marginalize it. The CEQ's resources declined from an annual budget of \$3.1 million under Carter in 1980<sup>73</sup> to a \$700,000 budget

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67. Executive Order No. 11514, required the CEQ to issue guidelines to federal agencies for the preparation of EISs. See Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970). Subsequently, Executive Order No. 11991 was issued amending Executive Order No. 11514. The order gave the CEQ the power to issue regulations to federal agencies for implementation of the procedural provisions of NEPA. See Exec. Order No. 11991, 42 Fed. Reg. 26,967 (1977); see also Council on Environmental Quality Regulations, 40 C.F.R. §§ 1500-1508 (1996) (reprinted in 42 U.S.C. §§ 4321-4345 (1994)).

68. See 42 U.S.C. § 4342.

69. See Bear, *supra* note 60, at 6.

70. See Charles F. Weiss, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements under the CEQs Amended NEPA Regulations § 1502.22: Worst Case Analysis or Risk Threshold?* 86 MICH. L. REV. 777, 794-95 (1988); see also 40 C.F.R. §§ 1500-08. See generally Mark S. Tawater, *Section 9.03*, in LAW OF ENVIRONMENTAL PROTECTION 9-105 (Sheldon M. Novak ed., 1987).

71. See Edward Walsh, *Staff Cut of 145 Said Proposed for White House*, WASH. POST, July 7, 1977, at A1; Edward Walsh, *Backers of Environmental Unit Ask Carter to Keep it Intact*, WASH. POST, July 8, 1977, at A3; Philip Shabecoff, *Environment Council Is Defended*, N.Y. TIMES, July 7, 1977, at B16; Gladwin Hill, *Environment: Fresh Worries*, N.Y. TIMES, July 8, 1977, at A7.

72. See David Hoffman, *Reagan Considers End to 3 Agencies*, WASH. POST, Dec. 11, 1984, at A1.

73. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982 382-83 (1982).

in 1985.<sup>74</sup> Reagan reduced the CEQ's personnel from fifty staff members to eleven.<sup>75</sup> In addition, the annual reports written and published by the CEQ under Reagan's first administration came to be viewed by environmentalists as politically motivated and skewed.<sup>76</sup>

From 1980 onward, presidents have not treated the CEQ as a council, appointing only a chairman.<sup>77</sup> In 1993, President Clinton was the third president to propose the elimination of the CEQ.<sup>78</sup> Because the CEQ was created by an act of Congress, it would have required an act of Congress to abolish it. Following a number of objections, Clinton removed the proposal to eliminate the CEQ.<sup>79</sup> In 1995, the agency had fourteen employees and a budget of \$2 million.<sup>80</sup> It was not until December 30, 1994, over two years after his election, that President Clinton made an appointment to the CEQ.<sup>81</sup>

The ability of the CEQ to play a prominent role in national policymaking has been hampered by the existence of an often hostile political environment within the EOP.<sup>82</sup> As a result, one

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74. See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1987 6d-23 (1987); see also ENVIRONMENTAL POLICY IN THE 1990S 404-05 (Norman J. Vig & Michael E. Kraft eds., 1994).

75. See UNITED STATES OFFICE OF PERSONNEL MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS, MONTHLY RELEASE: EMPLOYMENT AND TRENDS AS OF APRIL 1982 (1982); see also Cass Peterson, *Reagan Cites "Solid Progress" Toward Clean Air, Water*, WASH. POST, July 12, 1984, at A13.

76. See Peterson, *supra* note 75, at A13.

77. See Caldwell, *supra* note 49, at 22.

78. See Ann Devroy, *Clinton Announces Plan to Replace Environmental Council*, WASH. POST, Feb. 9, 1993, at A6; Tom Kenworthy, *Clinton Plan on CEQ Sparks Tiff With Environmentalists*, WASH. POST, Mar. 25, 1993, at A22; John H. Cushman, Jr., *A Clinton Cutback Upsets Environmentalists*, N.Y. TIMES, Sept. 26, 1993, at A1; see also 139 CONG. REC. S4809-03, 4816 (Apr. 22, 1993) (statement of Sen. Roth).

79. See Robert Cahn & Patricia Cahn, *Policing the Policy. (the National Park Service Compliance with the National Environmental Policy Act)*, NAT'L PARKS, Sept. 19, 1995, at 36 (describing how Clinton rescinded his proposal to abolish the CEQ, and instead, created a dozen new positions within the CEQ and gave the CEQ additional funding).

80. See U.S. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES 86 (1995) (reporting fiscal year 1995).

81. See 141 CONG. REC. S18229-02 (Dec. 7, 1995) (statement of Sen. Dole) (nominating Kathleen A. McGinty).

82. See *supra* notes 71-81 and accompanying text.

scholar described the CEQ as “reactive rather than proactive.”<sup>83</sup> However, the shortcomings of the CEQ are not inherent in the organization. In fact, following a study of the CEQ, the General Accounting Office concluded that the CEQ has been “influential in shaping the Nation’s approach to protecting and preserving our environment.”<sup>84</sup>

### B. NEPA, Federal Agencies and the Courts

Once Congress passed NEPA, the onus of implementation fell on the federal agencies. Given the breadth and complexity of federal administrative tasks, it is not surprising that agencies reacted in different ways. Most agencies adopted a wait-and-see attitude toward NEPA that accompanied a perception of the Act as noncommittal at best and contrary to their mission at worst.<sup>85</sup> In an early analysis of NEPA, Liroff summed up administrative response to the Act:

Several general patterns of agency response to NEPA are observable. First, there were those agencies like the AEC [such as the Atomic Energy Commission] prior to Calvert Cliffs and the FPC [such as the Federal Power Commission] who felt that compliance might interfere with their achievement of their traditional missions. Second, there was a lack of procedural response on the part of environmental agencies like EPA [i.e., the Environmental Protection Agency] that regarded NEPA as superfluous because their decisions were already infused with environmental considerations.

Third, there were a few agencies, like the AEC after Calvert Cliffs and the [Army] Corps [of Engineers], in which some concerted efforts to implement NEPA was [sic] made . . . .

Fourth some agencies showed a lack of interest in NEPA because ecological considerations did not seem germane to their principal missions, and there was little reward to be gained by allocating scarce agency resources to environmental concerns.<sup>86</sup>

83. *Nomination of Kathleen A. McGinty: Hearing before the Senate Comm. on Environment and Public Works*, 104th Cong., 1st Sess. (1995).

84. U.S. GENERAL ACCOUNTING OFFICE, *THE COUNCIL ON ENVIRONMENTAL QUALITY: A TOOL IN SHAPING NATIONAL POLICY* i (1981).

85. See LIROFF, *supra* note 47, at 138.

86. *Id.* at 140.

As a result, it became obvious that successful implementation of NEPA would require intervention by the executive, judiciary, or legislature.

Although NEPA includes no explicit provision for judicial review, courts play an important role in the implementation and interpretation of the Act. From a practical point of view, courts have defined the requirements that are placed on the federal agencies by NEPA. One of the first federal appellate decisions to address NEPA was *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*.<sup>87</sup> In this case, the court considered whether rules adopted by the Atomic Energy Commission (AEC) with respect to environmental matters are adequate under NEPA.<sup>88</sup> The court held that the AEC's procedural rules that address environmental matters were not in compliance with NEPA.<sup>89</sup> In the process, the court linked the procedural and substantive aspects of NEPA and made it clear that the Act requires the federal agencies to internalize the values set forth in NEPA.<sup>90</sup> The court stated:

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department . . . . [AEC] is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [AEC] and other agencies to consider environmental issues just as they consider other matters within their mandates.<sup>91</sup>

The court did differentiate between the substantive and procedural components of the NEPA. It held that the substantive aspects of NEPA are flexible,<sup>92</sup> and found that "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."<sup>93</sup> However, the court found the procedural aspects of the Act to be

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87. 449 F.2d 1109 (D.C. Cir. 1971).

88. *See id.* at 1111-12.

89. *See id.* at 1117.

90. *See id.* at 1118.

91. *Id.* at 1112.

92. *See id.*

93. *Id.*

much more rigid. Referring to section 102, which contains the procedural aspects of NEPA, the court stated, "They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."<sup>94</sup>

*Calvert Cliffs* legitimized judicial review of agency compliance with both the procedural and substantive components of NEPA.<sup>95</sup> However, since that case, the Supreme Court has taken a more limited approach to judicial review of agency action, refusing to enforce the substantive provisions of the Act.

One of the first opinions that curtailed implementation of NEPA was *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.<sup>96</sup> The Court held that the Nuclear Regulatory Commission met the statutory requirements set forth in the Administrative Procedure Act (APA)<sup>97</sup> and in NEPA in order to issue permits to Consumers Power Corporation and Vermont Yankee Nuclear Power Corporation to construct nuclear power plants.<sup>98</sup> In *Vermont Yankee*, Justice Rehnquist articulated the Supreme Court's view concerning judicial review under NEPA.

NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.<sup>99</sup>

Although the Court placed emphasis on the judiciary's role in ensuring agency compliance with NEPA's procedural requirements, it

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94. *Id.* at 1115.

95. See Wenner, *The Courts and Environmental Policy*, *supra* note 7, at 242.

96. 435 U.S. 519 (1978).

97. 5 U.S.C. § 706 (1994).

98. See *Vermont Yankee*, 435 U.S. at 557-58.

99. *Id.* at 558 (citations omitted).

left open the opportunity for judicial review to ensure some level of compliance with NEPA's substantive goals.

In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,<sup>100</sup> the Court precluded the possibility of judicial review as a mechanism for implementation of NEPA's substantive goals.<sup>101</sup> In *Strycker's Bay*, the Department of Housing and Urban Development (HUD) was involved in the designation of a proposed site in New York City for low income housing.<sup>102</sup> The Court held that HUD met NEPA's procedural requirements and that the agency therefore had complied fully with NEPA.<sup>103</sup>

*Vermont Yankee* cuts sharply against the Court of Appeals' conclusion [in *Strycker's Bay*] that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."<sup>104</sup>

Following the decision in *Strycker's Bay*, the courts were to interpret NEPA as requiring nothing more than an adequate assessment of the environmental consequences of significant actions by federal agencies.<sup>105</sup> In his dissent, Justice Marshall argued that the majority went too far:

*Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency "considered" environmental consequences. The agency's decision must still be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"<sup>106</sup> and the reviewing court must still insure

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100. 444 U.S. 223 (1980).

101. See *id.* at 228.

102. See *id.* at 223.

103. See *id.* at 228.

104. *Id.* at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

105. See Wenner, *The Courts and Environmental Policy*, *supra* note 7, at 243.

106. *Id.* at 229 (quoting 5 U.S.C. § 706(2)(A)) (citations omitted).

that the agency “has taken a ‘hard look’ at environmental consequences . . . .”<sup>107</sup>

Justice Marshall interpreted the holding of the majority to imply that the courts need not even apply the minimal test set forth in the APA when reviewing agency decisions.<sup>108</sup> As he understood the majority’s holding, the courts would have to limit their focus to whether the agency has merely considered the environmental consequences of its action.<sup>109</sup>

*Robertson v. Methow Valley Citizens Council*<sup>110</sup> and *Marsh v. Oregon Natural Resources Council*<sup>111</sup> are the most recent in a line of Supreme Court cases that have effectively decimated the substantive provisions of NEPA.<sup>112</sup> *Robertson* involved an EIS prepared by the United States Forest Service while *Marsh* involved an EIS prepared by the Army Corps of Engineers. Both agencies were challenged on the basis of the argument that they failed to include a complete mitigation plan and a worst case analysis in their EISs.<sup>113</sup> In *Marsh*, the Court held that “NEPA does not work by mandating that agencies achieve particular substantive environmental results.”<sup>114</sup> Similarly, the Court held in *Robertson* that “NEPA itself does not mandate particular results, but simply prescribes the necessary process.”<sup>115</sup>

107. *Id.* (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n21 (1976)) (citations omitted).

108. *See id.* at 231.

109. *See id.*

110. 490 U.S. 332 (1989).

111. 490 U.S. 360 (1989).

112. Although NEPA does not include an explicit provision for judicial review of agency actions that affect the environment, the judiciary has provided the impetus for NEPA substantive implementation. “Judicial review has given NEPA its significance. The Act itself places obligations on agencies, but without apparent means of oversight . . . . While NEPA supplied the most pervasive means of environmentally responsive decisionmaking throughout government, the absence of institutional enforcement invited administrative inattention.” Nicholas C. Yost, *LAW OF ENVIRONMENTAL PROTECTION* § 9.01 (Sheldon M. Novick ed., 1987).

113. *See Robertson*, 490 U.S. at 345-46; *Marsh*, 490 U.S. at 368.

114. *Marsh*, 490 U.S. at 371.

115. *Robertson*, 490 U.S. at 350. The Court went on to state that “NEPA merely prohibits uninformed—rather than unwise—agency action.” *Id.* at 351. With regard to whether NEPA requires the Corps of Engineers to develop a full mitigation plan, the Court held, “NEPA does not require a fully developed plan detailing what steps will be taken to

In these two unanimous decisions, the Court held for the Forest Service and Corps of Engineers respectively. These decisions display the unwillingness of the Court to enforce the substantive provisions of NEPA, and the tendency of the Court to impose additional limitations on the procedural components of the Act (particularly the EIS) over time.<sup>116</sup> In the process, “the United States Supreme Court has undone much of the promise of NEPA.”<sup>117</sup>

#### V. ASSESSMENT OF THE CURRENT STATE OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND PATHS TO REFORM

Given the unwillingness of the courts, particularly the Supreme Court, to enforce the provisions of NEPA,<sup>118</sup> action by either Congress or the President would be required to implement the Act. Neither has displayed a serious interest in the Act. All three branches, as well as the Federal administrative agencies, are responsible for the failure of the nation to realize the goals set forth in NEPA.<sup>119</sup> The present situation was not brought about by deficiencies inherent in the NEPA or the CEQ. However, an amendment to NEPA might be possible, thereby forcing Congress, the judiciary, the President, and the federal agencies to comply more fully with the spirit of NEPA.

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mitigate adverse environmental impacts and does not require a ‘worst case analysis.’” *Id.* at 359.

116. The number of EISs filed has decreased over time from 1,949 in 1971 to 513 in 1992, and a corresponding decrease in the number of NEPA lawsuits has occurred, from 189 in 1974 to 81 in 1992. See Bear, *supra* note 60, at 71. These trends may be partially attributed to the narrow reading of NEPA adopted by the Supreme Court. Thus, the Court may have created a situation in which NEPA does not even fulfill the modest goal of requiring informed agency decisionmaking because federal agencies do not feel compelled to develop EISs as often as in the past, and challenges to EISs are drafted less frequently than in the past.

117. See Nicholas C. Yost, *NEPA’s Promise—Partially Fulfilled*, 20 ENVTL L. 533, 549 (1990); see also David B. Lawrenz, *Judicial Review Under the National Environmental Policy Act: What Remains After Robertson v. Methow Valley Citizens Council?*, 62 U. COLO. L. REV. 899 (1991); Marion D. Miller, *The National Environmental Policy Act and Judicial Review After Robertson v. Methow Valley Citizens Council and Marsh v. Oregon Natural Resources Council*, 18 ECOLOGY L. Q. 223 (1991) (analyzing the Court’s decisions on NEPA).

118. See discussion *supra* Part IV.B (describing the inaction of the judiciary with regard to NEPA).

119. See discussion *supra* Parts III-IV.

First, NEPA's statement of national environmental policy must be set out in a manner that would clarify the intention of Congress to make environmental protection a *substantive* goal to be incorporated into federal decisionmaking. To accomplish this task, NEPA could be amended to declare that each person has a fundamental and inalienable right to a healthful environment. In 1969, Senator Jackson's Bill 1075 included such language; however, the language was struck in conference.<sup>120</sup> Another alternative would be to amend NEPA to include a provision that "establishes a governmental obligation to administer the laws and policies in ways that avoid unnecessary damage to the environment, its species and ecosystems."<sup>121</sup> If NEPA were amended to include a strengthened substantive statement of environmental protection (either a rights-based statement or a responsibilities-based statement), it would provide a reaffirmation of NEPA's substantive goals to all parties including the courts and federal agencies.

Closely related to this first point is a second point that both judicial review and a citizen suit provision should be incorporated into the language of NEPA. Citizens and the courts have played critical roles in the evolution of NEPA up to this point.<sup>122</sup> Further, citizen suit provisions have been integrated into other environmental laws, such as the Clean Air Act,<sup>123</sup> Clean Water Act,<sup>124</sup> and Resource Conservation and Recovery Act.<sup>125</sup> It would be logical to institutionalize the role of these two important groups of actors, the

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120. See 115 CONG. REC. 39702 (Dec. 17, 1969). For a discussion of the concept of an environmental bill of rights, see Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970). Such language has attracted criticism. See, e.g., Ruhl, *supra* note 12, at 47-49.

121. Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y FORUM 1, 3 (1991).

122. See William Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 208 (1989); Michael Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 478 (1990).

123. 42 U.S.C. § 7604 (1994).

124. 33 U.S.C. § 1365 (1994).

125. 42 U.S.C. § 6972 (1994).

judiciary and private citizens, in the process of implementing NEPA through amendment.<sup>126</sup>

Third, in light of judicial interpretation of NEPA, it is critical to link substance to procedure explicitly. In its present form, section 102(2)(C) of NEPA requires federal agencies to consider the environmental impacts of a variety of alternative projects.<sup>127</sup> Caldwell has suggested that the law as written has contributed to better decisionmaking, but change is necessary to realize the substantive goals set forth in section 101.<sup>128</sup> “The EIS alone cannot compel adherence to the principles of NEPA. The EIS is necessary but insufficient as an action-forcing procedure . . . .”<sup>129</sup> To further NEPA’s substantive goals, the EIS requirement could be supplemented with a mandate that agencies adopt the project from among alternatives that “maximizes environmental protection and enhances environmental values” while maintaining the economic viability of the project.<sup>130</sup>

Fourth, section 102(2)(C) mandates that “every recommendation or report on proposals for legislation” include an EIS.<sup>131</sup> Generally, this mandate has been ignored by Congress.<sup>132</sup> Grad notes that “[t]here is little evidence that NEPA has had any significant effect on the legislative process . . . . Few impact statements have been filed in the context of legislation that may have substantially adverse effects on the environment . . . .”<sup>133</sup>

Subjecting legislation to the procedural requirements that have been enforced by the judiciary up to this point would result in more fully informed, and perhaps better, decisionmaking. If substantive

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126. In a classic work on environmental law, one scholar argues for an expanded role for the judiciary and citizens to protect the environment and supplement other democratic processes. See JOSEPH SAX, *DEFENDING THE ENVIRONMENT* (1971).

127. See 42 U.S.C. § 4332(2)(c) (1994).

128. 42 U.S.C. § 4331 (1994).

129. Caldwell, *supra* note 49, at 22.

130. Thomas France, *NEPA—The Next Twenty Years*, 25 *LAND & WATER REV.* 113, 140 (1990); see Blumm, *supra* note 120, at 477; Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptation's From NEPA's Progeny*, 16 *HARV. ENVTL. L. REV.* 207, 257 (1992).

131. 42 U.S.C. § 4332(2)(C) (1994).

132. See 4 FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 9.02 (1996).

133. *Id.*

and procedural requirements are jointly implemented, notoriously inefficient and environmentally unsound laws, such as those governing grazing and mining on federal lands, would possibly be reformed.<sup>134</sup> In addition, appropriation bills, in which many decisions that lead to the destruction of the environment are successfully hidden, would be subject to review.<sup>135</sup>

Fifth, to the fullest extent possible, legislation should include provisions that force the President to fulfill his responsibility to appoint a *council* on environmental quality and to make that council a high priority. Up to this point, numerous presidents have failed to appoint a council, thus violating the Constitution which states in part that the President "shall take care that the laws be faithfully executed."<sup>136</sup> Though this duty has been repeatedly ignored in the past, it need not be the case in the future.<sup>137</sup> Additionally, a clarification of congressional commitment to the CEQ may increase the likelihood that the President will fulfill the responsibility of chief executive.

## VI. CONCLUSION

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134. See generally UNITED STATES GENERAL ACCOUNTING OFFICE, *GRAZING LEASE ARRANGEMENTS OF BUREAU OF LAND MANAGEMENT PERMITTEES* (1986) (discussing current grazing practices and regulations); see also John D. Leshy, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 20-23 (1987); George Cameron Coggins, *Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 *LAND & WATER L. REV.* 381, 382 (1994) (addressing the issue of mining); John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 *NAT. RESOURCES & ENV'T*, Summer 1995, at 13, 18-20; George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 *NAT. RESOURCES & ENV'T*, Summer 1995, at 3, 3. For an exploration of recent doctrinal changes in these areas, see *NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS* (Lawrence MacDonnell & Sarah Bates eds., 1993).

135. On the issue of appropriation bills and environmental degradation, see Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 *HARV. ENVTL. L. REV.* 457 (1997). Under current CEQ regulations, appropriations do not fall under the definition of legislation. See 40 C.F.R. § 1508.17 (1996). The Supreme Court upheld this definition stating that "appropriation requests constitute neither "proposals for legislation" nor "proposals for . . . major Federal actions . . ." *Andrus v. Sierra Club*, 442 U.S. 347, 364-65 (1979).

136. U.S. CONST. art. II, § 3.

137. See discussion *supra* Part IV.A (recounting presidents' repeated misunderstanding of the statutorily-imposed CEQ).

The amendment of NEPA is not likely to be an easy task. However, a reinvigorated NEPA may establish environmental protection among the nation's priorities when entering the twenty-first century. The need for an explicit referent in statutory or constitutional law is essential to ensure strong and efficacious environmental law within the United States.

Over twenty-five years ago the federal government, led by Congress and the President, recognized the damage that humankind has inflicted on the environment and declared a national commitment to environmental protection.<sup>138</sup> This type of bold step forward occurs infrequently in a political system characterized by incrementalism.<sup>139</sup> However, as we near the end of the twentieth century and the beginning of the twenty-first century, the time may be ripe to reconsider the relationship between humankind and the environment from a more enlightened perspective informed by a more complete (although still incomplete) knowledge of the natural world and our impact upon it.

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138. See discussion *supra* Part III (describing the intent of Congress on the inception of NEPA).

139. For an explanation of incrementalism, see Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959); Charles E. Lindblom, *Still Muddling, Not Yet Through,* 39 PUB. ADMIN. REV. 517 (1979); see also Moe, *supra* note 63, at 111-12. For a widely-recognized analysis of incrementalism in the public sector, see AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (3d ed. 1979).

## VII. APPENDIX

## National Environmental Policy Act

42 U.S.C. §§ 4321-4345

## § 4321. Congressional declaration of purpose

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

## § 4331. Congressional declaration of national environmental policy

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

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

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) Responsibility of each person to contribute to preservation and enhancement of environment

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

- (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the

environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

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

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

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and ir retrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

### § 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current

policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

#### § 4334. Other statutory obligations of agencies

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

#### § 4335. Efforts supplemental to existing authorizations

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

#### § 4341. Reports to Congress; recommendations for legislation

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or

individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

§ 4343. Employment of personnel, experts and consultants

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter, in accordance with section 3109 of Title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

§ 4344. Duties and functions

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

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

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

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

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

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

#### § 4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives

In exercising its powers, functions, and duties under this chapter, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.