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Recommended Citation

Nicholas A. Robinson, SEQRA's Siblings: Precedents from Little NEPA's in the Sister States, 46 Alb. L. Rev. 1155 (1982), <http://digitalcommons.pace.edu/lawfaculty/386/>.

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SEQRA'S SIBLINGS: PRECEDENTS FROM LITTLE NEPA'S IN THE SISTER STATES

*Nicholas A. Robinson**

Most environmental degradation occurs incrementally and cumulatively. The small homebuilder blacktops and covers a vacant lot, thereby increasing the flow of casual surface waters on other lots in the watershed; by itself the effect is not noticed, but when several score of homebuilders repeat the event, flooding occurs downstream. The same is true of the isolated discharge of one smokestack's emissions into the atmosphere or the seemingly isolated filling of a small riverside marsh. When one road is sited, few see how it bisects a wildlife habitat or foresee how it triggers further new developments in its wake.

Indeed, as the biologist Garret Hardin has observed, a person's rational self-interest may usually be to exploit natural resources or property to the maximum extent possible without regard to the cumulative effect that ultimately inures to the detriment of the same person.¹ Even when a town arrests adverse trends within its jurisdiction,² the gasoline alley or fast food strip often locates at the border of the town in greater or more troublesome concentrations than would have otherwise been the case.

No single nostrum can establish a healthful and pleasing environment. No statute can legislate a sound environment into existence. Rather, environmental quality will be the result of many isolated and discrete decisions, each one structured so as to avert environmental degradation. Progress in society can then be realized without the unintended harm that might otherwise result.

As Lord Eric Ashby puts it, human endeavor can become a sympathetic part of the natural environment.³ In place of a conflict with nature brought on by pollution and other environmental harm, there can be a reconciliation of human society and nature. This becomes

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¹ Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

² See, e.g., *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); Annot., 63 A.L.R.3d 1184 (1975).

³ E. ASHBY, *RECONCILING MAN WITH THE ENVIRONMENT* (1978).

possible "not by heroic long-term megadecision, but by the cumulative effect of wise medium-term microdecisions, each decision clarifying the shape of the decision that needs to follow."⁴

The technique of environmental impact assessment has emerged as the principal regulatory tool for assuring that each person acts "so that due consideration is given to preventing environmental damage."⁵ Just as the National Environmental Policy Act (NEPA)⁶ requires that each of the federal government's agencies assure that its decisions will be environmentally sound, so have many of the various states decreed that their agencies and political subdivisions shall maximize environmental protection.

I. NEPA'S PROGENY: SEQRA'S SIBLINGS

New York's State Environmental Quality Review Act (SEQRA)⁷ is ably described throughout this Symposium. It mandates that New York governmental units "conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations."⁸

In adopting SEQRA in 1975, New York joined a number of states that had followed the lead of Congress in enacting NEPA.⁹ The state environmental policy acts, often referred to as "little NEPA's," occasionally copy NEPA almost verbatim.¹⁰ Most, however, make extensive adaptations ranging from the Michigan Environmental Protection Act, adopted contemporaneously with NEPA, which makes unlawful the "pollution, impairment or destruction of the air, water

⁴ *Id.* at 87.

⁵ N.Y. ENVTL. CONSERV. LAW § 8-0103(9) (McKinney Supp. 1981-1982). For a discussion of the quality and extent of "due consideration," see Ulasewicz, *The Department of Environmental Conservation and SEQRA: Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 ALB. L. REV. 1255 (1982).

⁶ 42 U.S.C. § 4321-4369 (1976). For further NEPA details see Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128 (1982).

⁷ N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney Supp. 1981-1982). For background on SEQRA, see Marsh, *Introduction—SEQRA's Scope and Objectives*, 46 ALB. L. REV. 1097 (1982).

⁸ N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney Supp. 1981-1982). See Marsh, *supra* note 7, at 1104.

⁹ 1975 N.Y. Laws ch. 612. See also Orloff, *supra* note 6, at 1129.

¹⁰ See, e.g., Montana Environmental Policy Act, MONT. REV. CODE ANN. §§ 69-6501 to -6517 (1971) (current version at *id.* §§ 75-1-101 to -324 (1981)); Public Policy Environmental Act, P. R. LAWS ANN. tit. 12, §§ 1121-1140 (1970) (current version at *id.* §§ 1121-1142 (1978 & Supp. 1980)).

or other natural resources or the public trust therein" unless there are no prudent and feasible alternatives,¹¹ to states with statutes that require an environmental impact assessment by executive order of the governor for selected actions only.¹²

Most of the twenty-eight jurisdictions that have little NEPA requirements incorporate the same administrative procedures as does the federal environmental impact statement (EIS) process.¹³ For this reason, there is considerable borrowing of case law and interpretation from one state to another. A common body of law guides the EIS process in whatever jurisdiction it comes to be adopted.

In this manner, the EIS process enjoys a status similar to a uniform state law such as the Uniform Commercial Code. When a question arises as to which types of alternatives should be examined in an EIS, guidance can be found in federal decisions under NEPA, or in leading cases under little NEPA's such as the California Environmental Quality Act (CEQA)¹⁴ and Washington's State Environmental Policy Act of 1971 (SEPA).¹⁵

There are currently twenty-eight jurisdictions with an EIS requirement. Fifteen states and Puerto Rico have enacted comprehensive laws like NEPA.¹⁶ Michigan has a law more substantial than NEPA,

¹¹ MICH. STAT. ANN. § 14.528(205)(2) (Callaghan 1980). For text of the full Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, see MICH. STAT. ANN. §§ 14.528(201) - .528(207) (Callaghan 1980).

¹² See, e.g., Exec. Order of April 23, 1971 (Hawaii); Exec. Order No. 53 (N.J. 1973); Admin. Order No. 33 (N.J. 1973). Hawaii has since enacted an EIS statute. See HAWAII REV. STAT. §§ 343-1 to -8 (Supp. 1980).

¹³ 42 U.S.C. § 4332(2)(c) (1976). See generally, [1979] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 591, 595-602.

¹⁴ CAL. PUB. RES. CODE §§ 21000-21176 (Deering 1976 & Supp. 1982) (the uniform requirement for all California state agencies, boards and commissions).

¹⁵ WASH. REV. CODE §§ 43.21C.010-.910 (Supp. 1981).

¹⁶ The current versions of the statutes for these jurisdictions are as follows: California, see California Environmental Policy Act, CAL. PUB. RES. CODE §§ 21000-21176 (Deering 1976 & Supp. 1982); Connecticut, see Connecticut Environmental Policy Act of 1973, CONN. GEN. STAT. ANN. §§ 22a-1 to -7 (Supp. 1974-1975); Hawaii, see Governor's Executive Order of August 21, 1974, as supplemented by HAWAII REV. STAT. §§ 343-1 to -8 (Supp. 1980); Indiana, see IND. CODE ANN. §§ 13-1-10-1 to -8 (Burns 1981); Maryland, see Maryland Environmental Policy Act of 1973, MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1974 & Supp. 1981); Massachusetts, see Massachusetts Environmental Policy Act, MASS. ANN. LAWS ch. 30, §§ 61-62H (Michie/Law Coop. 1973 & Supp. 1981); Minnesota, see Minnesota Environmental Policy Act of 1973, MINN. STAT. ANN. §§ 116D.01-.07 (1977 & Supp. 1981); Montana, see MONT. REV. CODES ANN. §§ 75-1-101 to -324 (1981); North Carolina, see North Carolina Environmental Policy Act of 1971, N.C. GEN. STAT. §§ 113A-1 to -10 (1978); South Dakota, see South Dakota Environmental Policy Act, S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to -13 (1977 & Supp. 1981); Virginia, see Virginia Environmental Quality Act, VA. CODE §§ 10-107.107-.112, 10-177 to -186 (1978 & Supp. 1981); Washington, see State Environmental Policy Act of 1971, WASH. REV. CODE ANN. §§ 43.21C.010-.910 (Supp. 1981), as supplemented by 1981 Wash. Laws chs. 278 & 290; Wisconsin,

and New Mexico, which had a little NEPA, repealed it after a short time.¹⁷ Four states have promulgated comprehensive executive orders establishing procedures equivalent to the EIS function.¹⁸ Nine states have established an EIS function for specified limited purposes.¹⁹

Courts in states with legislatively enacted little NEPA's look to federal case law for authority and guidance by analogy in construing their state act.²⁰ There is also a growing literature in the law reviews about the operation of these state laws;²¹ this body of commentary is

see Wisconsin Environmental Policy Act of 1971, WIS. STAT. ANN. § 1.11 (Supp. 1981-1982); Puerto Rico, see Public Policy Environmental Act, P.R. LAWS ANN. tit. 12, §§ 1121-1142 (1978 & Supp. 1980).

¹⁷ Michigan Environmental Protection Act of 1970, MICH. STAT. ANN. §§ 14.528(201)-.528(207) (Callaghan 1980); N.M. STAT. ANN. §§ 12-20-1 to -7 (Supp. 1973), *repealed by* 1973 N.M. LAWS ch. 46. Regarding the repeal of the New Mexico statute, see Comment, *The Rise and Demise of the New Mexico Environmental Quality Act, "Little NEPA,"* 14 NAT. RES. J. 401 (1974).

¹⁸ These four states, with their executive orders and implementing regulations, are as follows: Michigan, see Michigan Executive Directive 1971-10, *as superseded by* Michigan Executive Order 1973-9, *as superseded by* Michigan Order 1974-4 (May 1974); New Jersey, see New Jersey Executive Order No. 53 (Oct. 15, 1973); Texas, see *Policy for the Environment* (Mar. 7, 1972), published in *Environment for Tomorrow: The Texas Response*, updated by *The Environment Policy—Guidelines and Procedures for Processing EIS's*, (Nov. 1975); Utah, see State of Utah Executive Order (Aug. 27, 1974).

¹⁹ The states with environmental impact assessment processes limited in scope are the following: Arizona, see *Game and Fish Commission Policy of July 2, 1971*, see also *Memorandum by the Arizona Game and Fish Commission, Requirements for Environmental Impact Statements* (June 9, 1971); Delaware, see Coastal Zone Act, DEL. CODE ANN. tit. 7, §§ 7001-7003 (1974, Supp. 1980 & Interim Supp. 1981); The Tidal Wetlands Act, DEL. CODE ANN. tit. 7, §§ 6601-6620 (1974); Georgia, see GA. CODE ANN. §§ 95A-101 to -1306a (1976 & Supp. 1981); Kentucky, see KY. REV. STAT. § 278.025 (1981); Mississippi, see Coastal Wetlands Protection Law, MISS. CODE ANN. §§ 49-27-1 to -69 (Supp. 1981); Nebraska, see NEBRASKA DEP'T OF ROADS, ACTION PLAN (1973), *as revised by*, NEBRASKA DEP'T OF ROADS, ENVIRONMENTAL ACTION PLAN (1975); Nevada, see NEV. REV. STAT. §§ 321.640-.770 (1979); New Jersey, see Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 & Supp. 1981-1982); The Wetlands Act of 1970, N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979); N.J. STAT. ANN. § 12:5-3 (West 1979); Rhode Island, see Rhode Island Environmental Rights Act, R.I. GEN. LAWS § 10-20-8(b) (Supp. 1981).

²⁰ See, e.g., *Friends of Mammoth v. Mono County*, 8 Cal. 3d 247, 260-61, 502 P.2d 1049, 1057-58, 104 Cal. Rptr. 761, 769-70 (1972); *People v. County of Kern*, 39 Cal. App. 3d 830, 841, 115 Cal. Rptr. 67, 75 (1974); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wash. 2d 475, 513 P.2d 36 (1973); *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975). See also *Secretary of Env'tl. Affairs v. Massachusetts Port Auth.*, 366 Mass. 755, 323 N.E.2d 329 (1975); *Minnesota Pub. Interest Research Group v. Minnesota Env'tl. Quality Council*, 306 Minn. 370, 237 N.W.2d 375 (1975); *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 220, 430 N.Y.S.2d 440, 445 (1980); *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 832 (1979).

²¹ On little NEPA's generally, see note 16 *supra*. See also [1977] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 119-21, 130-35; Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URB. L. ANN. 3 (1974); Pridgeon, Anderson & Delphey, *State Environmental Policy Acts: A Survey of Recent Developments*, 2 HARV. ENVTL.

of increasing value to bench and bar alike.²²

New York's SEQRA was adopted at least four years after the federal, California and Washington statutes. Because of precedent from these other jurisdictions, there was no question in New York about applying SEQRA to private projects requiring a state permit, as had

L. REV. 419 (1977); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 50,090 (1973); Note, *Emerging State Programs To Protect the Environment: "Little NEPA's" and Beyond*, 5 ENVTL. AFFAIRS 567 (1976); Comment, 6 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 10,216 (1976); Comment, 7 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 10,187 (1977). Note, *State Environmental Impact Statements*, 15 Washburn L.J. 64 (1976).

²² For articles on California's law, see Hildreth, *Environmental Impact Under the California Environmental Quality Act: The Reports: New Legal Framework*, 17 SANTA CLARA L. REV. 805 (1977); Lynch, *The 1973 CEQ Guidelines: Cautious Updating of the Environmental Impact Statement Process*, Comment, 11 CALIF. W.L. REV. 297 (1975); Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CALIF. L. REV. 112 (1981) [hereinafter cited as *Substantive Enforcement*]; Comment, *Exclusionary Zoning: A Project for the California Environmental Control Act?*, 19 SANTA CLARA L. REV. 777 (1979); Note, *California Environmental Quality Act and Eminent Domain: Failure to Comply with CEQA as a Defense to Condemnation*, 8 LOY. L.A. L. REV. 734 (1975); Note, *Controlled Burning of Rangeland in California: Should CEQA Apply?*, 11 U.C.D.L. REV. 649 (1978); Note, *Environmental Decision Making Under CEQA: A Quest for Uniformity*, 24 U.C.L.A. L. REV. 838 (1977) [hereinafter cited as *Quest for Uniformity*]; *Environmental Law Symposium*, 19 SANTA CLARA L. REV. 513 (1979). For articles on Florida's statute, see Comment, *Environmental Law: The Inapplicability of the Special Injury Rule to the Florida Environmental Protection Act*, 33 U. FLA. L. REV. 425 (1981). For commentary on the Michigan law, see Note, *PBB Action Committee v. DNR: The Feasible and Prudent Alternative Argument Under the Michigan Environmental Protection Act*, 1979 DET. C.L. REV. 457; Comment, *New Growth in Michigan's Environmental Protection Act: State Supreme Court Enjoins Oil Development in Wilderness*, 9 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 10,144 (1979). For a discussion of Minnesota's statute, see Research Project, *An Assessment of the Minnesota Environmental Impact Statement Process*, 3 HAMLINE L. REV. 63 (1980); Note, *Environmental Law: Minnesota Environmental Policy Act*, 4 WM. MITCHELL L. REV. 238 (1978). For an analysis of the Montana law, see Tobias & McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority*, 41 MONT. L. REV. 177, 234-67 (1980). For commentary on New York's statute, see Manes, *Alice in the Wonderland of S.E.Q.R.*, 52 N.Y.S.B.J. 115 (1980); Nichols & Robinson, *A Primer on New York's Revolutionized Environmental Laws: Part I*, 49 N.Y.S.B.J. 41 (1977); Robinson, *Update on State-Impact Review Laws*, N.Y.L.J., Aug. 26, 1980, at 1, col. 1; Sandler, *State Environmental Quality Review Act*, 49 N.Y.S.B.J. 110 (1977); Weinberg, *What Every Real Estate Lawyer Should Know About New York's SEQRA*, 52 N.Y.S.B.J. 114 (1980); Note, *New York State Environmental Quality Review Act: An Overview and Analysis*, 41 ALB. L. REV. 23 (1977). For a discussion of the Washington statute, see Roe & Lean, *The State Environmental Policy Act of 1971 and Its 1973 Amendments*, 49 WASH. L. REV. 583 (1973); Comment, *Judicial Review of Compliance with the State Environmental Policy Act of 1971: Recent Developments*, 10 GONZ. L. REV. 803 (1975); Comment *The 1974 Amendments to Washington's State Environmental Policy Act*, 10 GONZ. L. REV. 787 (1975); Note, *Threshold Determination of the State Environmental Policy Act: Washington Adopts a More Flexible Approach—Equitable Remedies: Laches Defense Restricted*, 56 WASH. L. REV. 549 (1981); Note, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA*, 54 WASH. L. REV. 693 (1979). For a commentary on Wisconsin's law, see Special Project, *Agency Decisionmaking Under the Wisconsin Environmental Policy Act*, 1977 WIS. L. REV. 111 [hereinafter cited as *Wisconsin Environmental Policy*].

been litigated in the seminal California decision in *Friends of Mammoth v. Board of Supervisors*.²³ There was also no question that the EIS duty was a serious and fundamental administrative responsibility, as described in the federal ruling in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*.²⁴ CEQA had already been amended once by the time New York enacted SEQRA. When it did so, New York was able to benefit from the experiences of California and twelve other states with little NEPA's.²⁵

The legislature actively considered this corpus of jurisprudence when it shaped SEQRA.²⁶ The actual operations under the California Act were described to the legislature by the chief of that state's Office of Environmental Protection, Nicholas Yost.²⁷ Reports from other states were solicited and reviewed.²⁸ Assemblyman Oliver Koppell expressed New York's debt to California on the eve of SEQRA's taking effect June 1, 1976, as follows:

Fortunately, we do have substantial information in the experience of California, a state which has had such a law since 1970. The states have much in common, apart from the fact that much of the New York act is patterned on the earlier California model. Both states are large, populous and diverse. . . .²⁹

²³ 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

²⁴ 449 F.2d 1109 (D.C. Cir. 1971).

²⁵ The states that had an EIS requirement in 1975 were California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, South Dakota, Virginia, Washington and Wisconsin. See note 16 *supra*.

²⁶ See Koppell, *Environmental Protection Laws At Issue*, N.Y.L.J., May 6, 1976, at 1, col. 2 (an essay by the chairman of the New York State Assembly Environmental Conservation Committee).

²⁷ *Id.* Mr. Yost later became general counsel to the President's Council on Environmental Quality in the administration of President Carter.

²⁸ *Id.* (citing Massachusetts Executive Office of Environmental Affairs and Virginia Council on the Environment reports on the number of environmental impact reports and the time used in considering those reports).

²⁹ *Id.* Assemblyman Koppell further observed that:

According to Nicholas C. Yost, Deputy Attorney General in charge of the environmental unit of the Attorney General's Office in California, the California experience is that environmental reporting has worked, and worked well. There were fears of opening the flood gates of litigation. These fears have not materialized. Mr. Yost reported that with over 400 cities in California and 58 counties, plus several hundred special districts and all of the agencies of State government, the Attorney General's records indicated some approximately 103 suits since 1970—an average of something over twenty suits a year.

A report of the California Attorney General's office indicated that California's environmental impact reporting statute has not been "a vehicle for delay or frustration of projects on nonmeritorious grounds." The Attorney General's report concluded, that both in overall numerical terms and in relation to the number of agencies implementing their environmental consulting firm, confirms this conclusion (sic)

Indeed, shortly after the adoption of SEQRA, commentators were already citing California precedents to assist in the proper interpretation of SEQRA.³⁰ In like vein, the Practising Law Institute provided a continuing legal education course in 1978 on SEQRA featuring the California and Washington statutes, along with NEPA, as principal sources of authority for construing SEQRA.³¹ As observed by Professor Phillip Weinberg, who was in charge of the Environmental Protection Bureau in the New York State Attorney General's Office at the time of SEQRA's enactment:

SEQRA had as its model [NEPA], which since January 1, 1970 has required every federal agency performing, permitting or funding any major action with a substantial impact on the environment to weigh the environmental effects of its action and to prepare an environmental impact statement—to look, in short, before it leaps, or permits someone else to. Even more in point, a number of states, notably California and Washington, had also enacted environmental impact laws with parallel mandates. Our Legislature adapted these laws to New York's needs, requiring the state, localities and private businesses acting under state or local permit or funding to consider the impact of their action on the environment and to document that consideration by furnishing a reviewable record.³²

The teaching of these authorities is obvious. Both the bench and bar should examine the case law under little NEPA's in other states before "recreating the wheel" in New York. In some instances, New York ought not to follow case law from a sister state. The provisions of SEQRA may be so different as to make the authority inapplicable. Similarly, the ruling may be inadequate to the needs of New York.

In general, the fear of increased litigation, as reviewed above, is believed not to be well founded. It should be noted that the experience from other states, particularly California, is that there simply has not been the degree of litigation stemming from environmental reporting which was originally feared. In light of its stringent rule protecting administrative decisions, . . . New York is no more likely than California to have excessive litigation.

Similarly, with respect to reporting delays and costs, studies from Massachusetts and California do not appear to suggest that either will be inordinate. If the SEQR Act is properly implemented at the State and local agency levels, its procedures can and should be carried out with and at the same time as other requirements of planning, with minimum delay, if at all, and with expense commensurate with other necessary planning costs and not excessive in light of the importance of assuring that the future growth of the state is properly planned in the interests of both a prosperous and livable state.

Id. at 4 (footnotes omitted).

³⁰ Sandler, *supra* note 22, at 115-16.

³¹ PRACTISING LAW INSTITUTE, STATE ENVIRONMENTAL QUALITY REVIEW COMPLIANCE: A PRACTICAL APPROACH AT THE LOCAL GOVERNMENT LEVEL (J. Sachs ed. 1978).

³² Weinberg, *supra* note 22, at 120 (citations omitted).

Whether or not this analogous case law is followed, however, it should at least be considered.

The strength which a common body of law possesses is the intellectual force and perception of each decision's *ratio decidendi*; especially in rulings of first impression, the advocate and judge should at least examine prior rulings of the key states having statutes substantially similar to SEQRA. Since the environmental problems themselves are apt to be similar from state to state, and since commercial activity most often has interstate characteristics, society is best served by promoting a common pattern of environmental impact assessment. This will lead to predictability and shared expectations, strengthening both an ordered society with the rule of law and environmental protection.

II. COMPARATIVE VIEWS OF IMPACT ASSESSMENT

It is beyond the scope, and probably capacity, of this Article to identify every possible issue under SEQRA for which authority may be found in a sister state. Nonetheless, it may be instructive to illustrate how analogous case law from other states may be drawn upon to further SEQRA.³³ Obviously, other states may be drawn upon to further SEQRA. The little NEPA precedents may most usefully be sought not in the context of state agency actions which are often analogous to federal agency actions; rather, the state rulings are most valuable in construing the duties of villages, towns, cities, counties and other political subdivisions of a state. Two examples can demonstrate these matters. The first concerns the realm of the stewardship which the little NEPA's require. The second involves the details of the environmental impact assessment process itself.

A. Ethics and Stewardship

One leading case under SEQRA is *Tuxedo Conservation and Taxpayers Association v. Town Board*.³⁴ In *Tuxedo*, the town board had final SEQRA approval authority over a 200 million dollar project, which would quadruple the town's population.³⁵ One town trustee

³³ As well, the large body of federal case law under NEPA should be examined closely. See Orloff, *supra* note 6.

³⁴ 96 Misc. 2d 1, 408 N.Y.S.2d 668 (Sup. Ct. 1978), *aff'd*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (1979).

³⁵ *Id.* at 7, 408 N.Y.S.2d at 671.

was an officer of an advertising agency, employed by the developer parent corporation.³⁶ He refused to disqualify himself, however, and cast the decisive vote despite the probability of his firm's financial interest.³⁷ Although no ethics statutes had been violated, both trial and appellate courts in *Tuxedo* rigorously condemned the trustee's action and invalidated the project approval.³⁸

The *Tuxedo* decision held the town board trustee to the standard of "the punctilio of an honor the most sensitive,"³⁹ in the context of SEQRA decisions as "stewards of the air, water, land, and living resources" with "an obligation" to "this and all future generations."⁴⁰ About the same time as *Tuxedo*, the courts in California were reaching a different view. A badly divided California Supreme Court in *Woodland Hills Residents Associations v. City Council*⁴¹ failed to insist upon the punctilio of honor. The court held that campaign contributions to city council members do not prevent them from deciding matters involving contributors.⁴² Finding no literal violation of the statute, the court refused to imply a violation from the circumstances.⁴³ Thus, the court ignored even "the amount of the contribution, its timing, its method, as well as the significance of the issue being considered . . . in judging the appearance of bias."⁴⁴

It may be that the unfortunate recent legislative criticisms of the California Supreme Court have cast it into a timid mold. The California court's deference to the legislature, in the face of "the mother's milk of politics"⁴⁵ (that is, campaign contributions to CEQA decisionmakers), does little to ensure a full measure of environmental

³⁶ *Tuxedo Conservation and Taxpayers Ass'n. v. Town Bd.*, 69 A.D.2d 320, 323, 418 N.Y.S.2d 638, 639 (1979).

³⁷ *Id.* The court noted that the trustee had knowingly participated and had even requested a local committee's ethics opinion. *Id.* at 323, 418 N.Y.S.2d at 639-40.

³⁸ "For, like Caesar's wife, a public official must be above suspicion." *Id.* at 324, 418 N.Y.S.2d at 640. The trial court expressed a similar view: "Considering the scope of this application (1,500 acres, 3,900 units and one fifth of a billion dollars), only the naive would not suspect that there could be tacit business pressures conflicting with the right of the public to a fair hearing." *Tuxedo Conservation and Taxpayers Ass'n v. Town Bd.*, 96 Misc. 2d 1, 10, 408 N.Y.S.2d 668, 673 (Sup. Ct. 1978), *aff'd*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (1979).

³⁹ *Tuxedo Conservation and Taxpayers Ass'n v. Town Bd.*, 69 A.D.2d 320, 324, 418 N.Y.S.2d 638, 640 (1979) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.)).

⁴⁰ N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney Supp. 1981-1982).

⁴¹ 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980).

⁴² *Id.* at 947, 609 P.2d at 1033, 164 Cal. Rptr. at 259.

⁴³ *Id.* at 946-47, 609 P.2d at 1032-33, 164 Cal. Rptr. at 259.

⁴⁴ *Id.* at 951-52, 609 P.2d at 1036, 164 Cal. Rptr. at 262 (Bird, C.J., concurring and dissenting).

⁴⁵ 26 Cal. 3d at 953, 609 P.2d at 1037, 164 Cal. Rptr. at 264 (Newman, J., concurring).

protection. CEQA lacks the express stewardship intent of SEQRA,⁴⁶ and that may also explain the difference. Perhaps the public policy in California is to favor "political influence" in quasi-judicial decisionmaking.⁴⁷

A comparable situation in the State of Washington, however, would be resolved as in New York. Washington's little NEPA tracks the policies of NEPA, and establishes a stewardship role for government as to nature. All agencies of the state are urged to "[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations."⁴⁸ Moreover, the Washington legislature has recognized "that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."⁴⁹ In establishing this policy, Washington goes beyond

⁴⁶ Compare CAL. PUB. RES. CODE § 21100 (Deering 1981) with N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney Supp. 1981-1982). The California statute provides:

All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

- (a) The significant environmental effects of the proposed project.
- (b) Any significant environmental effects which cannot be avoided if the project is implemented.
- (c) Mitigation measures proposed to minimize the significant environmental effects including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.
- (d) Alternatives to the proposed project.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any significant irreversible environmental changes which would be involved in the proposed project should it be implemented.
- (g) The growth-inducing impact of the proposed project.

The report shall also contain a statement briefly indicating the reasons for determining that various effects of a project are not significant and consequently have not been discussed in detail in the environmental impact report.

CAL. PUB. RES. CODE § 21100 (Deering 1981). The New York Legislature expressed SEQRA's purpose as follows:

It is the purpose of this act to declare a state 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 enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

N.Y. ENTL. CONSERV. LAW § 8-0101 (McKinney Supp. 1981-1982).

⁴⁷ See Note, *Woodland Hills v. City Council of Los Angeles: Electoral Politics and Quasi-Judicial Fairness*, 69 CALIF. L. REV. 1098, 1123 (1981).

⁴⁸ WASH. REV. CODE ANN. § 43.21c.020(2)(a) (Supp. 1981), as supplemented by 1981 Wash. Laws chs. 278 & 290. See *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wash. 2d 271, 525 P.2d 774 (1974) (*en banc*).

⁴⁹ WASH. REV. CODE ANN. § 43.21c.020(3) (1981), as supplemented by 1981 Wash. Laws chs.

NEPA.⁵⁰

The judiciary in Washington, as in New York, has properly identified its role in examining impropriety and the appearance of impropriety. Several cases offer guidance for municipal officials as to both ethics and environmental stewardships.⁵¹ In varied contexts, the Washington judiciary has developed the "appearance of fairness" ethical standard for land use decision.⁵² In *Chrobuck v. Snohomish County*,⁵³ the Washington Supreme Court considered the rezoning of an area from a rural-residential to heavy industrial district. The court recognized that the denial of cross-examination, provision of trips paid for by the developer to similar plant sites as well as free entertainment, and prior membership in an organization with a financial interest in the project were cumulative circumstances condemned as casting "an aura of influence."⁵⁴ In *Buell v. City of Bremerton*,⁵⁵ the court focused on the single "infecting" circumstance of a board member with a financial interest in the project.⁵⁶ Even prior or subsequent connections with the project or project sponsor have been condemned as violating the duty to reach and appear to reach an unbiased decision.⁵⁷ Further, in *Fleming v. City of Ta-*

278 & 290.

⁵⁰ 42 U.S.C. § 4331 (1976) embodies Congress' national environmental policy. Unlike the Washington statute, it does not purport to create any individual rights.

⁵¹ *SAVE a Valuable Environment v. City of Bothell*, 89 Wash. 2d 862, 576 P.2d 401 (1978) (*en banc*); *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976) (*en banc*); *Narrowview Preservation Assoc. v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974) (*en banc*); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972) (*en banc*); *Anderson v. Island Co.*, 81 Wash. 2d 312, 501 P.2d 594 (1972) (*en banc*); *Buell v. City of Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972) (*en banc*); *Chrobuck v. Snohomish Co.*, 78 Wash. 2d 858, 480 P.2d 489 (1971) (*en banc*). The New York trial court's opinion in *Tuxedo* cited *Chrobuck* with approval. *Tuxedo Conservation and Taxpayers Ass'n v. Town Bd.*, 96 Misc. 2d 1, 10, 408 N.Y.S.2d 668, 673 (1978), *aff'd*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (1979).

⁵² *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972) (*en banc*); *Anderson v. Island Co.*, 81 Wash. 2d 312, 501 P.2d 594 (1972) (*en banc*); *Buell v. City of Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972) (*en banc*); *Chrobuck v. Snohomish Co.*, 78 Wash. 2d 858, 480 P.2d 489 (1971) (*en banc*).

⁵³ 78 Wash. 2d 858, 480 P.2d 489 (1971) (*en banc*).

⁵⁴ *Id.* at 862-70, 480 P.2d at 492-96. In *Fleming v. City of Tacoma*, the Washington court characterized the facts of the *Chrobuck* case as revealing that there were "close prior social and business connections with a proponent of the rezone and [that] his successor had publicly supported the proponent's position." *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 296-97, 502 P.2d 327, 330 (1972) (*en banc*).

⁵⁵ 80 Wash. 2d 518, 495 P.2d 1358 (1972) (*en banc*).

⁵⁶ According to the court, "the self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness." *Id.* at 525, 495 P.2d at 1362.

⁵⁷ See, e.g., *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 299-300, 502 P.2d 327, 331 (1972) (*en banc*) (subsequent employment); *Anderson v. Island County*, 81 Wash. 2d 312, 325-27, 501

coma,⁵⁸ post-decision employment of a council member by the project sponsor's attorney, and in *Anderson v. Island County*,⁵⁹ the biased participation of a former owner of the property, caused the courts to rescind both the ordinance and the reclassification. Although no wrongdoing was found in any of these cases, the Washington Supreme Court held that the importance of public trust and confidence mandated that even the appearance of impropriety be avoided.⁶⁰

This stringent standard was interwoven with the requirements of environmental stewardship in local bond use decisions in *SAVE a Valuable Environment v. Bothell*,⁶¹ *Swift v. Island County*,⁶² and *Narrowsview Preservation Association v. City of Tacoma*.⁶³ Inadequate environmental review and financially interested board members caused the *Swift* and *SAVE* courts to void both local zoning changes.⁶⁴ In *Narrowsview*, although the environmental review was adequate, the court found that the participation of a financially interested board member tainted the zoning approval.⁶⁵ The continuing scrutiny of the Washington judiciary under the "appearance of fairness" standard encourages fair and impartial land use decisions which fulfill the responsibility of each citizen to preserve and enhance the environment.⁶⁶

P.2d 594, 602 (1972) (*en banc*) (prior ownership of property).

⁵⁸ 81 Wash. 2d 292, 300, 502 P.2d 327, 331 (1972) (*en banc*). The employment was entered into less than 48 hours after the crucial vote. *Id.* The trial court observed:

The time coincidence is devastating. It is unfortunate this probably has taken place because this was one of those days that we all have where a problem arose and a man just didn't think about the whole implications of what he was doing. The appearance of conflict of interest is here. The appearance of conflict of interest is so strong that I am sure those who oppose the zoning and who thought this thing through will never, never believe that somehow this wasn't kind of wired before the final vote was taken.

Id. at 300, 502 P.2d at 332.

⁵⁹ 81 Wash. 2d 312, 501 P.2d 594 (1972) (*en banc*).

⁶⁰ *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972) (*en banc*); *Anderson v. Island County*, 81 Wash. 2d 312, 501 P.2d 594 (1972) (*en banc*); *Buell v. City of Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972) (*en banc*); *Chrobuck v. Snohomish County*, 78 Wash. 2d at 858, 480 P.2d 489 (1971) (*en banc*).

⁶¹ 89 Wash. 2d 862, 576 P.2d 401 (1978) (*en banc*).

⁶² 87 Wash. 2d 348, 552 P.2d 175 (1976) (*en banc*).

⁶³ 84 Wash. 2d 416, 526 P.2d 897 (1974) (*en banc*).

⁶⁴ In *Swift*, there was no environmental review and in *SAVE*, there was no mitigation of adverse environmental effects. *SAVE a Valuable Environment v. City of Bothell*, 89 Wash. 2d 862, 576 P.2d 401 (1978) (*en banc*); *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976) (*en banc*).

⁶⁵ *Narrowsview Preservation Assoc. v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974) (*en banc*). The tainted board member was an employee, whose employer would be directly affected by the decision. *Id.*

⁶⁶ WASH. REV. CODE ANN. § 43.21 C.020(3) (Supp. 1981), as supplemented by 1981 Wash. Laws chs. 278 & 290.

Taken seriously, the legislative mandate for stewardship is akin to the common law duty of a trustee to avoid waste. The trustee owes all allegiance to the public, present and future, to conserve and best manage the resources at issue. This task, as New York and Washington concur, is incompatible with even the appearance of a conflict of interest.

B. EIS Procedure

The heart of SEQRA and all of the little NEPA's is the environmental impact statement process. This is the "action forcing" element which makes the stewardship role realistic and practical.⁶⁷ It is this process which admits of a shared common law among the little NEPA's. The key stages of the SEQRA procedures can be construed in light of the analogous rulings of other jurisdictions. In like vein, New York's growing case law is becoming a part of the body of authority available to assist other jurisdictions.

Six principal steps characterize the EIS process. Initially, there is the threshold question of whether or not SEQRA applies to a given action.⁶⁸ Second is the lead agency designation.⁶⁹ Third is the negative declaration or the finding of a Type I action requiring preparation of an environmental impact statement.⁷⁰ Fourth is the preparation of the draft EIS (DEIS) and review of alternatives.⁷¹ Fifth is the preparation of the final EIS (FEIS) and full identification of impacts and their possible mitigation.⁷² Finally, there is judicial review of this

⁶⁷ There is ample commentary on the action-forcing element of § 102(2)(C) of NEPA and the little NEPA's. See, e.g., F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973); R. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT* (1976).

⁶⁸ Concerning actions, see 6 N.Y.C.R.R. § 617.2(b) (1979). See also Marsh, *supra* note 7, at 1099-100, 1106-09.

⁶⁹ "When an action is to be carried out or approved by two or more agencies, the determination of whether the action may have a significant effect on the environment shall be made by the lead agency having principal responsibility for carrying out or approving such action and such agency shall prepare, or cause to be prepared . . . the environmental impact statement." N.Y. ENVTL. CONSERV. LAW § 8-0111(6) (McKinney Supp. 1981-1982). Concerning lead agency designation, see 6 N.Y.C.R.R. § 617.6 (1979). As to one agency and as to more than one agency, see *id.* § 617.2(c) &(d).

⁷⁰ A negative declaration is a decision not to prepare an EIS because the proposed action will not have a significant effect on the environment. *Id.* § 617.12(a). The significance of an action is determined under criteria set forth in *id.* § 617.10(c); the negative declaration for nonsignificant acts appears in *id.* § 617.10(b).

⁷¹ The required contents of a DEIS are governed by *id.* § 617.14(d). On alternatives, see *id.* § 617.14(f).

⁷² The FEIS contains the comments on the DEIS and the final analysis. *Id.* §§ 617.8 &

process along with the final agency decision itself and the resolution of who has standing to seek review.⁷³

Although there is little case law concerning SEQRA's EIS procedure to rely on, references can be usefully drawn from California and Washington. Because the little NEPA's from these two states were models from which SEQRA was in part adapted,⁷⁴ the judicial glosses on their state environmental impact assessment process are apt sources to guide the evolution of SEQRA.⁷⁵

1. Whether the EIS Process Applies to a Given Action

Much rides on the initial decision that an action requires an EIS. Failure to undertake the EIS process frustrates SEQRA's stewardship and courts will enjoin actions seeking to circumvent the Act.⁷⁶ The validity of subsequent permits may be subject to invalidation.⁷⁷

Several early New York cases ratified exemptions from the SEQRA process.⁷⁸ Where facts of the underlying action manifestly constituted a Type I action under SEQRA, the cases favoring exemptions appear to be wrongly decided;⁷⁹ the rule of reason and remedial purposes of SEQRA militate that actions not be exempted.⁸⁰

The logic of California's *Friends of Mammoth* decision⁸¹ should

617.14(h). Mitigation must be shown at this time. *Id.* § 617.9(c)(2).

⁷³ Final agency action is the approval or disapproval step which occurs 30 days after the FEIS is filed. *Id.* § 617.9(b). Judicial review is available under article 78 of the CPLR. N.Y. Civ. PRAC. LAW § 7800-7806 (McKinney 1981).

⁷⁴ This Article is not intended to be an exhaustive treatise of the commentary on each of these six steps from each of the nineteen states which have little NEPA's akin to SEQRA. *See generally* authority cited in notes 16 & 18 *supra*.

⁷⁵ *See text* accompanying note 31 *supra*.

⁷⁶ *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (1979). 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).

⁷⁷ *See Citizens Task Force on SOHIO v. Board of Harbor Comm'rs*, 23 Cal. 3d 812, 591 P.2d 1236, 153 Cal. Rptr. 584 (1979). For other agency actions which can be invalidated for lack of an EIS, see *Tri-County Taxpayers Ass'n, Inc. v. Town Bd.*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982) (election appropriating funds for a sewer district annulled for lack of an EIS). *See generally* N.Y. GEN. MUN. LAW § 239-m (McKinney 1974). *See also Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 67, *appeal dismissed*, 55 N.Y.2d 747 (1981); *Weinstein v. Nicosia*, 32 Misc. 2d 246, 223 N.Y.S.2d 187 (Sup. Ct. 1962), *aff'd.*, 18 A.D.2d 881, 236 N.Y.S.2d 1023 (1963).

⁷⁸ *See, e.g., County of Franklin v. Connelie*, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (1979); *In re Hopkins*, 99 Misc. 2d 216, 415 N.Y.S.2d 774 (Sup. Ct. 1979).

⁷⁹ *See, e.g., County of Franklin v. Connelie*, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (1979).

⁸⁰ *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980).

⁸¹ *Friends of Monmouth v. Bd. of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

serve to guide SEQRA. California courts regularly require application of the EIS process in many varied circumstances. CEQA applies to power plant authorizations, to actions with environmental impacts outside the jurisdiction of the entity preparing the EIS, to annexation of land by a municipality, to permits for subdivisions, and to other local zoning decisions.⁸² Comparably broad rulings are found in the State of Washington.⁸³

Ministerial actions may be exempt from SEQRA,⁸⁴ but they must be identified as being ministerial beyond cavil. Washington has found it difficult to draw the line between ministerial and major actions. In *Eastlake Community Council v. Roanoke Associates*,⁸⁵ Washington's highest court ruled that where a building permit renewal was "mandatory" no EIS was needed, but where the renewal was "non-duplicative" and discretionary and there was no prior environmental review, then an EIS was required. Care must be taken to define the "ministerial" exemption.⁸⁶

The California courts have furthered CEQA's remedial purposes by restricting exemptions through narrow construction⁸⁷ and by declining to find implied exemptions.⁸⁸ Where discretion is involved in an agency decision, there is usually an opportunity to mitigate environmental harm. For such action, an EIS is required.

⁸² See, e.g., *Desert Env'tl. Conservation Ass'n v. Public Utils. Comm'n*, 8 Cal. 3d 739, 505 P.2d 223, 106 Cal. Rptr. 31 (1973) (power plants); *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973) (outside jurisdiction); *Bozung v. Local Agency Formation Comm'n*, 37 Cal. App. 3d 842, 112 Cal. Rptr. 668 (1974), *aff'd*, 13 Cal. 2d 483, 531 P.2d 783, 119 Cal. Rptr. 215 (1975) (annexation); *People v. Country of Kern*, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974) (general land use plan); *Rosenthal v. Board of Supervisors*, 44 Cal. App. 3d 815, 119 Cal. Rptr. 282 (1975) (local rezoning).

⁸³ *Loveless v. Yantis*, 82 Wash. 2d 754, 513 P.2d 1023 (*en banc*) (subdivision plan approval); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wash. 2d 475, 513 P.2d 36 (1973) (*en banc*) (condominium); *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 508 P.2d 166 (1973) (*en banc*) (withdrawal of water); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wash. App. 59, 510 P.2d 1140 (1973) (municipal grading permit).

⁸⁴ 6 N.Y.C.R.R. § 617.13(d) (1979) (exempting routine and maintenance activity).

⁸⁵ 82 Wash. 2d 475, 513 P.2d 36 (1973) (*en banc*). See also *Loveless v. Yantis*, 82 Wash. 2d 754, 513 P.2d 1023 (1973) (*en banc*) (on exemption for ministerial actions).

⁸⁶ See Note, *Aftermath; Friends of Mammoth and the Amended California Environmental Quality Act*, 3 *ECOLOGY L.Q.*, 349, 386-87 (1973) (critical discussion of California case law).

⁸⁷ *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976).

⁸⁸ *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976); *International Longshoremen's & Warehousemen's Union v. Board of Supervisors*, 116 Cal. App. 3d 265, 171 Cal. Rptr. 875 (1981).

2. The Designation of a Lead Agency

Where a project must be approved by more than one agency, it is essential for the effective and efficient operation of the EIS process that, as early as possible, one be identified as the agency responsible for conducting the environmental review.⁸⁹ This is the "lead" agency. Not only must one agency assume that burden of EIS responsibility, but other agencies must assist it in doing so. The need for efficient execution of this stage led to amendments of CEQA aimed at assigning the burden of EIS responsibility.⁹⁰

3. The Decision to Require an EIS

Guidance from other states can be of assistance in determining when and whether an EIS is needed under SEQRA. "Segmentation,"⁹¹ or the division of what would be a Type I action into small bits and pieces, each with insignificant impact, is usually not allowed.⁹² Even if the action would have a Type I classification, a decision must still be made as to when in time the action exists. A mere plan to act may not trigger an EIS.⁹³ If an agency is unsure whether an act is advanced enough to require an EIS under CEQA, it can order tests and research.⁹⁴ This goes beyond the administrative environmental assessment form (EAF) now used under SEQRA.

The general criteria for deciding when an impact is significant, so as to require an EIS, have been reviewed often. In *Norway Hill Preservation and Protection Association v. King County Council*,⁹⁵ Washington's Supreme Court defined "significantly" as "whenever more than a moderate effect on the quality of the environment is a

⁸⁹ 6 N.Y.C.R.R. § 617 (1979).

⁹⁰ Pridgeon, Anderson & Delphey, *State Environmental Policy Acts: A Survey of Recent Developments*, 2 HARV. ENVTL. L. REV. 419, 427-28 (1977).

⁹¹ Segmentation is the term derived from the practice of dividing highways into small linking units to avoid reviewing the entire route. See, e.g., *River v. Richmond Metropolitan Auth.*, 359 F. Supp. 611, 634 (1973), *aff'd*, 481 F.2d 1280 (4th Cir. 1973).

⁹² See, e.g., *Plan for Arcadia, Inc. v. Arcadia City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96, 105 (1974). The very fact of exercising discretion in making this decision may mean that the EIS must be done. *Loveless v. Yantis*, 82 Wash. 2d 754, 513 P.2d 1023 (1973).

⁹³ See, e.g., *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974); *Lake County Energy Council v. County of Lake*, 70 Cal. App. 3d 851, 139 Cal. Rptr. 176 (1977); *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973).

⁹⁴ See, e.g., *Society for Cal. Archaeology v. County of Butte*, 65 Cal. App. 3d 832, 135 Cal. Rptr. 679 (1977); *People v. County of Kern*, 62 Cal. App. 3d 761, 133 Cal. Rptr. 389 (1976).

⁹⁵ 87 Wash. 2d 267, 552 P.2d 674 (1976).

reasonable probability."⁹⁶ Factors considered by the court were the size of the project, the type of environmental change, and the classification of the project under SEPA.⁹⁷ If no EIS had been prepared and the action was significant, then even extensive prior discussion and the attachment of the protective conditions would be insufficient according to the court.⁹⁸ The court held that SEPA mandates full disclosure and investigation before decisionmaking precisely to ensure that adequate protective measures could be taken.⁹⁹ Ultimately, whether an EIS is required is a mixed question of law and fact. A rule of reasonableness should govern review of this determination.¹⁰⁰

4. The Draft EIS and Consideration of Alternatives

The DEIS is intended to be a comprehensive and fair review of all the adverse environmental effects of the proposed action. The central analytic tool for highlighting these impacts is a discussion of alternatives. By requiring a discussion of the effect of no action or a modified action, the decisionmaker identifies a way to avoid adverse impacts and is less reluctant to describe the range of realistically possible adverse effects in a candid fashion.

The EIS process must consider all aspects of a proposed action. Under CEQA, close scrutiny is given to such consideration. Thus, in *County of Inyo v. Los Angeles*,¹⁰¹ the court found a number of deficiencies in the consideration of alternatives and impacts. The court found two major deficiencies in the environmental impact report (EIR).¹⁰² First, the court held that consideration of alternatives must

⁹⁶ *Id.* at 278, 552 P.2d at 680 (quoting *City of Davis v. Coleman*, 521 F.2d 661, 673-74 & n.16 (9th Cir. 1975)).

⁹⁷ *Id.* at 275-76 & n.8, 552 P.2d at 679 & 681 n.8.

⁹⁸ *Id.* The court noted earlier that it chose the "clearly erroneous" administrative standard of review because SEPA's intent could easily be frustrated by declarations of no significance. *Id.* at 276, 552 P.2d at 679.

⁹⁹ *Id.* at 275, 552 P.2d at 679. The court recognized that the "most important aspect of SEPA is the consideration of environmental values . . . [SEPA] 'is an attempt by the people to shape their future environment by deliberation, not default.'" *Id.* at 272, 552 P.2d at 677 (quoting *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 118, 508 P.2d 166, 172 (1973)).

¹⁰⁰ *Wisconsin's Env'tl. Decade, Inc. v. Public Serv. Comm'n*, 79 Wis. 2d 409, 256 N.W.2d 149 (1977). For a similar ruling under SEQRA, see *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980).

¹⁰¹ 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977). See also *Laurel Hills Homeowners Ass'n v. City Council*, 83 Cal. App. 3d 515, 147 Cal. Rptr. 842 (1978).

¹⁰² An EIR is an environmental impact report and is the equivalent of SEQRA's EIS. Compare CAL. PUB. RES. CODE § 21100 (Deering 1981) with N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney Supp. 1981-1982).

include a "no project" alternative.¹⁰³ Second, the court held that the EIR was void because it was based on an inaccurate project description.¹⁰⁴ The court noted that the revised EIR described a small scale groundwater project and that the final EIR dealt with large scale phases of the City's aqueduct management program.¹⁰⁵ The *County of Inyo* court recognized that the interim EIR's may be based on new insights requiring revision. It refused, however, to validate the project when its scope was known in advance but was deliberately misstated to confuse the public.¹⁰⁶ The court reemphasized that the scope of the project and all reasonable alternatives must be included in the EIR.¹⁰⁷

An alternative can be feasible and merit review in the EIS even though the applicant would reject undertaking such a course.¹⁰⁸ An alternative must, therefore, be examined in the EIS even though the agency may later make an independent decision as to whether or not to make the alternative a condition of approval as a form of mitigation to comply with SEQRA's substantive mandate discussed below. The scope of the EIS must include secondary and cumulative impacts.¹⁰⁹

One useful technique, first developed in Massachusetts,¹¹⁰ is "scoping," a means of focusing on important issues and streamlining the method of review. When NEPA was enacted, it did not include a scoping provision but the revised implementing regulations now address the issue.¹¹¹ SEQRA has no specific provision on scoping, but the concept can be read into the Act.¹¹² Scoping is especially useful at

¹⁰³ *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 193, 203, 139 Cal. Rptr. 396, 401, 408.

¹⁰⁴ *Id.* at 192-93, 199-200, 139 Cal. Rptr. at 401, 406.

¹⁰⁵ *Id.* at 190-91, 199, 139 Cal. Rptr. at 399-400, 406.

¹⁰⁶ *Id.* at 199-200, 139 Cal. Rptr. at 406.

¹⁰⁷ *Id.*

¹⁰⁸ *Arcata Redwood Co. v. State Bd. of Forestry*, 7 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 20,755 (Cal. Super. Ct. Sept. 8, 1977).

¹⁰⁹ *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 283-84, 529 P.2d 1017, 1030, 118 Cal. Rptr. 249, 262 (1975). *Cf. Wisconsin Environmental Policy Act*, *supra* note 22 at 153-56 (describing the Wisconsin experience).

¹¹⁰ MASS ANN. LAWS ch. 30, §§ 61-62H (Michie/Law Co-op 1973 Supp. 1981).

¹¹¹ 40 C.F.R. § 1501.7 (1981). *See also* notes 131-32 and accompanying text *infra*.

¹¹² N.Y. ENVTL. CONSERV. LAW § 8-0109(2) lists specific considerations to be included in the EIS and provides that it "should not contain more detail than is appropriate." *Id.* This section also provides that "agencies may make their own independent judgment of the scope, contents and adequacy of an environmental impact statement." *Id.* § 8-0109(3). DEC's implementing regulations provide that impact statements should not be "encyclopedic," 6 N.Y.C.R.R. § 617.14(b) (1979), and "should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts." *Id.* §

the beginning of the EIS process where a scoping conference is often held with the lead agency.¹¹³

5. The Final EIS Proposals for Mitigation

Not only must an FEIS under SEQRA fully review adverse environmental effects and identify alternatives, but viable steps for mitigating those effects must also be discussed. The final agency decision should make appropriate mitigation a condition for project approval.

The failure to select a feasible alternative which would avert environmental harm gives the agency the option in some jurisdictions to deny the requested approval.¹¹⁴ This is ultimate mitigation. There is authority under CEQA that an agency need only impose feasible mitigation, not the most environmentally superior alternative.¹¹⁵ With SEQRA's social and economic compatibility provisions,¹¹⁶ this CEQA rule may be appropriate in New York.

SEQRA, unlike NEPA, expressly embodies the requirement of substantive mitigation.¹¹⁷ As in Washington, this means that a permit may be denied on the grounds that it would degrade the environment excessively in contravention of SEQRA's stewardship responsibilities.¹¹⁸ Among all the little NEPA's, Minnesota's statute probably imposes the greatest substantive burden.¹¹⁹

Even after an action has gone forward without a valid EIS or absent all feasible mitigation, the SEQRA duty to assure that feasible mitigation be considered and applied must be discharged. This may mean retrofitting a project. Both California¹²⁰ and New York¹²¹ courts have reached this EIS implication in their rulings.

617.14(c).

¹¹³ In fact, DEC's regulations governing procedures for DEC permit approvals strongly recommend that the applicant request a scoping conference where an EIS is necessary. *Id.* § 621.3 (1977).

¹¹⁴ *In re City of White Bear Lake*, 311 Minn. 146, 247 N.W.2d 901 (1976).

¹¹⁵ *Laurel Hills Homeowners Ass'n v. City Council*, 83 Cal. App. 3d 515, 147 Cal. Rptr. 842 (1978). This ruling is criticized in Note, *CEQA's Substantive Mandate Clouded by Appellate Court*, 8 ENVTL. L. REP. (ENVTL. L. INST.) ¶ 10,208 (1978).

¹¹⁶ N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney Supp. 1981-1982).

¹¹⁷ See Gitlen, *The Substantive Impact of SEQRA*, 46 ALB. L. REV. 1241 (1982); Ulasewicz, *supra* note 5. As to CEQA, see *Substantive Enforcement*, *supra* note 22.

¹¹⁸ See, e.g., *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

¹¹⁹ *State v. Erickson*, 285 N.W.2d 84 (Minn. 1979).

¹²⁰ *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal. App. 3d 203, 174 Cal. Rptr. 784 (1981).

¹²¹ *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 67, *appeal dismissed*, 55 N.Y.2d 747 (1981).

6. Standing and Judicial Review

The entire EIS process is enforced through recourse to the courts by way of judicial review of the agency action. The lead agency must compile a careful record documenting the EIS process.¹²² This record is the basis for determining both the procedural correctness and the substantive reasonableness of the agency's decision.

Judicial review is contemplated as the principal means for enforcing agency adherence to SEQRA's stewardship responsibilities.¹²³ The criteria for any citizen's standing to so enforce SEQRA is found in the pre-SEQRA ruling of *Douglaston Civic Association v. Galvin*.¹²⁴ While courts have occasionally found that the standing criteria of *Douglaston* have not been met,¹²⁵ the pattern of New York standing cases follows the federal lead in liberally construing environmental noneconomic interests as being of sufficient weight to accord standing to their champions to enforce SEQRA.¹²⁶ In this respect, most jurisdictions in zoning and land use cases analogous to EIS cases today accord standing to civic groups.¹²⁷

The literature on the scope of judicial review of an EIS process under little NEPA's has been extensively developed.¹²⁸ Since SEQRA relies on each state agency and local government to remake its own procedures to assure that its stewardship duties will be met, only the courts can assure that a uniform statewide process will eventually emerge.¹²⁹ This will take time and will ultimately call for the guiding hand of the court of appeals. Uniformity of EIS application will

¹²² *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 275-76, 552 P.2d 674, 679 (1976); *Wisconsin's Envtl. Decade v. Public Serv. Comm'n*, 79 Wis. 2d 409, 419, 256 N.W.2d 149, 155 (1977).

¹²³ See also *Wisconsin's Envtl. Decade v. Public Serv. Comm'n*, 79 Wisc. 2d 409, 256 N.W.2d 149 (1977); authority discussed in *Wisconsin Environmental Policy Act*, *supra* note 22, at 161-66. The pattern was fixed under NEPA with *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

¹²⁴ 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974). For further discussion of standing to sue under SEQRA, see Crary, *Procedural Issues Under SEQRA*, 46 ALB. L. REV. 1211, 1211-23 (1982).

¹²⁵ *A.W.A.R.E., Inc. v. North Hempstead*, 81 Misc. 2d 1010, 367 N.Y.S.2d 374 (Sup. Ct. 1975).

¹²⁶ *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). See also *Simons v. City of Los Angeles*, 100 Cal. App. 3d 496, 161 Cal. Rptr. 67 (1979); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973); *SAVE a Valuable Environment v. City of Bothell*, 89 Wash. 2d 862, 576 P.2d 401 (1978).

¹²⁷ See Annot., 8 A.L.R.4th 1087 (1981).

¹²⁸ See, e.g., *Roe & Lean*, *supra* note 22, at 533-40.

¹²⁹ Uniformity of application has been criticized under other little NEPA's. See, e.g., *Quest for Uniformity*, *supra* note 22.

therefore be enhanced by following the precedents of sister states where applicable.

III. CONCLUSION

Recurring patterns of new land uses and development exist throughout the United States. It is only natural, therefore, that state legislatures have sought to regulate and control these developments in similar ways. The environmental impact assessment process at its best is a technique not just to protect environmental quality, but also to promote the ordered growth of society. The courts do much to advance both wise use of natural resources and social and economic development by reinforcing the legislative judgment that environmental impact analysis shall be a part of all governmental decisionmaking in the federal government and in states such as New York, California and Washington.

Just as the experiences under the Massachusetts little NEPA¹³⁰ gave the Council on Environmental Quality the idea of "scoping" to narrow an EIS,¹³¹ and the NEPA regulations now include a requirement for scoping,¹³² so also the NEPA process can guide the states' little NEPA's. An evolving and symbiotic relationship exists between NEPA and the comparable state laws, just as there is one among the state enactments.

The New York Legislature should seek to improve and streamline SEQRA by considering the strengths in other states' little NEPA's. For one thing, a New York oversight body, analogous to the President's Council on Environmental Quality,¹³³ should be created to facilitate the work of SEQRA. Such a body could exist in either the Department of Environmental Conservation or the Department of State. A similar proposal has been made for California.¹³⁴

In like vein, the New York courts should draw on the wealth of EIS case law around the nation in shaping SEQRA. A common body of law, adapted *mutatis mutandis* for each state, now exists. The judici-

¹³⁰ MASS. ANN. LAWS ch. 30, §§ 61-62H (Michie/Law Co-op 1973 & Supp. 1981).

¹³¹ See 40 C.F.R. §§ 1500.4, 1501.1, 1501.4, 1501.7, 1502.9, 1506.8 (1979); [1978] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 396, 398 (discussing Council on Environmental Quality revisions to NEPA regulations). For a further discussion of scoping, see notes 110-13 and accompanying text *supra*.

¹³² 40 C.F.R. § 1501.7 (1981).

¹³³ 42 U.S.C. §§ 4341-4347. See also Crary, *supra* note 124, at 1231-32.

¹³⁴ *Quest for Uniformity*, *supra* note 22, at 873-76.

ary can and should do much to mold this corpus of ordered common law which environmental impact laws make possible.