

# The National Environmental Policy Act: A Review of Its Experience and Problems

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## INTRODUCTION

The National Environmental Policy Act (“NEPA”), the Magna Carta of environmental law, requires all federal agencies to evaluate the environmental impacts of their actions, a duty that extends to state, local, and private entities when a federal link is present. Though followed by legislation that enacted massive duties to protect air, water, and other natural resources, NEPA remains a critical environmental law. This Article looks at major elements in NEPA’s implementation and the major contributions NEPA has made to environmental analysis. It reviews strengths and weaknesses and suggests where improvement can occur as NEPA moves forward as a protector of environmental values. The Article’s focus is on encouraging agencies to take a wider view of the environmental impacts they consider in a decision making process that is less confining than the process now in place.

Part I begins the analysis by reviewing NEPA’s record as an environmental statute, noting achievements the statute has attained and criticisms it has attracted. Part II reviews the NEPA decision making process, assessing whether it has been effective as a means of carrying out NEPA’s environmental mandate. Part III considers how NEPA applies to agency projects as compared with agency plans and programs, and how NEPA’s effectiveness differs in these two settings. Part IV considers the “heart” of the environmental impact statement, the duty to consider alternatives to a proposed action, and how the courts have interpreted this requirement. Part V examines

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agency duties to extend their environmental analysis beyond the proposal under review by considering its indirect impacts. Part VI concludes by asking, in view of this discussion, whether NEPA has met the environmental challenge the statute was intended to meet.

#### I. CRITIQUING NEPA: WHAT HAS IT ACCOMPLISHED?

NEPA was born in an era that had faith in bureaucratic comprehensive rationality, the idea that predictive analysis of a broad class of administrative decisions would produce rational decision making that would consider environmental impacts.<sup>1</sup> This hope disappeared with the understanding that environmental systems are complex, dynamic, nonlinear, and mutually independent, making environmental prediction a much more difficult task. These complexities make the application of NEPA to actions and programs a much more difficult problem than initially expected. A statute and its regulations that assumed a more predictive and less complicated environment do not work well in an environment that has multiple ecological dimensions where change is not measured easily.

The sections that follow consider issues in NEPA's statutory and regulatory structure that demand attention and revision in light of this newer perspective on environmental management.<sup>2</sup> This is an element in NEPA reform that has not received enough attention<sup>3</sup> but that is critical to making NEPA a more effective statute. Evaluations of NEPA more commonly consider its effectiveness in getting agencies to incorporate environmental values into their decision making. This concern has brought forth a legion of studies.<sup>4</sup> Most conclude that NEPA has had a moderately positive effect. This was the conclusion

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1. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 409–11 (1981); Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 344 (2004); William H. Rodgers, Jr., *NEPA's Insatiable Optimism*, 39 ENVTL. L. REP. 10,618, 10,620 (2009).

2. See Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL. L. REP. 10,640, 10,670 (2009).

3. But see Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002) (recommending a monitoring program for tracking the implementation of environmental impact statements).

4. For citations to the literature and discussion, see DANIEL R. MANDELKER, NEPA LAW & LITIGATION §§ 11:2–11:6 (2d ed. 2009) [hereinafter NEPA LAW].

in an early study of the Corps of Engineers and U.S. Forest Service, which remains the most careful and comprehensive review of NEPA's influence on federal agencies.<sup>5</sup>

Recent studies by the Council on Environmental Quality ("CEQ"), an Executive Office agency created by statute to administer NEPA and authorized by Executive Order to adopt regulations,<sup>6</sup> have adopted a different perspective. CEQ accepted the challenge of NEPA's performance and examined its effectiveness in carrying out the statutory mandate. Its first study was a review of NEPA's effectiveness<sup>7</sup> that considered some of the structural problems in NEPA's application, such as the practice of agencies to avoid the preparation of environmental impact statements by finding that the environmental effects of an action are not significant because they can be mitigated.<sup>8</sup> This is the mitigated Finding of No Significant Impact ("FONSI"), which agencies are claimed to adopt ninety percent of the time. This was not the expectation when NEPA was adopted, and the FONSI is an administrative alternative not included in the statute.

CEQ later appointed a Task Force whose report comprehensively reviewed problems in NEPA's implementation.<sup>9</sup> The Report's recommendations include six focus areas. Two of these, programmatic analysis and categorical exclusions, are considered in this Article.<sup>10</sup> CEQ reviewed the Task Force recommendations, after which the then-Chair of CEQ issued a Memorandum with

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5. SERGE TAYLOR, *MAKING BUREAUCRACIES THINK* (1984) (attributing NEPA's success or failure in modifying agency decision making to the autonomy and influence of environmental analysts in the federal agencies, the internal pressures that determined how the agencies reacted to environmental information, and the presence of interdependent internal and external pressures that encouraged compliance with NEPA).

6. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (1970), *reprinted in* 42 U.S.C.A. § 4321 app. (2009).

7. COUNCIL ON ENVIRONMENTAL QUALITY, *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* (1997), <http://ceq.hss.doe.gov/nepa/nepa25fn.pdf>.

8. *Id.* at 19–20.

9. NEPA TASK FORCE, COUNCIL ON ENVIRONMENTAL QUALITY, *MODERNIZING NEPA IMPLEMENTATION* (2003), <http://ceq.hss.doe.gov/ntf/report/finalreport.pdf> [hereinafter NEPA TASK FORCE REPORT].

10. *See id.* at chs. 3 & 5.

suggestions for implementation.<sup>11</sup> For the two issues this Article discusses, the Memorandum recommends the development of guidance but does not recommend structural changes that would change how these NEPA responsibilities are carried out.<sup>12</sup>

Another criticism of NEPA is that the statute has been used to obstruct decisions by federal agencies by slowing down agency decision-making, with negative effects on the ability of agencies to carry out their statutory duties. These complaints prompted congressional intervention, most notably through statutes that revise and streamline NEPA procedures in legislation that applies only to individual federal programs. Legislation that applies to federally funded transportation projects is an example.<sup>13</sup> This and similar legislation weakens NEPA's environmental mandate by transferring decision-making authority to agencies responsible for their projects and by restricting judicial review of their decisions.

These reviews of NEPA's performance, together with statutory intervention to modify NEPA practice, suggest that an examination of the statute and its regulatory program is in order. Performance and obstruction problems may lie within the environmental review process the statute and its regulations have created. The sections that follow address several structural issues that affect the way in which NEPA's environmental mandate has been carried out.

## II. THE NEPA DECISION-MAKING PROCESS

NEPA is a brief law<sup>14</sup> that does not include a decision-making process. Neither are there clues on how the statute should be administered in its legislative history, which is also brief and unclear.

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11. Memorandum from James L. Connaughton to Heads of Federal Agencies on Implementing Recommendations to Modernize NEPA (May 2, 2005), [http://ceq.hss.gov/ntf/CEQMemo\\_Implementing\\_Recommendations.pdf](http://ceq.hss.gov/ntf/CEQMemo_Implementing_Recommendations.pdf). For a discussion of the memorandum, see 36 *Env't Rep.* (BNA) 1355, 1356 (2005).

12. For the adoption of categorical exclusions, for example, the Memorandum recommended methods to describe a category of actions, to substantiate that they do not environmental impacts, and to involve the public in making these decisions. Connaughton, *supra* note 11, at 4.

13. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified as amended in scattered sections).

14. National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (2006).

A cryptic mandate, at the heart of the statute, requires a “detailed statement” on “major federal actions” that significantly affect the quality of the human environment.<sup>15</sup> There is some indication that this requirement was expected to be self-serving, that agencies would decide on whether they complied, and that courts would not review this decision.<sup>16</sup> This expectation was unfulfilled, and courts now play an active role in NEPA’s implementation.

In the absence of detailed statutory direction, the key to compliance with NEPA lies in detailed regulations, adopted by CEQ, that specify how agencies should carry out NEPA’s statutory requirements. These regulations,<sup>17</sup> almost the same as when they were adopted in 1978, create a three-part decision-making process for NEPA compliance that provides an elaborate framework for NEPA decision making. Experience has shown that this process is overelaborate, redundant, and not responsive to the needs in NEPA decision making.

Under the first available option, agencies can designate actions that do not fall under NEPA at all. This is called a categorical exclusion, defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment.”<sup>18</sup> If an action is not listed as a categorical exclusion, an agency has the option of proceeding immediately to the preparation of an environmental impact statement but is more likely to prepare an environmental assessment.<sup>19</sup> Agencies are to use the preparation of this document to decide whether they need to prepare an environmental impact statement. An agency must prepare an impact

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15. *Id.* § 4332(2)(C). The “detailed statement” requirement was added after testimony by the late Professor Lynton Caldwell in a congressional hearing, who asked for “action-forcing” language in the statute. It is not clear that the meaning of the phrase was understood. See NEPA LAW, *supra* note 4, § 2:2. Professor Caldwell is widely regarded as the author of the environmental impact statement requirement.

16. For a summary, see NEPA LAW, *supra* note 4, §§ 2:2–2:4. The treatise contains full citations to cases and periodicals on the issues considered in this Article. One of the author’s students years ago completed undergraduate work at a university in Washington, D.C. For a class paper, she wrote a history of NEPA based on congressional interviews. The explanation for NEPA’s adoption was a statement that the chair of the relevant committee was “asleep at the switch.”

17. 40 C.F.R. § 1500 (2008).

18. *Id.* § 1508.4.

19. *Id.* § 1508.9.

statement if it finds in its environmental assessment that the environmental impacts of its action are significant. CEQ regulations then specify what an environmental impact statement must contain.<sup>20</sup>

Data are not available on the number of categorical exclusions prepared by agencies, though the number of judicial decisions suggests that agencies push this option to the limit, and a CEQ task force found that agencies were confused about their use.<sup>21</sup> The avoidance problem is even more serious with environmental assessments, as the number of environmental assessments prepared is thought to outnumber environmental impact statements by a ratio of one hundred to one. Moreover, as noted earlier, agencies commonly adopt mitigation measures as part of their environmental assessment as a basis for a finding that significant impacts will not occur, a practice known as a mitigated FONSI. This practice has become the strategy of choice for NEPA compliance. It is not specifically authorized by the regulations but has been approved judicially.<sup>22</sup>

What emerges from this discussion is a decision-making process, not mandated by statute, that is complicated and redundant, that includes a major compliance procedure not specifically authorized by the regulations, and that is subject to abuse. Redundancy occurs because the three compliance alternatives overlap. Each requires a significance determination that is key to the environmental analysis required by the statute. Categorical exclusions are designated because they are not significant actions, and a decision that an action can be categorically excluded must be reversed if its environmental impacts are found to be significant. The environmental assessment, sometimes referred to as a mini-impact statement, also determines whether an action is significant. If the action is not significant, an impact statement is not necessary. An environmental impact statement analyzes the environmental significance of the action it considers, and an agency can be reversed in court if the significance evaluation is not adequate.

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20. *Id.* §§ 1502.10–1502.18.

21. NEPA TASK FORCE REPORT, *supra* note 9, at 57. See NEPA LAW, *supra* note 4, §§ 7:10–7:10.2.

22. NEPA LAW, § 8:57. For discussion of this practice see Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002).

A realignment of this decision-making process to eliminate redundancy and clarify agency responsibilities clearly is needed. Agencies can be required to define specifically the categorical exclusions they are allowed to make, an option many choose, and the question should be whether the action excluded can be significant under any circumstances in which it might arise. Whether a mitigated FONSI should be allowed as a method of NEPA compliance needs consideration. Questions concerning the adequacy of impact statement content also must be addressed, an issue considered for several important elements of the impact statement in the sections that follow.

### III. APPLYING NEPA TO AGENCY PLANS AND PROGRAMS

#### *A. How the Problem Has Been Addressed in Decisions, Regulations, and Statutes*

Many agencies are required to adopt plans that govern actions they take later to meet their statutory obligations. Forest management plans are an example. CEQ regulations define a “Major Federal Action” that is subject to NEPA to include both projects and plans,<sup>23</sup> but there are important differences in how NEPA can be applied effectively to each. A constant complaint is that NEPA’s application to individual projects is limited and reactive and does not consider the wider environment in which a project will be carried out. Consequently, NEPA analysis often is piecemeal and does not consider the larger environment in which agency actions occur. This problem is remedied to some extent by requirements that agencies must consider alternatives to their actions and their indirect and cumulative impacts, and must prepare program impact statements that consider related actions. These requirements are given some attention below, but are only a partial response.

Applying NEPA directly to agency plans, as required by NEPA regulations, is the most effective way to require a broader review of the environmental impacts of agency actions that are covered by plans, but judicial decisions and legislation have limited this

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23. 40 C.F.R. § 1508.18.

opportunity. One important type of plan governs federal funding for state and local government projects and provides the policies under which these projects are implemented. Regional agencies usually prepare these plans with federal assistance. State and regional transportation plans are an important example. Despite these links to federal funding and compliance, the Fifth Circuit in *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*<sup>24</sup> held NEPA did not apply to a long-range systems guide and land use plan the Commission adopted for the Atlanta metropolitan area. The plan made transportation projects eligible for federal funding, the federal agency reviewed and approved the plan, and federal funds were used in its preparation. Nevertheless, the Fifth Circuit held the federal presence was not so pervasive that NEPA applied. There was no federal substantive review of the regional plan, and possible federal funding for projects contained in the plan did not make it federal. Other cases have taken the same position,<sup>25</sup> and Congress now has exempted decisions by the Secretary of Transportation on state and regional transportation plans from NEPA.<sup>26</sup>

The obvious difficulty with court decisions and statutes exempting agency plans from NEPA review is that decisions made in these plans determine how the federal agency will make project funding decisions later, no matter how the court viewed the matter in *Atlanta Coalition*. NEPA still applies to individual projects when they are funded by federal assistance. Environmental review at that time can question siting and other decisions for projects that are included in a plan, but this is not the comprehensive review that would occur if the plan were covered by NEPA at the time it was adopted.

Similar problems arise concerning forest management plans adopted under the Federal Land Policy and Management Act ("FLPMA"), which authorizes their preparation.<sup>27</sup> The Supreme Court substantially limited judicial review of forest management

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24. 599 F.2d 1333 (5th Cir. 1979). See also Oliver A. Houck, *How'd We Get Divorced? The Curious Case of NEPA and Planning*, 39 ENVTL. L. REP. 10,645, 10,647-48 (2009).

25. E.g., *Bradley v. U.S. Dep't of Hous. & Urban Dev.*, 658 F.2d 290 (5th Cir. 1981) (concerning local redevelopment plan funded with federal community development assistance).

26. 23 U.S.C. §§ 134(p), 135(j) (2009) (emphasizing that impact statements are required on individual projects).

27. Federal Land Policy Management Act ("FLPMA") 43 U.S.C. § 1712 (2006).



plans by holding they are not decisions that are ripe for review under FLPMA,<sup>28</sup> though the damage was mitigated by dictum suggesting these plans are nevertheless reviewable under NEPA.<sup>29</sup> Some courts have accepted this dictum.<sup>30</sup> Later, the Court held that courts will not usually enforce an agency plan because it is only a guide and does not generally prescribe specific actions.<sup>31</sup> Though the approval of a plan is a major federal action that requires an impact statement, the Court held there is no further major federal action after a plan is approved that requires a supplemental impact statement under NEPA,<sup>32</sup> though additional NEPA analysis would be required if a plan is amended or revised. Responding to these cases, the Forest Service issued a categorical exclusion that exempts forest plans, plan amendments, and plan revisions from NEPA.<sup>33</sup>

Comprehensive environmental reviews of agency plans and programs under NEPA can be required even if there is no formal agency plan. This kind of review is done in a program impact statement, a term neither defined nor explained in CEQ regulations, though CEQ recognizes the need for this type of statement.<sup>34</sup> The regulations authorize agencies, “[w]hen preparing statements on broad actions,” to evaluate related proposals together, such as proposals occurring “geographically . . . in the same general location.”<sup>35</sup> This is an important option that can overcome myopic concentration on individual projects by allowing the comprehensive review of related projects in the same area. Highway projects concentrated in a metropolitan area are an example.

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28. *See* Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 739 (1998).

29. *Id.*

30. For cases applying the NEPA dictum, see NEPA LAW, *supra* note 4, § 4:28 nn.47–48.

31. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 56 (2004). *See also* Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL’Y F. 105, 110 (2008).

32. CEQ regulations require preparation of a supplemental impact statement if there are new circumstances or information or if there is substantial change. NEPA LAW, *supra* note 4, §§ 10:49–10:52.

33. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 71 Fed. Reg. 75,481 (Dec. 15, 2006).

34. 40 C.F.R. § 1502.4(c).

35. *Id.* § 1502.4(c)(1).

Despite the availability of this option, the Supreme Court substantially limited it in *Kleppe v. Sierra Club*.<sup>36</sup> The Department of the Interior had undertaken a Northern Great Plains resources program to assess the social, economic, and environmental impacts of resource development in five Great Plains states and also conducted two related studies. Plaintiffs claimed these three studies were a regional program that required the preparation of an impact statement. The Court disagreed, holding there had been no proposal for action on a regional scale and that preparing an impact statement would be impossible in the absence of a regional plan.<sup>37</sup> The D.C. Circuit had held an impact statement was required because the regional plan and studies were attempts to control development in the region, but the Supreme Court again disagreed. It held that “the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action.”<sup>38</sup>

Cases since *Kleppe* have interpreted it to hold that program impact statements were not necessary on a group of related activities. In *Environmental Defense Fund, Inc. v. Alexander*, for example, the district court held an impact statement was not required on a feasibility study proposed by the agency in which it planned to evaluate the need for additional navigation works and locks on a waterway.<sup>39</sup> Courts have required a program impact statement, however, when agencies have entered into formal programs.<sup>40</sup>

### *B. Why Plans and Programs are Different from Projects*

The exemption of forest management plans from NEPA through a categorical exclusion is discouraging, but it raises the question whether the application of NEPA to agency plans presents different problems from its application to specific projects. This issue was reviewed comprehensively in an article by Stark Ackerman, who

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36. 427 U.S. 390 (1976).

37. *Id.* at 401–02.

38. *Id.* at 406.

39. 501 F. Supp. 742, 750–51 (N.D. Miss. 1980).

40. *Natural Res. Def. Council, Inc. v. Hodel*, 435 F. Supp. 590, 598–602 (D. Or. 1977), *aff'd on other grounds sub nom.*, *Natural Res. Def. Council, Inc. v. Munro*, 626 F.2d 134 (9th Cir. 1980).

discussed the problems that arise in the application of NEPA to forest management plans and questioned the effectiveness of NEPA compliance when these plans are reviewed under NEPA.<sup>41</sup> He pointed out that forest plan decisions, unlike project decisions, are long-term programmatic decisions addressing dynamic conditions. He added:

While forest plan decisions are made at a particular point in time, changes in the national forest resource base (such as catastrophic changes due to fire, weather, insect infestation, or disease), changes in economic conditions, or changes in public values can alter a key element of the forest plan decision. In addition, the experience in implementing a plan can identify the need to change the assumptions and projections made as part of the original NEPA analysis. Such changes or experience can result in an altered vision of the appropriateness of the forest plan decision, as well as the adequacy of the NEPA analysis that supports it.<sup>42</sup>

This is a key insight, and similar comments can be made about other agency plans, such as transportation plans. Ackerman asks whether NEPA can ever be effective as applied to forest planning and suggests that:

To be effective, the process must be more timely and final. This could be accomplished by streamlining the process to relax or remove some analysis standards, by shifting the emphasis from periodic large-scale forest plans to a more regular and continuous incremental decision making process, and by elevating major programmatic planning decisions to the political arena.<sup>43</sup>

These suggestions are reasonable and reflect the differences that arise when NEPA is applied to agency plans. A more flexible

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41. 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 (1990).

42. *Id.* at 726 (citation omitted).

43. *Id.* at 731 (citations omitted).

application of NEPA's requirements is necessary. Ackerman's critique also calls into question the inflexible, one-time application of NEPA's requirements that is mandated by requiring a choice among a categorical exclusion, an environmental assessment, or an environmental impact statement as the method of NEPA compliance. Which action should be taken to comply with NEPA when agencies prepare and implement agency plans will vary over time.

#### IV. THE DUTY TO CONSIDER ALTERNATIVES

NEPA places important analytic responsibilities on agencies that must be satisfied to comply with NEPA's environmental mandate. One of the most important is the duty to consider alternatives to a proposed agency action in an environmental assessment or environmental impact statement.<sup>44</sup> The alternatives requirement is a major statutory innovation that was not part of agency statutory responsibilities prior to the adoption of NEPA.<sup>45</sup> CEQ regulations refer to the alternatives requirement as the "heart" of the environmental impact statement.<sup>46</sup>

The critical importance of the alternatives requirement was noted in the first landmark case on NEPA, *Calvert Cliffs' Coordinating Commission, Inc. v. U.S. Atomic Energy Commission*.<sup>47</sup> There, the D.C. Circuit held that the alternatives requirement "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact . . . ."<sup>48</sup> An example can illustrate. Assume a state transportation agency, with federal funding, proposes the

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44. 43 U.S.C. § 4332(2)(C)(iii) (2008) ("detailed statement on . . . alternatives to the proposed action"). A comparable requirement applies when an impact statement is not required. *Id.* § 4332(2)(E).

45. However, a year before NEPA, Congress adopted a statute allowing the Secretary of the Department of Transportation to consider alternatives for highway projects that affected parks, historic sites, and recreation and wildlife areas. 49 U.S.C. § 303(c) (2008). An identical provision appears in the Federal Highway Act. 23 U.S.C. § 138 (2008).

46. 40 C.F.R. § 1502.14. *See also* *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972) (finding that the alternatives requirement is a "linchpin" of the entire impact statement).

47. 449 F.2d 1109 (D.C. Cir. 1971).

48. *Id.* at 1114.

construction of a new bypass highway around a city. Alternatives to this proposal include doing nothing, changing the location and width of the highway, or substituting nonhighway alternatives such as mass transit and access management that can improve traffic flow. These alternatives could mean eliminating the bypass project, keeping the project but changing its character, or eliminating the project but substituting another transportation alternative. The agency must discuss each alternative adequately in its environmental impact statement or assessment unless it believes an alternative is not relevant. This is an entirely new requirement. Nothing in land use law, for example, requires an applicant for a rezoning for a bakery to show that alternative locations exist that are preferable, or that the bakery should be built in a different manner.

How extensive a discussion of alternatives must be, and what alternatives to an action or project must be discussed, are major questions, but there is a critical threshold issue that also requires close examination. CEQ regulations provide that impact statements must “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternative including the proposed action.”<sup>49</sup> A similar requirement applies to environmental assessments.<sup>50</sup>

Courts have recognized that the purpose and need requirement is critical because it determines the universe of alternatives an agency must consider. Agencies can frame their purpose and need statements in a way that either broadens or narrows their alternatives analysis. In the bypass example described above, for example, the agency can narrow its discussion of alternatives by stating the purpose and need of the project as “providing an additional highway route around the city.” It can broaden the scope of its alternatives consideration by stating the purpose and need of the project as “improving transportation in the city’s metropolitan area.”<sup>51</sup>

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49. 40 C.F.R. § 1502.13 (2008).

50. *Id.* § 1508.9(b).

51. For a case recognizing the tension between an overly narrow and overly broad statement of purpose and need, see *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

Courts recognize this tension in the purpose and need requirement. As the Tenth Circuit noted in *Colorado Environmental Coalition v. Dombeck*, some courts “have interpreted this [alternatives] requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative (i.e., the applicant’s proposed project).”<sup>52</sup> Yet the court cited other cases holding that agencies “also are precluded from completely ignoring a private applicant’s objectives” and concluded that there is no mutually exclusive conflict in these views.<sup>53</sup> The conflict is there, however. In *Dombeck*, which considered the expansion of a ski resort, objectors wanted the sponsor to adopt a wilderness conservation objective, which the court found unnecessary. A forest plan for the area had previously prescribed additional recreational development for the forest and had designated the area in question for that development. Because of this planning policy, the court accepted a statement of purpose and need that limited expansion alternatives to those “designed to substantially meet the recreation development objectives of the Forest Plan.”<sup>54</sup> Consideration of the wilderness objective was not required. A broader statement of purpose and need could have included the need for new development balanced against the need to consider wilderness objectives.

Courts are also limited in reviewing purpose and need statements because agencies make them, and courts defer to their decisions under the rules governing judicial review of agency decisions. Most

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52. 185 F.3d 1162, 1174 (10th Cir. 1999).

53. *Id.* at 1175.

54. *Id.*

The Forest Service defined the needs of the proposal as:

1. To respond to a proposal which has the potential for offering more effective recreation utilization of public lands without creating additional demands and impacts on off-site lands and communities.
2. To help to achieve Forest Service goals by providing high quality recreation experiences for visitors to the National Forest, specifically within the Vail Ski Area special use permit area.
3. To fulfill the broad management goals of the White River National Forest Land and Resource Management Plan.

*Id.* at n.15.

cases uphold an agency's statement of purpose and need.<sup>55</sup> For this reason, encouraging agencies to look beyond project impacts in defining purpose and need may require new administrative guidance or possible statutory change. Legislation revising the NEPA process for transportation projects, for example, contains guidance on how to define purpose and need. It provides there must be a "clear statement" of objectives, which may include objectives identified in transportation plans.<sup>56</sup> This statute requires the purpose and need statement to go beyond the immediate objectives of a project.

#### V. THE DUTY TO CONSIDER INDIRECT IMPACTS<sup>57</sup>

Agency responsibilities to consider environmental effects that lie beyond a project's scope are also substantially affected by their duty to consider indirect effects. This responsibility is not widely noticed but has an important influence on the scope of analysis required in environmental reviews. Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."<sup>58</sup> CEQ regulations define "effects" to include growth-inducing effects.<sup>59</sup> This is a causation test that, when properly applied, puts the agency in a forecasting role because it must consider the impact of its action on development in the surrounding area.

A leading Ninth Circuit case, *City of Davis v. Coleman*,<sup>60</sup> illustrates this problem. A federally funded highway interchange was

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55. NEPA LAW, *supra* note 4, § 9:23 nn.8, 14.

56. 23 U.S.C. § 139(f)(3)(A) (2005). However, the lead transportation agency has the responsibility to define purpose and need, a statutory directive that may preclude public input and judicial review. For commentary taking this position, see Jenna Musselman, Comment, *SAFETEA-LU's Environmental Streamlining: Missing Opportunities for Meaningful Reform*, 33 *ECOLOGY L.Q.* 825 (2006). For guidance on how transportation planning can shape the statement of purpose and need, see 23 C.F.R. pt. 450, App. A, ¶ 8 (2009).

57. There is a related duty to consider cumulative impacts, which are impacts similar and usually adjacent to or near the proposed action, but it is not clear whether this duty extends to planned actions that have not yet reached a proposal stage. See NEPA LAW, *supra* note 4, §§ 10:42–10:42.4.

58. 40 C.F.R. § 1508.8(b) (2009).

59. Effects are defined to include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id.*

60. 521 F.2d 661 (9th Cir. 1975).

planned in a rural area near Davis, California, to create a demand for new industrial development in the area, partly stimulated by the presence of a University of California campus in the city. Meeting a demand for highway improvement was not a factor. The agency did not prepare an impact statement, and the Ninth Circuit reversed this decision because the agency did not discuss the inevitable new industrial growth and its expected impact:

The growth-inducing effects of the Kidwell Interchange project are its *raison d'être*, and with growth will come growth's problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.<sup>61</sup>

A number of environmental problems were implicated. The local water supply would be affected. It would not last indefinitely, and its depletion would affect groundwater levels. A growth management program adopted by the city would be another casualty. New industrial development near the interchange would disproportionately increase the city's population, aggravate a housing shortage, create urban sprawl, and increase the demand for city services. Yet the city could not tax any of this development, as it was outside city limits. The Ninth Circuit also rejected an argument that the uncertainty of development in the area made the "secondary" effects of the interchange too speculative to consider.<sup>62</sup> Uncertainty about the pace and direction of development merely indicated the need for exploring alternate possibilities. These would be based on external contingencies that would influence the development that would occur.

Forecasting growth and development expected to occur because of investments in highways and other public facilities is normally carried out as part of the comprehensive planning process municipalities typically undertake. *City of Davis* thus requires an evaluation under NEPA of the growth impacts of public development but not the adoption of policies that can manage that growth, which is

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61. *Id.* at 675.

62. *Id.* at 676.



beyond NEPA's scope. Local governments can adopt these policies, and state statutes require planning in California, where the *City of Davis* case arose.<sup>63</sup>

A later Ninth Circuit case, also from California, illustrates the interplay between local plans and the duty to consider indirect impacts under NEPA. *City of Carmel-by-the-Sea v. U.S. Department of Transportation*<sup>64</sup> considered the realignment of a state highway in Carmel. A combined environmental impact statement under NEPA and environmental impact report under the counterpart California statute selected an alternate route in a nearby canyon. Carmel challenged the combined statements and objected, in part, to the analysis of growth-inducing effects. It relied on the CEQ regulation and *City of Davis*, but the Ninth Circuit held the agencies had properly considered the growth-inducing effects of the highway. It concluded “[t]he construction of the Hatton Canyon freeway will not spur on any unintended or, more importantly, unaccounted for, development because local officials have already planned for the future use of the land, under the assumption that the Hatton Canyon Freeway would be completed.”<sup>65</sup> Though some new development might occur, it was planned and accounted for in the Carmel Valley Master Plan. “No further analysis is warranted.”<sup>66</sup>

The implications of this case for NEPA practice are considerable. A requirement to consider the indirect effects of agency projects widens the scope of the NEPA inquiry to include effects that occur beyond the project. This requirement has the same effect geographically as the requirement to consider alternatives in requiring the consideration of alternative project options. Considering the indirect effects of public improvement projects such as highways, however, transforms the NEPA analysis into a planning exercise in which the impacts of the project are considered but planning policies cannot be adopted or implemented. Reliance on local plans can

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63. Planning is mandatory in California. CAL. GOV'T CODE § 65,583 (Deering 2009).

64. 123 F.3d 1142 (9th Cir. 1997).

65. *Id.* at 1162.

66. *Id.* at 1163. The Ninth Circuit also relied on a CEQ regulation authorizing cooperation with state and local agencies. *Id.* at 1162. However, the only reference to local plans in the regulations is a requirement to discuss inconsistencies with local plans. 40 C.F.R. § 1506.2(d) (2009).

remedy this problem, but local plans can be inadequate or even exclusionary and not appropriate as part of a NEPA review.<sup>67</sup>

The *Carmel* case accepted the development policies included in the local plan, but federal agencies may not be as accepting. They may want to evaluate the content and policies of local plans before deferring to them as the basis for a NEPA evaluation. Regional plans may be entitled to greater weight. Whether policies adopted in comprehensive plans should even govern decisions in NEPA analysis is another question. More attention to this problem is necessary in NEPA regulations or perhaps in statutory amendments.

Similar problems arise at the state level, where state statutory counterparts to NEPA apply to local planning and zoning decisions in some states. The difficulty there is that land development projects may require both environmental reviews and review under local land use regulations, and the two regimes may have different purposes and requirements. Unnecessary duplication can occur. A rezoning for a new commercial development, for example, may require review under local land use regulations and review under the state's counterpart to NEPA, which will cover most of the same issues.

The author examined these problems as part of a project by the American Planning Association that proposed new model planning and zoning legislation. The model legislation includes a proposal to integrate review under land use regulations with review under state NEPA counterparts.<sup>68</sup> The proposal recommends three alternatives for dealing with this problem. One alternative that could be useful in the NEPA process would evaluate the environmental effects of the land use, housing, transportation, and community facilities elements of a comprehensive plan when the plan is adopted.<sup>69</sup> If this analysis is

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67. The courts have properly rejected the use of exclusionary zoning to exclude government housing projects. See NEPA LAW, *supra* note 4, § 8:55.

68. See Daniel R. Mandelker, *Melding State Environmental Policy Acts with Land-Use Planning and Regulations*, 49 LAND USE L. & ZONING DIG., Mar. 1997, at 3 (discussing the problem and suggesting statutory changes). Model legislation that incorporates alternatives for dealing with this problem is in Chapter 12 of AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE (Stuart Meck ed., 2002).

69. The other two options are to prepare an environmental impact statement on a comprehensive plan or to include environmental requirements in local comprehensive plans and land development regulations.

done adequately at the local level, and if growth policies in the local plan are acceptable, the plan could support the NEPA evaluation of growth-inducing effects that is required by the indirect effects regulation.<sup>70</sup>

#### CONCLUSION

NEPA's environmental full disclosure requirement was intended as a wake-up call to federal agencies to add environmental values to their decision making. The intent was that decision-making procedures based on a narrow agency mission focus often neglected environmental concerns and would now be widened to take these concerns into account. The problem is that difficulties in the implementation of the statute have limited the achievement of this objective.

One problem is the complex and overlapping set of procedures through which agencies decide whether an environmental impact statement must be prepared. These procedures are redundant. They complicate agency compliance because often it is not clear how agencies should proceed, and agencies use the preparation of categorical exclusions and environmental assessments to avoid the duty to prepare the full impact statement contemplated by NEPA.

The statutory limitation of NEPA to agency "actions" has limited the scope of the statute to individual agency decisions and projects, and prevented its application in a wider context where environmental values can be considered over a broader landscape. This Article reviewed three examples of this narrowing. One is the limited extent to which NEPA applies to agency plans as compared with agency projects. The exclusion of transportation plans, which set major policies for growth and development for states and regions, is especially disturbing. Analysis of plans may require different analytic

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70. *Citizens of Goleta Valley v. Bd. of Supervisors of County of Santa Barbara*, 801 P.2d 1161 (Cal. 1990). The Supreme Court of California held that in evaluating alternatives to a hotel shorefront development, the agency could rely on the comprehensive plan, which had considered the alternative sites available. The court held that an environmental report "is not ordinarily an occasion for the reconsideration or overhaul of fundamental land use policy." *Id.* at 1173.

techniques and a different perspective but is essential to NEPA's effectiveness.

Statements of purpose and need that determine the scope of alternatives analysis are an overlooked but critical part of NEPA compliance. Agencies have this responsibility, but it will narrow the scope of NEPA review if agencies describe purpose and need so that only the preferred project is identified. Whether a new highway is described as a project to remedy traffic congestion or a project to meet regional transportation needs, for example, will determine how wide a NEPA analysis should reach. Reliance on the statement of goals and policies in comprehensive plans can help avoid nearsightedness in the purpose and need statement, especially if the plan has been adopted at the state or regional level.

Agencies must also consider the indirect impacts of their actions. This is a causation requirement, and requires agencies to consider the environmental effects of development that may occur in the future that are caused by their actions. Growth and development triggered by a new highway interchange is an example. Consideration of growth-inducing effects requires agencies doing NEPA analysis to undertake the forecasting task of comprehensive planning because they must forecast a project's growth-inducing effects, but they cannot adopt policies to manage that growth. Linkage with local plans may provide an answer to this problem.

NEPA is a major environmental statute that has contributed its weight to the protection of the environment. Attention to implementation and structural problems that determine NEPA's reach and effectiveness will make its promise of environmental disclosure more effective.