Reviewing NEPA's Past: Promoting NEPA's Future

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Conservation is a state of harmony between men and land. Despite nearly a century of propaganda, conservation still proceeds at a snail's pace; progress still consists largely of letterhead pieties and convention oratory. On the back forty, we still slip two steps backward for each forward stride. (Aldo Leopold, 1949[1])

In every deliberation, we must consider the impact of our decisions on the next seven generations. (Iroquois Confederation, 18th Century)[2]

ABSTRACT: On December 31, 2009, President Obama proclaimed the 40th anniversary of the National Environmental Policy Act of 1969 (NEPA), a landmark "conservation" law. During this 40-year period, NEPA has been hailed as a champion of American "environmental rights" and criticized as an obstacle to economic progress. In the view of some critics, NEPA uselessly exploits private and public time and resources. It is remarkable that NEPA, although battered and worn, has survived virtually intact for four decades.

This paper is not a "how to" dissertation containing new or revised prescriptions for preparing defendable environmental impact statements (EISs), environmental assessments (EAs), and other "action forcing" documents prepared by federal agencies. It is not a recitation of NEPA's main provisions with which most readers are familiar. Instead, it selects ten of a plethora of problems blockading responsible NEPA process implementation: seven historic and persistent and three new or emerging. This selection is by no means an all-inclusive list. Finally, the paper looks to what the future steps might be taken to implement NEPA as its founders intended.

[*The views expressed in this paper are those of the authors and do not reflect the opinions of clients or employers.]

Introduction

The late political science Professor Lynton Caldwell of Indiana University, often called the "father of NEPA," stated in a 1997 publication:

> Few statutes in the United States are intrinsically more important and less understood than the National Environmental Policy Act of 1969.[3] This legislation, the first of its kind to be adopted by any national government and now widely emulated throughout the world, has achieved notable results yet has not fully achieved its basic intent. Its purpose and declared principles have not yet been thoroughly internalized in the assumptions and practices of American government. . . . Voluntary compliance with NEPA may one day become standard operating procedure for government and business.[4]

This landmark legislation, often referred to as the U.S. environmental *Magna Carta*, was long in coming. It is not as though "the environment" was discovered on Monday and NEPA was passed on Tuesday. Terrance Finn, author of a detailed account of the progress of NEPA through the House and Senate, stated

[1] Leopold, Aldo, *A Sand County Almanac*, p. 243, Ballentine Books (paperback), New York, NY, 1949.
[2] Rodes, Barbara, and Rice Odell, *A Dictionary of Environmental Quotations*, Simon and Shuster, New York, 1992. As quoted in Clark and Canter, *supra* note 4 below.
[3] Pub.L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970.
[4] L.K. Caldwell, "Implementing NEPA: A Non-Technical Political Task," Chap. 3, Ray Clark and Larry Canter (Eds.), *Environmental Policy and NEPA Past, Present, and Future*, St. Lucie Press, 1997, p. 25.

that "for over ten years the concepts incorporated in Public Law 91-190 were developed, expressed, explained, forgotten, revised, advocated, opposed, and finally accepted."[5] Earth Day 1970 wasn't too far away. The political bell had tolled for environmental quality and the American people were pulling the rope.

NEPA commenced its long, winding legislative road when Senator James Murray of Montana introduced the Resource and Conservation Act of 1960 with 30 co-sponsors. It was opposed by the Eisenhower administration, federal agencies, and the business lobby. Some of the same opposition persists today.

On the threshold of NEPA, a year and a half before its passage, the Senate Committee on Interior and Insular Affairs and the House of Representatives Committee on Science and Astronautics held a joint colloquium (hearing) in July 1968 on a national policy for the environment. Key environmental players who attended included: Senator Henry M. Jackson of Washington, Laurence Rockefeller, Lynton Caldwell, Stewart Udall (Secretary of the Interior), and Russell Train who later became chair of the Council on Environmental Quality (CEQ) and national head of the Environmental Protection Agency (EPA). Other NEPA pioneers who may have been in attendance include: Senators Gale McGee (N.D.), Gaylord Nelson (WI), and Clair Engle (CA).[6] The hearing report contained many of the national policy goals later incorporated by NEPA.

There was some limited legislation protecting national parks, national forests, and wildlife prior to NEPA as well as some rudimentary air and water quality legislation. However, the only major "modern" environmental protection laws on the books in 1969 were the Land and Water Conservation Fund Act of 1965[7] and the Wilderness Act of 1964.[8] If environmental protection was not a legislative wasteland, it was fallow ground that greatly needed tilling because the American people insisted on it. As the environmental movement gathered steam, NEPA was the big legislative step that led in the cornucopia of 1970s legislation including, among others: Clean Air Act[9]; Clean Water Act[10]; Endangered Species Act[11]; Safe Drinking Water Act[12] and Resource Conservation and Recovery Act.[13]

Although it is rarely mentioned in the vast NEPA literature, there is an "environmental ethics" context to NEPA that dominates the national policy objectives of NEPA Sections 2 and 101.[14] The writings of such environmental ethicists as Ralph Waldo Emerson, Henry David Thoreau, George Perkins Marsh, Aldo Leopold, and Rachel Carson are reflected in the national environmental policy mandates of NEPA. Examples of these environmental ethics principles in NEPA Sections 2 and 101 are:

- promote efforts which will prevent or eliminate damage to the environment
- the continuing policy of the Federal Government. . .to use all practicable means and measures. . . 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.

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[5] Finn, T.T., "Conflict and Compromise: "Congress Makes A Law: The Passage of the National Environmental Policy Act." Doctoral dissertation, Georgetown University Washington, D.C., 1972.
[6] Lamb, R.E., "What Were They Thinking? The Joint House-Senate Colloquium to Discuss A National Environmental Policy," National Association of Environmental Professionals, 35th Annual Conference, Scottsdale, AZ, 2010.
[7] 16 U.S.C. §§ 4601-4 *et seq.*
[8] 16 U.S.C. §§ 1131 *et seq.*
[9] 42 U.S.C. §§ 1877 *et seq.*

[10] 33 U.S.C. §§ 1251 *et seq.*
[11] 16 U.S.C. §§ 1531 *et seq.*
[12] 42 U.S.C. §§ 300f *et seq*.
[13] 42 U.S.C. §§ 6901 *etc. seq*.
[14] NEPA Sec. 2, 42 U.S.C. § 4321 and Sec. 101, 42 U.S.C. § 4331.

- fulfill the responsibility of each generation as trustee of the environment for succeeding generations. (A basic principle of environmental ethics.)
- attain the widest range of beneficial uses of the environment without degradation. . .or other undesirable and unintended consequences.

These and other NEPA principles conform to Leopold's idea of an environmental ethic. In the above referenced *A Sand County Almanac*, he observes: "An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct."

Some Persistent and Historic NEPA Problems

The CEQ NEPA effectiveness study, conducted after 25-years of NEPA practice, concluded that "NEPA is a success" in that it has made agencies take a "hard look" at the environmental effects of their proposed actions.[15] The study found that NEPA implementation has "fallen short of its goals" and that some agencies "act as if the detailed statement is an end in itself. . . .But NEPA is supposed to be about good decision-making – not endless documentation." Interagency consultation comes after a decision has already been made, accomplishing what might be called a *fait accompli*. Study participants were concerned about the time devoted to the NEPA process, the excessive detail of NEPA analysis, and confusion over NEPA's relationship to other environmental laws and regulations.[16]

NEPA implementation and compliance has at least five key elements or segments. Although they might be called "phases," they are continuous and overlapping, with no clear beginning or end. The five elements or phases are: (1) CEQ guidelines and regulations; (2) federal agency NEPA procedures; (3) NEPA litigation; (4) NEPA opposed or "under siege"[17]; and (5) NEPA reform, streamlining, and modernization. All of these elements are closely interrelated with numerous feedback loops.

The following in no particular order of priority are NEPA implementation problems or violations that have existed since 1970 and are examples from a long, long list. There are also suggestions and observations about how such problems may be corrected in the future.

I. NEPA as "Procedural" and Not "Substantive."

NEPA Section 102 states: "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 Act." (Emphasis added.) This directive clearly applies to the national environmental policy set forth in NEPA Sections 2 and 101.

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[15] Council on Environmental Quality, "The National Environmental Policy Act A Study of Its Effectiveness After Twenty-five Years," January 1997.

[16] NAEP paper authors found that the time required to prepare an EIS can range from an average of 44 months (3.6 years) for agencies examined to as long as 77 months (6 years) for some Federal Highway Administration projects. See Piet and Carol deWitt, "Environmental Impact Statement Preparation Times: 2007 and 2008," *Environmental Practice*, Vol. 10, pp. 164-174, Cambridge University Press, 2008. See Section VI below on integrating NEPA with other laws.

[17] Robert Dreher in "NEPA Under Siege The Political Assault on the National Environmental Act, Georgetown Environmental Law & Policy Institute, Georgetown University, 2005 examines numerous recent legislative restrictions, limitations, exemptions, and categorical exclusions for activities associated with such federal actions as barrier construction along the U.S.-Mexico border; oil and gas drilling disturbance under five acres; renewal of grazing permits; U.S. Forest Service forest plans; certain timber harvesting; public participation; and judicial review.

NEPA has rarely been implemented in accordance with the intent of Congress and the vision of its founders. In his book on *The National Environmental Policy Act: An Agenda for the Future*[18], *Professor* Caldwell lists six "lessons" about agency implementation of NEPA. One of them is: "NEPA documents have too much emphasis on documentation rather than on results." In other words, there is so much paperwork that NEPA substantive policy objectives are masked or ignored.

The tone was set for federal courts requiring strict compliance with the NEPA Section 102(2) requirement that agencies comply with procedural mandates "to the fullest extent possible" in the 1971 decision of *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission.*[19] While *Calvert Cliffs* implies that the substantive policy of Section 101 is also subject to strict compliance, *the* federal courts have overwhelmingly favored the doctrine that federal agencies must rigorously follow the rule-based "procedural" requirements of NEPA Section 102(2)(C) [the "detailed statement" preparation procedure] but need not strictly comply with the "flexible" substantive policies of Section 101. In general, they have not clearly linked the NEPA procedural requirements with achieving national environmental policy goals.[20]

Calvert Cliffs emphasized that the AEC must *consider* environmental factors in making decisions and that the "detailed statement" is an *aid* to such decision making. Although the court condemned a "crabbed interpretation of NEPA that makes a mockery of the Act," many critics believe that the hundreds of court cases which rely on this early decision do exactly that. Thus, while federal agencies must meet the "action forcing" requirements of Section 102, they need not make decisions that meet the environmental policy standards of Section 101. [Note: Citations to the numerous cases relying on *Calvert Cliffs* are beyond the scope of this paper.] The 1978 case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* was one of the first to curtail realization of substantive goals under NEPA.. The court stated: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."[21] Like numerous later cases, the court held that a reviewing court must be "most differential" to an agency's expertise.

Giving NEPA Substance

In the future, the CEQ, federal agencies, and the courts must interpret, modify, and strengthen the NEPA process to give the Act the substance Congress intended. If the NEPA process is to offer any hope of articulating and institutionalizing existing and emerging American environmental values, the focus must be broadened from the procedural machinations dictated by Section 102 (2)(C) so as to include Sections 2 and 101 of the Act which express the national policy. In his 1998 book on NEPA's future agenda,[22] Lynton Caldwell reminds us that NEPA states:

> The purposes of this Act 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.[23]

Professor Caldwell identifies five critical aspects of NEPA on his agenda:

1. NEPA is an environmental *policy* act outlining a course for governmental action. It is not a regulatory statute.

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[18] Lynton K. Caldwell, *The National Environmental Policy Act: An Agenda for the Future*, Indiana University Press, Bloomington, IN, 1998.
[19] 449 F.2d 1109 (D.C. Cir.), 1971.
[20] For more information on *Calvert Cliffs* and related cases, see Daniel R. Mandelker, *NEPA Law and Litigation*, Thomas/West, 2010, Sec. 1:3.
[21] 435 U.S. 519 at 557-58.
[22] See *supra* note 18.
[23] NEPA Sec. 2, 42 U.S.C. § 4321

2. The procedural requirements of NEPA are intended to force attention to the *policies* declared in the Statement of Purpose (Section 2) and in Title 1, Section 101 of the Act.
3. NEPA is future-directed, furthering the *values* that have to some degree long been present in American society.
4. NEPA is not self-executing. The purpose of the EIS is to *force* attention (by federal agencies) to NEPA's goals and principles.
5. There is a distinction between the national policy purpose of NEPA and the very large volume of federal, state, and local environmental laws and regulations which have a different focus, scope, and emphasis. (And, it might be added, often cause the NEPA process to become untracked.)

The declarations of purposes and policies of NEPA as set forth by the Congress have been obfuscated in all the noise created by agencies and the courts in their examination and implementation of only Section 102(2) (C) EIS procedures. NEPA has been implemented as though it was the National Environmental *Procedures* Act, compliance with which should be made litigation proof. In wandering through the procedural thicket, agencies and courts have generally ignored the *primary* Congressional directive that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the *policies* set forth in this Act. . . ." (Emphasis added.)[24]

A 2009 NAEP paper challenges the "NEPA is only procedural" doctrine by noting that the idea of "perfect" NEPA compliance is an EA or EIS that "contains all the parts necessary to fill a checklist, or a standardized format."[25] The authors suggest that, in order to make NEPA mandates substantive and not merely procedural, each of the six policy objectives in NEPA Section 101(b) should be compared among each of the proposed action alternatives. Agencies can create the tools for this type of analysis.

According to NEPA, "it is the continuing responsibility of the Federal Government to use *all practicable means*" (emphasis added) to achieve these objectives:

1. Fulfill the responsibilities of each generation as trustee of the environment;
2. Assure for all Americans safe, beautiful, productive, and aesthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation or undesirable consequences;
4. Preserve important historic, cultural, and natural aspects of our national heritage, and maintain and environment which supports diversity;
5. Achieve a balance between population and resources use which will permit high standards of living; and
6. Enhance the quality of renewable resources.[26]

It is beyond the scope of this paper to propose specific methods for achieving these objectives. One obvious method identified above is to analyze and compare each of the objectives with each of the alternatives to any proposed federal action. Another is to analyze each alternative to determine if it meets policy objectives in the same manner that agencies determine if an alternative meets the purpose and need of the project. A third way is integrate the requirements of NEPA Sections 102(2)(C)(ii), iv), and (v)[27] with NEPA policy objectives. Currently, these procedural elements are generally addressed in brief *pro forma* paragraphs in EAs and EISs.

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[24] NEPA Sec. 102 (1), 42 U.S.C. § 4331 (1)
[25] Owen L. Schmidt and David S. Mattern, "NEPA: Is "Perfect" Good Enough?," Proceedings National Association of Environmental Professionals Annual Conference, Scottsdale, AZ, 2009.
[26] With some editing, based on NEPA Sec. 101 (b), 42 U.S.C. § 4331 (b).
[27] These "detailed statement" procedural requirements relate to analyzing unavoidable environmental effects, short-term and long-term uses and productivity, and irreversible and irretrievable commitments of resources.

Meeting the substantive policy requirements of NEPA will require future court decisions favorable to this concept and creation of imaginative agency procedures to meet this objective. Further guidance from the CEQ can also contribute.

II. NEPA Not Used to Make More Environmentally Responsible Decisions.

NEPA, CEQ, and other federal agency regulations provide a logical, defendable, transparent framework for influencing agency decisions that potentially conform with national environmental policy objectives. The CEQ regulations require that an agency's "record of decision" (ROD) on its proposed action identify all alternatives including those considered to be "environmentally preferable."[28] The CEQ guidance defines "environmentally preferable" as "the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. . . .[I]t also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources."[29] Even though agency adoption of the environmentally preferable alternative is not mandatory, it is clear that agency decisions cannot ignore national policy goals which must be interpreted and administered "to the fullest extent possible."[30] However, the 1980 *Strycker's Bay* U.S. Supreme Court decision held that NEPA "simply does not require an agency to choose the alternative that is environmentally preferable."[31] And the *Calvert Cliffs* case discussed above discussed in Section I above found that "Congress did not establish environmental protection as an exclusive goal."

Decisions included in an EIS ROD[32] or those concerning environmental assessments (EAs), findings or no significant impact (FONSIs), and categorical exclusions (CEs) are made by federal agency executives who follow a hierarchical organizational structure.[33] For example, the decision structure of the U.S. Forest Service flows "down" the hierarchy from the Secretary of Agriculture to the Under Secretary for Natural Resources and Environment to the Chief of the Forest Service (and Deputy Chiefs) to the Regional Forester to the Forest Supervisor and, finally, to the District Ranger. However, with the exception of those who have climbed the hierarchical ladder, the on-the-ground knowledge and experience with a particular Forest and peculiar local circumstances goes "up" the hierarchy and, hopefully, to the top eventually. While many federal agency personnel lower in the hierarchy are dedicated apolitical civil servants, political appointees (the higher ups) are not immune to political influences from applicants, special interest groups, other agency heads, members of Congress, and even the President. (Lobbyists and political favor seekers start their efforts to influence agency decisions at the top.)

Sometimes, NEPA-generated scientific findings are revised or suppressed due to political pressures (e.g., the BP Gulf oil spill). Consulting firms are particularly sensitive to client needs that may frustrate environmental protection. Issues like global warming, sustainability, endangered species, transportation, energy policy, and population growth can be influenced as much or more by political ideology as by scientific findings. The Editor-in-Chief of *Scientific American* observes that: "Science findings are not random opinions but the result of a rational, critical process. . . . Certainly politics has not left science unmolested."[34]

In an excellent article in the NAEP Proceedings of 2010, the authors discuss two sides of the decision making conundrum. One side is that "NEPA has had a profound effect on federal decision-making. It has changed projects and programs and in many cases has changed the agency culture itself." The other side is: "But after 40 years of practice, we have seen some agencies and practitioners grow either cynical or weary

[28] 40 C.F.R. § 1505.2(b).
[29] *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, No. 6, 46 Fed. Reg. 18026 (March 23, 1981, as amended).
[30] NEPA Section 102(1), 42 U.S.C. § 4332(1).
[31] See *Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).*
[32] See *supra* note 28.
[33] See David Keys and others, footnoted reference 26 below.
[34] Mariette DiChristina, "Science and Society," *Scientific American,* May 2010. *p. 6.*

of NEPA analysis that costs too much, takes too long and counts for too little. The trend has not been good."[35]

III. Insufficient Enforcement and Monitoring of Mitigation Measures

Mitigation, defined as agency obligations to avoid, minimize, rectify, reduce, or compensate for adverse environmental impacts of an agency action,[36] has often been a black hole of compliance among federal agencies or, to mix metaphors, a patchwork quilt of many colors and materials. Although the CEQ draft guidance[37] sheds some light in the darkness, it is not enforceable except by enlightened federal court decisions which would remove the still lingering effects of the *Robertson v. Methow Valley Citizens Council*[38] decision behind which agencies (and courts) can sometimes hide. There, the U.S. Supreme Court held that "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental impacts or to include in each EIS a fully developed mitigation action plan" even though a "reasonably complete discussion" of mitigation measures is important. (In other words, *pro forma* routine discussion is acceptable but commitment to a mitigation action plan is not.) However, a later lower court case held that a mitigation plan must be well enough defined to assure its success.[39]

The draft CEQ guidance states that "ongoing agency implementation and monitoring is limited and in need of improvement." Monitoring of mitigation measures is not only "limited" but it hardly exists. Some agencies may have some type of "self-policing" procedure to ensure that mitigation measures are implemented. But absent constant public pressure and litigation, promised mitigation is easily ignored. No one really knows how many monitoring and enforcement programs have been adopted and by whom with what results. This is a sort of "donut hole" in the CEQ requirements that each EIS Record of Decision (ROD) state whether mitigation measures have been adopted along with a monitoring and enforcement program.[40]

There is a tendency for agencies to discount, understate, minimize, disregard, isolate, and even dismiss significant adverse environmental impacts by using mitigation as a machete to cut through the impact jungle. This tactic is used frequently to qualify an EA for a "mitigated" Finding of No Significant Impact (FONSI). Another tactic is to overstate or exaggerate the effectiveness of mitigation measures to qualify the proposed project for a "mitigated FONSI." Also, agencies tend to equate compliance with all applicable laws and regulations with a FONSI. In fact, a proposal can still have significant impacts even if such compliance is promised.

The draft CEQ guidance states: "This proposed draft guidance approves the use of the 'mitigated FONSI' when the NEPA process results in *enforceable* mitigation measures. . . ." (Emphasis added.) The operative word here is "enforceable" which suggests some new type of agency mandate subject to review by the courts. What is needed instead from the CEQ is not more encouragement of mitigated FONSIs but detailed guidance on the *limitations* of often contrived and unenforceable mitigation measures that support them.

IV. Mediocre Writing and Encyclopedia Mania

The CEQ regulations, in force for thirty-three years, require that excessive paperwork for EISs be reduced by setting page limits, preparing documents that are "analytic rather than encyclopedic," writing in "plain language," and following a "clear format."[41] The regulations also contain limited guidance on how such

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[35] See David Keys, Ray Clark, Larry Canter, and David Yentzer, "Why NEPA Is Not Inherently Self-Defeating," NAEP Conference Proceedings, Atlanta GA, 2010.
[36] 40 C.F.R. § 1508.20.
[37] CEQ Draft Guidance for NEPA Mitigation and Monitoring, February 18, 2010.
[38] 490 U.S. 332 (1989).
[39] *Sierra Club v. Flowers*, 423 F. Supp. 2d 1273 (D. Fla. 2006).
[40] See 40 C.F.R. § 1505.2 (c).
[41] 40 C.F.R. §§ 1500.4 (a), (b), (d), and (e); and §§ 1502.7 and 1502.8. These same requirements are contained in E.O. 11514 of July 7, 1970, eight years

writing and paperwork reduction can be accomplished. With rare exceptions, these CEQ writing requirements have generally been ignored so that *the common complaint that NEPA documents take too long and cost too much is generally valid.*

The authors of NEPA documents generally write for their peers in various disciplines rather than for the public. Hydrologists write for other hydrologists, archaeologists write for other archaeologists, and so on. This disciplinary balkanization contributes to multiple layers of complexity in long, turgid documents that frustrate public understanding and involvement. An NAEP paper succinctly expresses this problem as follows:

> Instead of simply identifying environmental impacts of a proposed action and alternatives such that that the decisonmaker and the public can understand and appreciate. . . and factor them into decisionmaking, NEPA practitioners and lawyers have turned NEPA compliance into a time- and money-consuming monster. *It is time to reclaim NEPA*. The way to start is to simplify NEPA analysis and documentation.[42] (Emphasis added.)

There have been only a few court cases that have addressed this "plain language" writing problem. One was a recent case that invalidated a Bureau of Land Management (BLM) EIS because it failed to encourage informed decisions supported by public participation. The court stated:

> In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. . . .A reader seeking enlightenment on the (eutrophication in this case) issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together.[43]

Undoubtedly, there are many cases where substandard, opaque, hard to understand NEPA document writing that have invited litigation. There is no magic sword or formula for dealing with the "monster" of poor writing and the consequent loss of public comprehension of NEPA documents. Agencies should take seriously their desire for *good communicators* and offer both incentives and sanctions related to writing. Hiring good writers, training by technical writing experts, better peer review, and professional editing would significantly reduce the time and money wasted on sometimes incomprehensible dissertations.

Federal agencies have generally not conducted effective training programs or made other efforts sufficient to curb this problem. Further, NEPA documents are overwhelmingly prepared by contractors that may not thoroughly understand NEPA or the CEQ and agency regulations and guidance. Contractors paid by applicants for federal assistance of some kind may be biased in favor of the paying non-federal client rather than the federal agency proposing the action. Contractors are driven by economics to balloon more studies, run more models and add graphics, appendices, and even more volumes. Contractor work is often subjected to inadequate agency oversight and review and sometimes has a "built in" conflict of interest.[44]

There is no magic sword or complex formula for slaying the dragon of poor writing and incomprehensibility of NEPA documents. Agencies should take seriously their professed desire for good communicators and offer both incentives and sanctions as appropriate. Hiring of good writers, training by technical writing experts, better peer review, and professional editing would be a start to reducing time and money now spent on literary extravagance.

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before the July 30, 1979 effective date of the CEQ regulations.

[42] Lucinda L. Swartz, "Reclaiming NEPA," Proceedings National Association of Environmental Professionals Annual Conference, Atlanta, GA, 2010.

[43] *National Parks and Conservation Association v. U.S. Bureau of Land Management*, 586 F. 3d 737 (9th Cir. 2009).

[44] See 40 C.F.R. § 1505.5 (c). Also, see Roger Hansen, Theodore Wolff, and Lance McCold, "The Conflict of Interest Problem in EIS Preparation," *Proceedings of 21st Annual Conference of the NAEP,* Orlando, FL, May 19-22, 1997.

V. Inappropriate Use of Categorical Exclusions

In 2010, the CEQ issued a final guidance memorandum on "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act."[45] CEQ defines a "categorical exclusion" (CE or CATEX or CX, here CE) as "a category of actions that does not individually or cumulatively have a significant effect on the human environment. . . for which neither an EA or an EIS is required."[46] A CE is not an exemption from or waiver of NEPA requirements but a level of NEPA review. A major limitation to qualifying a proposed action for a CE is that the determination must identify "*extraordinary circumstances* in which a normally excluded action may have significant environmental effect." (Emphasis added.) It is the responsibility of federal agencies to determine "classes" of actions that meet the CE requirements.[47] Depending on the type of action and the possible presence of extraordinary circumstances, a CE determination may require preparation of an EA or even an EIS. In *Rhodes v. Johnson,* 153 F.3d 785(7th Circ. 1998), an EA was required for a categorical excluded U.S. Forest Service (USFS) CEd controlled burn due to the presence of an endangered bat and a research area.

The CEQ guidance explains "extraordinary circumstances" in this manner: "Extraordinary circumstances are appropriately understood as those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an otherwise categorical-excludable action to be further analyzed in an EA or EIS." Extraordinary circumstances are sometimes overlooked when a proposed action is of the type that is routinely categorically excluded.

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A CE determination for an agency action provides a handy escape hatch from preparing an EA or EIS if used responsibly. This has resulted in an explosion of the use of CEs as the primary route for NEPA compliance in order to reduce delay, costs, and needless paperwork. The CEQ CE guidance of November 23, 2010 notes: "*Today, categorical exclusions are the most frequently employed method of complying with NEPA. . .underlining the need for (CEQ) guidance. . . .*" (Emphasis added.) Agencies are at the point where proposals needing an EA or EIS even a few years ago are now being categorically excluded. However, justifying the increased use of CEs to eliminate unnecessary paperwork is misguided if the CEQ requirements for making EAs and EISs shorter, more readable, and less encyclopedic were followed instead of ignored.[48]

The accelerated use of CEs is due, in part, to such legislation as the American Recovery and Reinvestment Act (Recovery Act) of 2009.[49] It is also due to attempted but often misguided "streamlining" of the NEPA process and the short spending timetables which many agencies face. For example, over 166,000 Recovery Act projects subject to NEPA were processed in 2009. In response to this project flood, federal agencies started or completed approximately 820 EISs, 6,400 EAs, and 180,000 CEs.[50]

Federal agencies often use their own standard "checklist" document to determine the level of NEPA review: EIS, EA, or CE. Checklists can be transformed into an EA as specified in 40 C.F.R. 1509.9 which is permissible if the document is a "brief" document identified as an EA. An *Environmental Practice* paper discusses CEs as a major "streamlining" element as they limit the types of agency actions requiring EAs or EISs.[51]

Inappropriate use of CEs may shield actions that have significant potential environmental impacts from full NEPA review. A case in point is USFS and Department of the Interior regulations that categorically

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[45] Council on Environmental Quality, 75 Fed. Reg. 75628, December 6, 2010.
[46] 40 C.F.R. § 1508.4.
[47] 40 C.F.R. § 1507.3.
[48] 40 C.F.R. §§ 1500.4, 1502.7, and 1502.8.
[49] See Ronald E. Bass commentary, Annual NEPA Report 2009, NAEP NEPA Working Group, April 27, 2010.
[50] U.S. Department of Energy, "Lessons Learned," Fourth Quarter Report, 2010.
[51] R.P. Hansen, T.A. Wolff, and A.G. Melcher, "NEPA and Environmental Streamlining: Benefits and Risks," *Environmental Practice*, National Association of Environmental Professionals, June 2007, pp. 83-95.

exclude certain timber harvesting activities of up to 1,000 acres to reduce wildfire risks. The USFS also determined that a CE was adequate for a Forest plan for an entire national forest of often hundreds of thousands of acres.[52] Perhaps the most notorious example of inappropriate use of a CE led to the approval of the Deepwater Horizon oil exploration drilling plan that precipitated the 2010 oil pollution disaster (BP oil spill) in the Gulf of Mexico. The CE for this well was established 20 years ago.[53] A Government Accountability Office (GAO) report found that from 2006 to 2008, the BLM used CEs established under the Energy Policy Act[54] to approve approximately 6,000 oil and gas drilling permit applications or about 25% of those for which applications were filed.[55]

Examples of the number of agency action categories used to qualify actions for CEs are: FHWA, 34; Federal Aviation Administration (FAA), 11; U.S. Fish and Wildlife Service (USFWS), 26; and DOE, 102. These seemingly few categories result in CEs for hundreds of individual actions.

The CEQ guidance on CEs can be used to advantage to chart a future course for the appropriate use of CEs for any proposed federal action. This would include such things as:

- Confirm that the CE actually "fits" a description of the proposed action.
- Avoid using CEs that frustrate or obliterate NEPA's environmental stewardship goals.
- Clearly present proposed CEs on certain actions for public review and comment in order to increasing the transparency of CE decisions...
- Avoid using CEs that depend on mitigation measures in the same manner as a mitigated FONSI.
- Determine whether an accumulation of individually minor actions subject to a CE have significant cumulative impacts.[56]
- Use the experience of agency staff and outside experts in particular disciplines to determine if a CE is really applicable.
- Follow CEQ procedures for establishing or revising CEs according to Section IV of the CE guidance including CE documentation and public involvement.
- Establish CEs using the best available information (e.g., extraordinary circumstances) and analysis which passes the test of scientific integrity.

VI. Failure to Integrate NEPA With Other Environmental Laws

NEPA does not exist in a vacuum surrounded by impenetrable walls although sometimes federal agencies hermitically seal their own functions and NEPA procedures in isolation from the public and other agencies. Environmental investigations and compliance requirements exist under numerous environmental laws and regulations and are integral to the NEPA process. It is this abundance of "other laws" that makes informed NEPA compliance so complex and difficult to understand. *The NEPA Book* says:

> In practice*, integration is one of the most complex and difficult aspects of NEPA implementation.* Often, the proposed action that triggers NEPA review will also require compliance with a variety of federal and state environmental laws that sometimes conflict with one another have separate documentation and public noticing requirements, or more stringently require the protection of a particular resource. (Emphasis added.)[57]

The primary CEQ requirements are:

[52] 71 Fed. Reg. 75481 December 15, 2006.
[53] 75 Fed. Reg. 29997, May 28, 2010.
[54] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; 42 U.S.C. §§ 13317 *et seq.*
[55] David O. Williams, *Colorado Independent*, September 16, 2009.
[56] 40 C.F.R. § 1508.7
[57] R.E. Bass, A.I. Herson, and K.M. Bogdan, *The NEPA Book*, Ch. 6, Solano Press, 2d Ed., 2001.

- 40 C.F.R. §1500.2 (c) requiring agencies to integrate the requirements of NEPA and other planning and environmental review procedures. . .so that all procedures run concurrently rather than consecutively;
- 40 C.F.R. §1502.25 (a) requiring that draft EISs (DEISs) be prepared concurrently and integrated with surveys and studies required by the Fish and Wildlife Coordination Act (FWCA),[58] the National Historic Preservation Act (NHPA),[59] the Endangered Species Act (ESA),[60] and ***other*** *environmental review laws and executive orders* (emphasis added); and
- 40 C.F.R. § 1502.25 (b) requiring EISs to list all federal permits, licenses, and other entitlements which must be obtained to implement the proposal.

The CEQ did not intend by Section 1502.25 that the laws named were more important than other laws requiring environmental review but most agencies [e.g., USFS, BLM. National Park Service (NPS), DOE] routinely integrate surveys and studies required by the FWCA, NHPA, Clean Water Act (CWA), and ESA into the NEPA process where they apply. The requirements of Executive Orders (E.O.) 11988 (floodplain management),[61] 11990 (wetlands protection)[62], and 12898 (environmental justice)[63] are usually included in an agency's EIS process.

The CEQ requires and EIS to "list" all federal permits, licenses, and other entitlements. "Entitlements" includes notifications, consultations, agreements like memoranda of understanding (MOUs), reviews, and other approvals. In actual practice, problems occur when the listing is limited to "federal" approvals because there are numerous state and local approvals that also apply to a federal action. A mere listing of approvals needed is inadequate without including legal citations and applicability to the proposal. The applicable requirements can require a breadth of legal research skills that are usually not available to the agency. For example, a Colorado FHWA highway proposal required 23 state and federal permits, notifications, and approvals that had to be researched.[64]

The NEPA Book referenced above includes in Chapter 6 a suggested 10-step integration process which is hereby incorporated by reference. A discussion and critique of each step is beyond the scope of this paper. Incorporating at least some of these steps in integrating other laws and regulations in the NEPA process would go a long way to solving the integration problem.

VII. Federal Agency Resistance to the NEPA Process

Discussion of this problem is not intended as a sweeping condemnation of all agencies or agency personnel for failing to comply with NEPA... However, federal agency failure to abide by NEPA mandates and the "letter and spirit" of the Act does result from numerous factors including but not limited to: inadequate scientific, technical, and legal training of the whole hierarchy of agency personnel; unfamiliarity with NEPA document project management tools; decisions that prevail down the organizational ladder while ignoring the vast experience and expertise of personnel who have little or no hierarchal access; career-long commitment to the agency "mission" which is often incompatible with NEPA objectives and responsibilities; ignoring the mandate of NEPA Section 102 (1) discussed in section II above that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set for in this Act. . . .; and, perhaps most important, an anti-environmental ideological political posture among some agency personnel.

Among some agencies or agency personnel there is a lack of political will to properly implement NEPA. This is one of the "lessons" discussed by Professor Caldwell in his *An Agenda for the Future* book

[58] 16 U.S.C. 661 *et seq.*
[59] 16 U.S.C. 470 *et seq.*
[60] 16 U.S.C. 1531 *et seq.*
[61] 42 *Fed. Reg.* 266951, May 24, 1977.
[62] 42 *Fed. Reg.* 26951, May 24, 1977.
[63] 59 *Fed. Reg.* 7629, February 16, 1994.
[64] Northwest Corridor EIS Regulatory Permits Memorandum, July 2008. (Northwest Denver, CO.)

referenced in footnote18 above. Caldwell contends that "NEPA is still not taken seriously at the highest level of government." Long prevailing arguments that NEPA is a costly and time consuming process that thwarts agency decision making that would be environmentally responsible *without* NEPA has become entrenched over time. This is both a political and administrative problem.

An associated problem is that Congress did not delegate authority to the CEQ, the U.S. Environmental Protection Agency (EPA), or any other agency to enforce either the substantive or the procedural mandates of NEPA. Neither did it create a statutory "citizen suit" or other judicial review provision. NEPA is not self-implementing. Thus, by default, the federal courts have been the principle vehicles for interpreting and enforcing the Act. Court challenges to federal decisions on proposed projects are generally brought under the Administrative Procedure Act (APA).[65] on such grounds as an agency action being "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[66]

Since the problem of agency resistance to NEPA is both political and philosophical, it has no foreseeable solution although it can be mitigated by some NEPA training, streamlining, and modernization efforts.[67]

Recent Problem Trends

The following list is only a small sampling of problems receiving attention in the past 10 to 15 years although a few of them (e.g., climate change) have arisen or become exacerbated more recently. Space is not available for an appropriate discussion of such problem trends as environmental justice, ecological management, and adaptive management. Analyzing the impacts of a project on things like wildlife habitat, endangered species, air quality, socioeconomics, and cultural resources has become routine. However, there are some recent or newly installed parameters that are causing confusion, uncertainty, and controversy. Only three examples are discussed below.

- ***"Streamlining" At Cost of NEPA Fulfillment.*** This 2007 quote is appropriate for this problem topic:

  > Thirty-seven years after (NEPA) was passed, it should come as no surprise that the United States Congress, the President, federal agencies, and private industry have unleashed a major effort to streamline, update, or "reform" the NEPA process. Many of the major stakeholders, including some environmental interests, believe that NEPA has failed to reach its objectives. Recent Congressional actions or proposals to expand exemptions from NEPA for certain projects, compress environmental review time, and even delegate NEPA compliance to the states are seen by NEPA supporters as overreactions that could eviscerate the Act's purposes and objectives.[68]

  There is no question that the NEPA process needs to be updated, modernized,[69] and "streamlined" to meet needs not anticipated 41 years ago. Better inter-agency coordination, concurrent environmental reviews, more effective public involvement, time and page limits, CE control, and other streamlining measures would be beneficial.[70] However, legislation exempting a wide range of energy projects from NEPA compliance, arbitrarily limiting alternatives, restricting public

[65] 5 U.S.C. §§ 500 *et seq.*
[66] See *Hanly v. Kleindienst*, 471 F.2d 823, among the numerous cases on judicial review of challenges to agency actions subject to NEPA.
[67] See "Modernizing NEPA Implementation," The NEPA Task Force Report to the Council on Environmental Quality, September 2003. See also numerous federal agency initiatives.
[68] R.P. Hansen, T.A. Wolff, and A.G. Melcher, "NEPA and Environmental Streamlining: Benefits and Risks," *Environmental Practice* (NAEP Journal), 9-83-95, Cambridge University Press (June 2007).
[69] See The NEPA Task Force Report to the Council on Environmental Quality, "Modernizing NEPA Implementation," September 2003.
[70] Common streamlining elements proposed also include cost ceilings, litigation limitations, more CEs, and limiting the number of alternatives considered.

involvement and judicial review, categorically excluding U.S. Forest Service plans from EISs prepared since 1976[71], and codifying many provisions already in the CEQ regulations only limit the effectiveness of the NEPA process.[72]

Climate Change. Despite a multitude of naysayers and political grandstanders, worldwide global warming and climate change is here and growing. International scientific bodies[73] conclude overwhelmingly that a considerable portion of global warming is caused by emissions of greenhouse gases (GHG) associated with human activity.[74] As of 2004, human activities have produced over 49 *billion* tons of GHG. A few effects of climate change are: flood risks, storm surges, ecosystem alteration, decreased snowpack, habitat threats to sensitive species, rising sea levels, and more violent weather events. From now on, GHG emissions and their impacts on climate change will need to be addressed in NEPA documents. (See 2010 CEQ Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions at web site).

Unlike many toxic chemicals and radionuclides, no quantitative thresholds have yet been established for effects of GHG on human health and the environment. At the same time, no threshold has been calculated that would enable federal agencies to conclude with any degree of certainty that a proposed project's emissions of GHG would have "no significant impact" on regional or global climate change.[75] Can a FONSI for an energy-consuming project ever be legitimately issued when the impacts of GHG emissions are unknown?[76]

A 2007 U.S. Supreme Court opinion served as the springboard for the EPA's current regulatory program governing GHG emissions. In *Massachusetts v. EPA,*[77] the U.S. Supreme Court upheld arguments of Massachusetts and 12 other states that EPA has authority to regulate GAG emissions from new motor vehicles because Section 202(a)(1)[78] of the Clean Air Act directs EPA to "regulate any pollutant" from new motor vehicles that may endanger the public welfare. The EPA requires sources emitting 25,000 metric tons or more of GHG per year to file reports.[79] However, GHG emissions are subject to EPA reporting requirements for stationary sources that emit the same annual amount or greater.[80]

The CEQ draft guidance (see above web site) proposes that federal agencies "consider opportunities to reduce GHG emissions caused by proposed Federal actions and adapt their actions to climate change impacts throughout the NEPA process." This means considering both the quantitative and qualitative impacts of sources that directly or indirectly emit 25,000 metric tons or

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[71] See 2003 FAA Reauthorization Act, 2003 Healthy Forest Restoration Act, 2005 Energy Policy Act, and the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFTEA-LU) as examples discussion of which is beyond the scope of this paper.

[72] For excellent overview of the "assault" on NEPA, see R.G. Dreher, "NEPA Under Siege The Political Assault on the National Environmental Policy Act," Georgetown Environmental Law & Policy Institute, Georgetown University Law Center, 1-28, Washington.D.C. (2005).

[73] Examples of scientific research sources are the United Nations Intergovernmental Panel on Climate Change (IPCC) and the multi-agency U.S. Global Change Research Program (USGCRP).

[74] GHGs attributable to human activities consist of: carbon dioxide; methane; nitrous oxide, hydrofluorcarbons; perfluorocarbons; and sulfur hexaflouoride.

[75] See N.A. Dupont, "NEPA and Climate Change: Are We at the 'Tipping Point'," 23 *Natural Resources & Environment* 4, American Bar Association, Spring 2009. Also see *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F3d 1172 (9th Cir. 2008).

[76] CEQ regulations in 40 C.F.R. 1502.22 were amended in 1986 to include instructions on how to handle incomplete or unavailable information.

[77] 127 S.Ct. 1438, 749 U.S. 497.

[78] 42 U.S.C. § 7521 (a)(1).

[79] See 40 C.F.R. Part 98, 74 *Fed. Reg.* 66496, October 30, 2009.

[80] EPA Mandatory Reporting of Greenhouse Gases Final Rule, 74 *Fed. Reg.* 56260, October 30, 2009.

more of GHG (see EPA's reporting requirement above). This amount is *not* to serve as an indicator of threshold significant effects.

Federal agencies and NEPA practitioners will be challenged as never before with how to respond to the new and emerging climate change issue.

- **Sustainability.** Like climate change, the concept and even the definition of "sustainability" is constantly stirring in the cauldron of a wide range of sciences, economics, philosophy, politics, and even religion. The most widely quoted definition of "sustainable development" is that of the United Nations Brundtland Commission transmitted to the UN General Assembly on March 20, 1987: *"sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*." See also Paul Hawken's *Blessed Unrest: How the Largest Movement in the World Came into Being and Why No One Saw It Coming*, Viking Press, New York (2007). Hawken writes: "Sustainability is about stabilizing the currently disruptive relationship between earth's two most complex systems – human culture and the living world." [Note: Much of this material can be found in the Wikipedia 28-page web site article at http://en.wikipedia.org/wiki/Sustainability.]

  In the vast literature on sustainability, one of the leading references is *Limits to Growth*[81] which argued in 1972 that growth trends at that time meant that human society will exceed the Earth's carrying capacity in 100 years or by 2072. This Club of Rome report, updated in 2002, concluded that human use of natural resources and pollution generation have already surpassed rates physically and ecologically sustainable. Symptoms of what the authors call "overshoot" include those that are faced every day by federal agencies responsible for NEPA compliance: falling supplies of groundwater, forests, fish, and soils; rising accumulations of waste; capital, energy, and labor trying to recover more distant and deeper resources; conflicts over resources and pollution rights, e.g., oil and gas exploration and global warming; and other sustainability issues.

  Paul Ehrlich, author of The *Population Bomb* [82]is famous for developing a theory encompassing the elements that determine sustainability: population; affluence (consumption); and technology. He is one of those responsible for a formula expressed as the PAT equation or I = P x A x T where I = Environmental Impact, P = Population, A = Affluence (consumption levels), and T = Technology.

  In analyzing the effects of a proposed project on sustainability, federal agencies will need to consider impacts on the earth's natural capital, e.g., minerals, oil and gas, wood, fisheries, agricultural production, and irrigation water supply. In other words, they must conduct the life cycle analysis of a project's "ecological footprint." There are many indicators to measure or estimate sustainability such as metrics, benchmarks, indices, reporting procedures, and audits. This will demand that the staffs of agencies and their consultants develop personnel rosters that include [expertise in the social sciences, environmental design arts, ecological sciences, atmospheric sciences, environmental policy and management, ecological economics, environmental ethics, and even philosophy. Many of these same people will also have to deal with the impacts of global warming and climate change. There is as yet no real "sustainability science" but it is starting to evolve. It is likely that the CEQ will formulate guidance on considering sustainability effects in NEPA documents.

Other Persistent NEPA Implementation Problems

Regardless of their level of priority, space is not available to discuss the following problems in detail:

[81] Donella H. Meadows, Dennis L. Meadows, Jorgen Randers, and William W. Behrens III, Universe Books, NY (1972); *Limits to Growth The 30-Year Update*, Chelsea Green Publishing Co., White River Junction, VT.
[82] Paul R. Ehrlich, *The Population Bomb*, Ballantine Books, 1968.

- **Public Involvement**: This is often spasmodic and without continuity, often colored by agency and applicant bias, disjointed, poorly planned, or too late.
- **Level of NEPA Documentation**: Agencies expend exorbitant amounts of time and resources determining the level of documentation needed: CE, EA, EIS, or nothing.
- **Impact Analysis**: Those responsible are often ill-informed, lacking in sufficient experience, and unfamiliar with the methodological and analytical tools available.
- **Premature Commitments of Resources**: Agencies and parties seeking federal approvals often spend significant resources on a proposed project before the NEPA process even begins.
- **Insufficient Knowledge of NEPA and the NEPA Process**: The ranks of NEPA practitioners in agencies and consulting firms are often thin and lacking in sufficient training.
- **Ecological Approach**. Resource management alternatives identified in NEPA documents are rarely informed by a scientific ecological approach**.**

What Will the Future Hold?

Some changes in NEPA and its associated processes are predictable and others have not yet been considered. In 1997, a proposal was made to amend NEPA (revise the Act) in several respects: (1) clarify the intent of Congress to make the purpose and national environmental policy expressed in NEPA Sections 2 and 101 a *substantive* goal for federal agencies to achieve; (2) provide for judicial review and citizen suits, similar to that contained in other environmental legislation; (3) link policy *substance* to NEPA *procedures*; (4) require preparation of NEPA documents on proposals for legislation with potential environmental consequences as mandated by NEPA Section 101(2)(C); and (5) reaffirm the responsibility of the President to appoint a three-member CEQ as required by NEPA Section 202.[83] (Reasons for not amending NEPA are discussed below.)

This proposal adds detail to the NEPA revitalization "lessons" expressed by Professor Caldwell in looking at an "agenda" for the future of NEPA[84]. Restated, these are: (1) look at the complex relationships between environmental resources (meaning ecological or ecosystem management) in NEPA documents; (2) place more emphasis on results that will avoid environmental damage than on the content of NEPA documentation" (3) do not overemphasize science at the expense of ethical and esthetic considerations as well as NEPA policy goals; (4) increase agency "internalization" of NEPA policies and procedures by curtailing over-reliance on contractors and consultants who diminish this need; (5) correct the lack of "political will" to properly implement NEPA by assuring that the Act is taken seriously at the highest levels of government; and (6) give the same attention to NEPA's underlying purposes as is given its procedural requirements.

On July 9, 2002, the CEQ announced the formation of a "NEPA Task Force" to "seek ways to improve and modernize NEPA analysis and documentation and to foster improved coordination among all levels of government and the public."[85] The NEPA Task Force Report on *Modernizing NEPA Implementation* was issued in September 2003. Since then, and looking to the future, the CEQ has issued several guidance documents and handbooks including:

- *A Citizen's Guide to the National Environmental Policy Act – Having Your Voice Heard*
- *Guide for Aligning NEPA and Environmental Management Systems*
- *Implementing the Recommendations* (of the CEQ NEPA Task Force)
- *Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act*
- *Draft Guidance for Mitigation and Monitoring*
- *Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions.*

[83] Paul S. Weiland, "Amending the National Environmental Policy Act: Federal Environmental Protection in the 21st Century," *Journal of Land Use & Environmental Law*, Vol. 12:2 (Spring 1997).
[84] See Caldwell, *supra* note 18.
[85] 67 *Fed. Reg.* 59449, July 23, 2002.

Each of these documents, and others, are available in the CEQ NEPA Net web site at http://ceq.hss.doe.gov/nepa/nepanet.htm.

It is noteworthy that the Task Force Report did not recommend *any* amendments to NEPA or revisions of the CEQ regulations.

A number of "streamlining" elements are contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[86] These elements, and others, involving NEPA include: expanding the role of federal, state, local, and tribal agencies by making them "participating" agencies; mandating that NEPA reviews may done in a "timely, coordinated, and environmentally responsible manner"; setting a schedule for completion of the environmental review process; setting a "statute of limitations" barring judicial review of federal approval if not filed within 180 days of the Record of Decision; establishing a "pilot program" to allow states to assume Department of Transportation (DOT) NEPA responsibilities. Discussing the DOT regulations and guidance to implement the NEPA-related provisions of SAFETEA-LU is beyond the scope of this paper. The statute of limitations provision is particularly troubling.

Proposals are often made to amend NEPA and revise or codify (include in statutes) the CEQ regulations. In 2005, the U.S. House of Representatives Committee on Resources formed a "Task Force for Improving the National Environmental Policy Act." The House Task Force recommended 13 amendments to NEPA and five new CEQ regulations. Some of these recommendations were deserving of support as improvements in the NEPA process. The problem with amending NEPA is that it opens a "Pandora's Box" of amendments offered by vocal Congressional NEPA opponents to weaken water down, or even eliminate NEPA or its effectiveness. The NAEP NEPA Working Group opposed the House Task Force recommended amendments to NEPA and revisions of the CEQ regulations on the basis that they were unnecessary, already "covered" by CEQ regulations or guidance, and would generate controversy, uncertainty, and litigation. Additional efforts to amend NEPA or revise the CEQ regulations must be monitoring regularly and with vigilance.[87] In February 2008, the International Center for Technology Assessment, the Natural Resources Defense Council, and the Sierra Club petitioned the CEQ for a NEPA amendment to include climate change analysis in NEPA documents.

In order to assure a future for NEPA that protects and enhances the human environment as its founders and key Congressional leaders intended, some of the steps that should be taken included but are not limited to:

1. Make the NEPA process comply with fulfilling the *substantive* purposes and policy goals of the Act as well as the *procedural* requirements.
2. Adopt and utilize existing and proposed "streamlining" elements that preserve and enhance the objectives, policy, and values expressed in NEPA. Resist efforts to amend NEPA and the CEQ regulations.
3. Take whatever steps are necessary to restore and strengthen the responsibility of federal agencies to fulfill the purposes of NEPA through meaningful and workable reforms.
4. Improve the effectiveness of the CEQ through such measures as: restoration of the annual environmental reports; appointment of a highly accredited three-member Council; and increased budgeting and staffing.
5. Implement the present CEQ guidance on mitigation monitoring, greenhouse gases, and categorical exclusions and work to obtain guidance on sustainability, ecosystem management, and other issues.
6. Greatly improve NEPA training opportunities and programs throughout the federal agency system by developing a multi-agency training model.

[86] Pub. L. 109-59; 119 Stat. 1144; 23 U.S.C. §§ 101 *et seq*.

[87] The House Task Force held seven public hearings at six locations around the country during 2005 with 66 witnesses. Some environmental groups charged that the hearings were biased against NEPA (by "loading" the hearings with NEPA opponents) and resulted in a "witch hunt." Attempts to amend NEPA will be, to say the least, highly controversial and would be deserving of a legislative EIS.

The NEPA process is not broken, outdated, oppressive, too cumbersome, too expensive, or an antiquity ready for the trash heap. This quotation from the *Environmental Practice* paper referenced above is appropriate:

> [T]here is no incontrovertible proof that the NEPA process and other environmental reviews are the *principal* cause of transportation, energy, national defense, natural resources, or other project delay. Factors such as lack of funding, public controversy, project complexity, internal Uncertainty, inadequate personnel training, and faulty project management may contribute more to delay. . . .[88]

It will take the dedication of the President, the Congress, all federal agencies, the CEQ, and professional NEPA practitioners like those in National Association of Environmental Professionals to restore and protect NEPA's purposes and processes.

[88] See *supra* note 51 for reference.