

# BOOK REVIEW

## **IS THAT ALL? A REVIEW OF *THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE*, BY LYNTON KEITH CALDWELL**

OLIVER A. HOUCK\*

The National Environmental Policy Act<sup>1</sup> (NEPA) holds the unusual honor of being the most successful environmental law in the world and the most disappointing. Passed in the waning moments of 1969, within a few short years NEPA would take over the federal establishment like a new language, spawn “little NEPAs” in nearly half of the states,<sup>2</sup> spread to Europe, Latin America, and the Far East at the speed of fast food outlets,<sup>3</sup> and become a bedrock principle of international environmental law.<sup>4</sup>

---

\* Professor of Law and Director of the Tulane Environmental Law Program, Tulane University, New Orleans, Louisiana. Professor Houck has also served as Assistant U.S. Attorney in Washington, D.C.; General Counsel and Vice-President of the National Wildlife Federation; on the Board of Directors of the Defenders of Wildlife and the Environmental Law Institute; and on the Litigation Review Board of the Environmental Defense Fund. Please direct questions or comments to [ohouck@tulane.edu](mailto:ohouck@tulane.edu). This book review is also available at <http://www.law.duke.edu/journals/10DELPFHouck>.

1. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1994).

2. As of 1990, 19 states, the District of Columbia, and the Commonwealth of Puerto Rico had enacted “little NEPAs” by statute or by executive order. See PRESIDENT’S COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: TWENTIETH ANNUAL REPORT 41 (1991) [hereinafter CEO, 20TH ANNUAL REPORT]. Moreover, New York City and a number of other local governments and municipalities had also enacted “little NEPAs.” See *id.* at 42. Further, several additional states had adopted NEPA-like processes through case law. See *id.*; see also *Save Ourselves, Inc. v. Louisiana Env’tl Control Comm’n*, 452 So.2d 1152 (La. 1984) (interpreting Louisiana Constitution to require discussion and disclosure of impacts and alternatives to state actions).

3. For a summary of the expansion of NEPA to other countries, see CEO, 20TH ANNUAL REPORT, *supra* note 2, at 43-44. For more contemporary discussions, see generally Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591 (1992); Clive Bruffet, *Monitoring the Effectiveness of Environmental Impact Assessment in Southeast Asia*, 4 ASIAN J. ENVTL. MGMT. 53 (1996) (describing Asian environmental impact assessment systems); 2 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE: IMPACT AND LIMITATIONS (Judith Petts ed., 1999) (evaluation of European and

Yet, at bottom, the law is hard to find. Parsing its language, phrase by opaque phrase, we arrive at a requirement that federal agencies, with all of their inherent biases and under the constant push of their particular economic constituencies—road contractors, land developers, oil and gas producers, shippers, and timber companies—must review the environmental impacts of their own actions before acting, i.e., they must generate an environmental impact statement.<sup>5</sup> It hardly sounds like a barn-burner.

Every semester, in law schools around the United States, a new crop of students not yet familiar with NEPA but eager to plunge into environmental law and save the world, plunge instead into this short, cryptic, largely-aspirational statute and go into shock. Is that all? Thirty years after the enactment of NEPA, “is that all?” remains its most haunting question. It is the root question of Lynton Caldwell’s recent book, *The National Environmental Policy Act, An Agenda for the Future*.

The world owes a large debt of gratitude to Lynton Caldwell. It was his essay in the mid-1960s that, at the time when this country was becoming uncomfortably aware that things were very wrong with the environment, urged the need for a new national policy of environmental protection.<sup>6</sup> It was his collaboration with Senator Henry Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, that led to NEPA’s now-famous “action forcing” requirement:

Dr. CALDWELL. I have already suggested, it seems to me, that the Congress indeed has a responsibility and could enunciate [a national environmental] policy. But beyond this, I would urge that in the shaping of such a policy, it have an action-forcing, operational aspect. When we speak of policy we ought to think of a statement which is so written that it is capable of implementation; that it is not merely a statement of things hoped for, it is a statement which will

---

Latin American systems).

4. See RESTATEMENT (3D) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §601 cmt. e (“[A] state has an obligation to consult with another state if a proposed activity within its jurisdiction and control poses a substantial risk to the environment of the other state . . .”), reprinted in WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES 200 (1992); U.N. Conference on Environment and Development, Rio Declaration on Environment and Development 4, U.N. Doc. A/CONF.151/5Rev. 1 Princ. 4 (1992), reprinted in 31 I.L.M. 874 (1992) (adopting a “precautionary principle” that nations look ahead to anticipate and prevent environmental harm). For a discussion of the incorporation of NEPA into the decision-making process of international organizations, see CEO, 20TH ANNUAL REPORT, *supra* note 2, at 44-6.

5. See 42 U.S.C. § 4332(2)(c).

6. See Lynton K. Caldwell, *Environment: A New Focus for Public Policy*, 23 PUB. ADMIN. REV. 138 (1963).

compel or reinforce or assist . . . the executive agencies in particular, but going beyond this, the Nation as a whole, to take the kind of action which will protect and reinforce what I have called the life support system of this country.

The CHAIRMAN [SENATOR JACKSON]. I would like to pursue this policy matter for a moment. I agree with you that realistically what is needed is restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure the departments must comply with. Otherwise, these lofty declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation. I believe this is what you were getting at.

Dr. CALDWELL. Yes, exactly so.

The CHAIRMAN. I am wondering if we might not broaden the policy provision in the bill so as to lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency.

I think the immediate example that comes to my mind and has to yours already by the statement is that the Atomic Energy Commission, in granting permits or licenses in connection with nuclear power-plants, should be required to make an environmental finding.

This, of course, might be applicable to the Federal Power Commission. One can go on down the list of agencies . . .<sup>7</sup>

An “environmental finding.” There are few occasions in life when one can see the very beginning of a huge idea, and this is one of them. Nonetheless, Dr. Caldwell has gone on to ride NEPA like a parent, criticizing its shortcomings in a series of articles that began at

---

7. *National Environmental Policy Act of 1969: Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91<sup>st</sup> Cong. 116 (1969) [hereinafter *Hearings*]. It is interesting to learn, from Dr. Caldwell's current book, that this conversation was something of a set-piece, staged in advance with Senator Jackson and Committee Council William Van Ness. See LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE* 63 (1998). If debts of gratitude are in order, Mr. Van Ness also needs to be recognized both for his work on NEPA and for his management and drafting of the Federal Water Pollution Control Act Amendments of 1972. See generally HARVEY LIEBER, *FEDERALISM AND CLEAN WATERS* (1975). The Federal Water Pollution Act is one of the most successful environmental laws ever enacted, propelled forward even today by its own “acting-forcing” mechanisms. See Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1251(a) (1994). See also Oliver A. Houck, *The Regulation of Toxic Pollutants under the Clean Water Act*, 21 ENVTL. L. REP. 10,528 (1991) (describing the Act's multiple implementation schemes).

least ten years ago and that culminate in his new book.<sup>8</sup> Thirty years out, he is not content.

In his current book, Dr. Caldwell perceives a statute that has been taken over by lawyers, that has had marginal effect on federal agency programs, and that has simply failed to integrate environmental considerations into the mainstream of the major decision-making of this country, and now, the world. He sees the authority and aspirations of his statute swallowed up by an undue focus on impact statement preparation, to the exclusion of NEPA's other provisions. He sees the "substantive" requirements of NEPA that exhort environmentally sound decision-making fall by the wayside, ignored by federal agencies and unenforced by the courts. He sees unattained or not-even-attempted potential in the President's Council on Environmental Quality and other mechanisms to elevate environmental concerns and to leverage these concerns to the forefront. Like many a father, Dr. Caldwell sees the shortcomings, the failure to reach all that was wished for in this child. And like many a father, he wished for too much.

Dr. Caldwell is not alone in his disappointment with NEPA. To its critics, the statute is an elaborate catechism requiring years of delay and paperwork—often irrelevant, always self-promoting, and at times outright deceitful in its consideration of environmental effects—before getting on with the job.<sup>9</sup> To its supporters, NEPA has worked miracles in changing government behavior, infused agencies with environmental specialists, brought in the views of other agencies and an often-skeptical public, surfaced alternative courses of action, and produced thousands of better decisions—harm-avoiding and harm-mitigating decisions—on the ground.<sup>10</sup> Both camps are, of course, correct, and there is little to be gained in trying to conclude

---

8. See, e.g., Lynton Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENTL. L. REV. 203 (1998); Lynton Caldwell, *NEPA Revisited: A Call for Constitutional Amendment*, ENVTL. F., Nov.-Dec. 1989, at 18, 20.

9. See WILLIAM ROGERS, ENVIRONMENTAL LAW 811 (2d ed. 1994). For one (of many) hearings airing these and similar complaints from industry and development interests, see *Implementation of the National Environmental Policy Act by the Council on Environment Quality, 1982: Hearing Before the Subcomm. on Toxic Substances and Environmental Oversight of the Senate Comm. on Environment and Public Works, 97th Cong. 8-11 (1982)* (statement of Daniel W. Cannon, Director of Environmental Affairs, National Association of Manufacturers).

10. See ROGERS, *supra* note 9, at 811; J. Clarence Davies, *Some Thoughts on Implementing Integration*, 22 ENVTL. L. 139, 145 (1991); Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10,060, 10,062 (1989). See also COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1977).

which is more correct. Nearly everyone sees the donut. Nearly everyone sees the hole.

The real problem with NEPA is that it attempts the impossible. Against a horizon of injuries—such as cities shut down by toxic smog, rivers so polluted they caught fire, and federally aided highways laying waste to inner cities, increasingly toxic pesticides and the predictions of a Silent Spring, a catalogue of horrors impressive both in their urgency and their diversity<sup>11</sup>—Congress looked for a silver bullet, the one solution for all federal actions<sup>12</sup> that would do nothing less than change the conduct of the entire government.

At the start of a law class on NEPA, I often present my students with the vision held by Congress and ask them to develop their own statute. They soon propose a Super Environmental Agency, an environmental czar, to rule on activities that affect the environment...but on every new highway, airport, post office, mineral deposit, nuclear plant, transmission line, dredged canal, industrial source permit, fishery quota, timber sale, and range allotment in the country? What expertise would such an agency need in transportation, navigation, and resource management? And with all of that expertise, would we now be inventing a second government? Who would appoint such an agency and how would it be insulated from the same economic and political pressures that now drive the Department of Transportation, the U.S. Forest Service, and the U.S. Army Corps of Engineers? Instead, are we better off trying to “green” the existing agencies, and if so, exactly how do we do that?

In theory, all of these questions have answers. However, the problem is that they have several different answers, some of which

---

11. The Senate Report underlying NEPA begins with the following apocalyptic vision:

The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards; and many, many other environmental quality problems . . . .

S. Rep. No. 91-296, at 1 (1969).

12. See *Hearings, supra* note 7, at 116 (statement of the Chairman) (“I am wondering if we might not broaden the policy provision in the bill so as to lay down a *general requirement* that would be applicable to *all* agencies.”) (emphasis added).

work no better and others of which are not feasible in an American scheme of government (although some of them, such as the environmental czar, are appearing in the programs of other countries).<sup>13</sup> In light of these difficulties, the solution Congress arrived at in 1969 begins to look a little better. If Congress wanted to affect this great range of federal activity and impacts, it was going to have to come up with general substantive principles and then procedural mechanisms with which to apply them. The principles are those of section 101(b).<sup>14</sup> The mechanisms are in section 102.<sup>15</sup> The hard parts are the

---

13. See generally Felipe Paez, *Environmental Framework Laws in Latin America*, 13 PACE ENVTL. L. REV. 625, 648 (1996) (describing the role of Mexico's national environmental agency); Greg M. Block, *One Step Away from Environmental Citizen Suits in Mexico*, 23 ENVTL. L. REP. 10347 (1993) (describing the Mexican ruling administration's authority to reject participation in statutory enforcement by environmental groups); Article 40, Regulation of the Chilean Environmental Impact Assessments System, Decree No. 30, Minister-Secretary General of Government (empowering a Chilean authority to reject environmental impact statements).

14. Which provides:

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

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

NEPA, 42 U.S.C. § 4331(b) (1994).

15. Which provides:

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

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

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

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

principles. They are inspiring, but they are not law. Almost by definition, they cannot be law.

The critical element of any law is precision. It is the line between that which may be done and may not be done.<sup>16</sup> A declaration that highways shall not go through public parks, such as that in section 303 of the Department of Transportation Act, is law.<sup>17</sup> One can independently and objectively look at a proposed road, see where it goes, and determine whether or not it complies. On the other hand, a declaration that federal agencies shall “attain the widest range of beneficial uses of the environment,” such as that in NEPA section 101(b)(3), is not law.<sup>18</sup> Such a statement could support, alternatively, damming the Colorado River (to provide electricity for Los Angeles), leaving it alone (for the benefit of tourists and rafters), or for that matter—as has been urged—removing the existing Glen Canyon Dam.<sup>19</sup> So it is with nearly all of the NEPA policies of section 101(b).<sup>20</sup> Motivational as they may be, they lack the precision that

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

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

Id. § 4332.

16. In administrative law, this ingredient of specificity is called “law to apply” and determines the reviewability (*i.e.*, the enforceability) of a particular statute or regulation. *See* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-13 (1971).

17. 49 U.S.C. § 303(c) (1994) (protecting public areas absent a showing of no feasible prudent alternatives). For a discussion of this provision and its requirements, see *Citizens to Preserve Overton Park*, 401 U.S. at 411-13.

18. *See* 42 U.S.C. § 4331(b)(3).

19. *See* EDWARD ABBEY, *THE MONKEY WRENCH GANG* (1975). This proposal to remove the dam has now picked up momentum from the Sierra Club and other environmental organizations. *See generally* Ed Marston, *Sierra Club Moves to Fortify Its ‘Drain Lake Powell’ Campaign*, *HIGH COUNTRY NEWS*, Oct. 13, 1997.

20. The phrase “*nearly* all” is used, because a notable exception may be contained in section 101(b)(6), providing that the government “approach the maximum attainable recycling of depletable resources.” That provision might supply direct grounds for enforcement against practices that ignored, or even penalized, recycling. This issue was the crux of the complaint in

would allow someone in our system, ultimately a reviewing court, to say, “this is over the line.”

Several courts have tried to find law in these provisions. In one particularly inviting case, the Court of Appeals for the Second Circuit struck down a decision by the Department of Housing and Urban Development creating a ghetto of low-income housing across midtown Manhattan,<sup>21</sup> only to have the Supreme Court reverse,<sup>22</sup> stating that once NEPA’s procedural impact statement requirement was met, “NEPA requires no more.”<sup>23</sup> As dubious and clearly insensitive to people and their environment as the housing decision was in this case (and as the Court’s curt, *per curiam* opinion was), one can appreciate the Court’s practical predicament: by what standard is a federal court to determine whether or not an action “fulfills the responsibilities of each generation as trustee of the environment for succeeding generations,” as stated in NEPA section 101(b)(1) or any of the ensuing substantive provisions?<sup>24</sup>

---

*U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), better known for its resolution of the issue of the standing of plaintiffs to sue.

21. See *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978).

22. See *Stryker’s Bay Neighborhood Council v. Karlan*, 444 U.S. 223 (1980).

23. See *id.* at 228.

24. The question of whether the principles of section 101(b) were “substantive law”—i.e., provided a legal standard against which government conduct could be judicially reviewed and, if necessary, reversed—had been left open for more than a decade. In his thesis on NEPA in *Calvert Cliffs*, Judge Wright suggested this tantalizing possibility, stating:

The reviewing court probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.

*Calvert Cliffs Coordinating Committee v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Reviewing courts, even the Supreme Court, kept this flame alive, in dicta, throughout the 1970s. See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (stating that “NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural” and, since “essentially” does not mean “totally,” implying that substantive review remained alive). With *Strykers Bay*, however, the Court slammed the door on substantive review, as it has so remained. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Had an agency decision so egregious as that in *Strykers Bay* come along in the early 1970s, it is possible that the Court would have decided differently or at least given the issue the decency of a signed opinion. In fact, this author has argued in favor of substantive review, as early as 1972, in an amicus brief advocating substantive review on the Gilham dam case. See Amicus Brief for the National Wildlife Federation, *Environmental Defense Fund, Inc. v. Corps of Eng’r*, 470 F.2d 289 (8th Cir. 1972). The plaintiff’s counsel adopted the argument in the first of several law review articles on “substantive NEPA.” See Richard S. Arnold, *The Substantive Right to Environmental Quality under the National Environmental Policy Act*, 3 ENVTL. L. REP. 50028 (1973); see also ROGERS, *supra* note 9, at 896 (arguing that section 101(b) “could provide a vast body of federal case law defining the right to a healthful environment in terms comparable to common law nuisance”).



This was not a failure of wordsmithing on the part of the Congress. It was a failure to appreciate the impossibility of saying something as general as “Be Environmental!” to the federal establishment as a whole and expecting it to happen, or to be enforced when it did not happen. So, of course NEPA shrank to the rock-hard requirement of an environmental impact statement in section 102(2)(C). It was the one provision in the statute that unarguably provided law to apply.<sup>25</sup>

The unfortunate truth is that NEPA could not have it both ways, the aspirationally general and the enforceably specific. Congress would either have to have made those aspirations—e.g., to “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities”<sup>26</sup> (which is almost a contradiction in terms)—more clear, or it would have to have developed some mechanism more powerful than “giv[ing] appropriate consideration”<sup>27</sup> to environmental impacts to implement those aspirations. In fact, given the generality of its language and the compromises made in its enactment, NEPA is extremely lucky to have had any impact on federal decision-making at all. At another time, and almost certainly today, this statute would have been delivered stillborn. It was brought to life by two great coincidences in the law.

The first was *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*.<sup>28</sup> Local residents had challenged the licensing of a nuclear plant, and during the proceedings, the Commission dutifully

---

It is difficult, today, to separate the Court’s treatment of substantive review under NEPA from its determined hostility to *any* application of NEPA. *See infra* text accompanying note 49 and sources cited. Setting aside the Court’s obvious indigestion over NEPA, however, one cannot easily glean from the standards of section 101(b) the precision that would allow a reviewing court to determine whether, in a given case, an agency proposal had violated the law. *But see supra* note 20.

25. NEPA, of course, is not the only statute to shrink from its intended scope. The reduction of *all* environmental law to bare-bones minima is a phenomenon this author has called the Fifty Percent Principle (“nothing in environmental law is more than fifty percent”), which we can see, for example, in the gap between the “zero discharge” goal of the Clean Water Act and the current rate of pollution discharge in this country. *See* Oliver A. Houck, *Are Humans Part of Ecosystems?* 28 ENVTL. L. 1, 12 (1998). Some statutes like the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1994) (outlining the purpose of multiple-use natural resources planning), contained the highest of aspirations but so little “law to apply” that they have had virtually no effect on federal decision-making. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

26. NEPA § 101(b)(5), 42 U.S.C. § 4331(b)(5) (1994).

27. *See id.* at § 4332(B).

28. 449 F.2d 1109 (D.C. Cir. 1971).

promulgated rules to comply with the brand new environmental statute, i.e., NEPA. The Commission was not stonewalling NEPA; unlike the stance of other federal agencies,<sup>29</sup> the Commission would apply NEPA to ongoing proceedings and would open its review process to all environmental considerations brought forward by the public. Nonetheless, plaintiffs appealed the rules. An initial, remarkable aspect of *Calvert Cliffs* is that plaintiffs were able to raise NEPA at all. Here was a statute without a citizen suit provision. Indeed, a provision assuring every citizen a “right” to a clean environment had been deleted in the House-Senate conference out of fear that it would lead to legal claims.<sup>30</sup> Yet, here were ordinary citizens claiming violations of NEPA. At the benches of many judges of the time, and in front of still more judges of today, these plaintiffs would have been sent packing under any of several doctrines including “standing,”<sup>31</sup> “ripeness,”<sup>32</sup> or the absence of a “private right of action.”<sup>33</sup> Instead, however, they came before Judge Skelly Wright, a veteran of the civil rights struggle in Louisiana and no stranger to government excuses, obstruction, and delay.<sup>34</sup> NEPA set standards that were to be “rigor-

---

29. The U.S. Army Corps of Engineers, for example, took the early position that NEPA did not apply to several hundred on-going water resources construction projects. *See, e.g.*, *Environmental Defense Fund v. Corps of Eng's*, 2 ERC 1173 (D.D.C. 1971) (rejecting government argument that NEPA did not apply to previously authorized projects).

30. The original subsection 101(b), as passed by the Senate, provided, “Congress recognizes that each person has a fundamental and inalienable right to a healthful environment;” this provision was dropped in favor of the current 101(c), providing no such “right.” *See* “Statement of the Managers on the Part of the House,” Conf. Rep., 1156 CONG. REC. 39702 app. (daily ed. Dec. 17, 1969). *See also* RICHARD LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS ALTERNATIVE* 27 (1976).

31. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1997).

32. *See, e.g.*, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

33. *See, e.g.*, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

34. *See* Michael S. Bernick, *The Unusual Odyssey of J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 971 (1980) (describing Judge Wright's de-segregation decisions in Louisiana in the face of entrenched, government-wide resistance and intense public reaction). Denounced as “Judas Scalawag Wright” and hung in effigy on numerous occasions, Wright became a focus of citizens' anger. A drive was started to impeach him for usurpation of legislative power. The legislature overwhelmingly voted to condemn his “disregard of the sovereignty of the state,” and when a coffin bearing a coffee-colored doll named “smelly Wright” was carried through the state capitol, nearly all of the legislators stood up and cheered. *See id.* at 972. Wright was also the victim of threatening letters and telephone calls—he was even treated to the spectacle of a burning cross on his front lawn. *See id.* at 986. In 1961, two vacancies occurred on the Court of Appeals for the Fifth Circuit; however, Wright was passed over for both positions, the official explanation being that Senate approval would not be forthcoming in light of strong opposition from Louisiana Senators Allen Ellender and Russell Long. *See id.* at 990. Finally, “late in 1961, a vacancy opened on the District of Columbia Circuit. The Southern senators saw this as a way to get Wright out of the South . . .” *Id.* at 991. This would be a move with significant unintended

ously enforced” by reviewing courts,<sup>35</sup> Judge Wright would write, whose “duty,” he continued, was “to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>36</sup> *Calvert Cliffs* set the precedent, and a very high standard, for judicial review. Without that, nothing in NEPA would have followed.

Having found review, Judge Wright then wrote a treatise on NEPA. He did not change the statute. He simply rewrote it with as much law to apply as he could find. The opinion opens not with the facts of the case nor the particular issues raised by the plaintiffs, but rather, with a declaration of the importance of this new statute and an interpretation of its provisions.<sup>37</sup> Dr. Caldwell, Senator Jackson, and the entire Senate Committee would have been hard pressed to write a stronger, more explicit statement. Indeed, had they done so, it is quite possible that NEPA would never have been enacted.<sup>38</sup> Turning at last to the merits, Judge Wright flayed the Atomic Energy Commission with language (e.g., its “crabbed interpretation of NEPA makes a mockery of the Act;”<sup>39</sup> the statute provided no “escape hatch for foot-dragging agencies”<sup>40</sup>) that has acted as a goad to government and a guide to reviewing courts ever since.<sup>41</sup>

---

consequences for public and administrative law. See David Pike, *The DC Super Circuit*, NAT'L L. J., at 1, 10 (Mar. 30, 1981) (noting that the D.C. Circuit moved to “the forefront of courts striking out boldly in behalf of regulation for the public interest”).

35. See *Calvert Cliffs Coordinating Committee v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

36. *Id.* at 1111.

37. The opinion begins with the self-creating prophesy:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material ‘progress’.

*Id.*

38. As one Senate staff member was quoted to have declared:

If we had waited another year, we would have developed legislation which wasn't so drastic in terms of program effect. If Congress had appreciated what the law would do, it would not have passed. They would have seen it was screwing public works . . . . The timing of the bill complicated the way it worked. Had it passed a year earlier or later, things would have been far different. If Congress had known what it was doing, it would not have passed the law.

LIROFF, *supra* note 30, at 35.

39. See *Calvert Cliffs*, 449 F.2d at 1117.

40. *Id.* at 1114.

41. *Calvert Cliffs* has gone on to become what must be the most oft-cited opinion in environmental law. As of January 2000, a search of Westlaw found *Calvert Cliffs* cited in 436 reported decisions.

The second watershed event in NEPA was its subsequent rewrite as regulations, this time by the President's Council on Environmental Quality. The Council, a body created by Congress without any significant statutory powers and with only the slender tasks of conducting studies and advising the President on environmental matters,<sup>42</sup> had been taking the initiative to issue "guidelines" on points of NEPA law to other federal agencies—over which it held absolutely no authority—in response to the case victories that citizen suits had been wresting from the courts.<sup>43</sup> These guidelines, however, had little more legal force or effect than suggestions. Then in 1978, during the brief term of the only President since 1969 to avow himself an environmentalist, the Council received an executive order empowering it to issue NEPA regulations,<sup>44</sup> and it proceeded to do so.<sup>45</sup> Regulations are law, and agencies are as bound to comply with them as they are with acts of Congress.<sup>46</sup> The Council's NEPA regulations were as prescriptive and detailed as the statute was opaque. They milked every possible obligation out of NEPA and its accompanying—and by that time, somewhat conflicting—case law. They spelled out what federal agencies had to do, obligation by obligation, as far as the statute would permit—and some would say beyond.<sup>47</sup> These regulations became the bible for the federal establishment and for reviewing courts. They became NEPA.

For these reasons, it is either a little disingenuous or a little naive for *The National Environmental Policy Act, An Agenda for the Future* to complain of NEPA's reduction-to-its-minima at the hands of environmental lawyers. As any first-time reader of this statute can attest, it is anything but self-evident. The drafters of NEPA were fortunate that their statute went anywhere at all, much less that it has gone so

---

42. See NEPA, 42 U.S.C. § 4344 (1994). The Council's eight statutory responsibilities relate exclusively to studies and advice to the President.

43. See Richard Liroff, *The Council on Environmental Quality*, 3 ENVTL. L. REP. 50,051 (1973).

44. See Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977).

45. See 40 C.F.R. § 1500 (2001).

46. While the binding legal effect of the Council's regulations on other federal agencies has been questioned, see ROGERS, *supra* note 9, at 820, it is without question that the regulations receive high deference from reviewing courts. Furthermore, all federal agencies, pursuant to the Council's regulations, have issued their own regulations implementing NEPA, to which they are unarguably bound. See *Parker v. United States*, 448 F.2d 293 (10th Cir. 1971) (pronouncing an agency to be bound by its regulations).

47. Compare 40 C.F.R. § 1508.7 (1999) (treatment of cumulative impacts in the regulations, including "reasonably foreseeable future actions") with *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (rejecting the need to include "contemplated" projects).

far. NEPA was saved from anonymity and an early death by a extraordinary opinion by the District of Columbia Circuit, followed by other far-sighted opinions, followed by a remarkably strong set of regulations, that, collectively, did what Congress could not or would not do. To have expected more of the federal government, without far more explicit statutory language, is simply not-of-this-world.<sup>48</sup>

If NEPA was not written in a way to allow its lofty goals to be enforced, however, Dr. Caldwell certainly has grounds to complain that it was written with sufficient clarity of its purposes and procedures to have had a greater impact on the federal establishment. Further, if the courts may take credit for establishing the rigor of this law, they must also take the blame for subsequently diminishing it and trimming its reach. NEPA provokes fundamentally different points of view. There are those, and they clearly include the enacting Congress and Judge Skelly Wright, who view NEPA as a planning device—a mechanism to open the federal doors, bring in the public, sort out the alternatives, compare their impacts, and arrive at better decisions. There are others, and they clearly include the current Supreme Court, who view NEPA more as a press release—a statement disclosing the impacts of decisions made. The former see the process as an instrument of positive change. The latter see it as a threat to agency decision-making and the status quo. In the words of then-professor, now-Justice Scalia, “does [the absence of judicial enforcement of NEPA] mean that important legislative purposes, heralded in the halls of Congress, are lost or misdirected in the vast hallways of the federal bureaucracy? Yes it does, and a good thing too!”<sup>49</sup>

It is hard to imagine a venue more hostile to NEPA—to any aspect of NEPA—than the Supreme Court has proven to be. Of the

---

48. Indeed, it is hard to appreciate the degree of opposition and hostility NEPA faced within the government, even to the clearly required impact statement process. Consider the following memorandum from the mining division of the U.S. Department of the Interior, commenting on an environmental impact review:

There is nothing in the report to support the statement, “Even with successful reclamation, there might be a reduction in the productivity of the disturbed land.” Certainly there should be a better word than “disturbed” to describe land utilized and altered in the production of coal.

When the Geological Survey has the lead in preparing environmental statements, inflammatory words such as disturbed, devastated, defiled, ravaged, gouged, scarred and destroyed should not be used. These are the words used by the Sierra Club, Friends of the Earth, environmentalists, homosexuals, ecologists and other ideological eunuchs opposed to developing mineral resources.

Memorandum from Andrew V. Bailey, Chief, Branch of Mining Operations, U.S. Geological Survey to Environmental Section (Oct. 8, 1976) (on file with author).

49. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 897 (1983).

twenty-two cases raising NEPA issues to the Court over the last thirty years, none—not one—has been decided in a fashion that favored the application of the statute to the facts at hand.<sup>50</sup> The odds of 22-to-0 are not explainable by any random pattern known to science; chances that lopsided would close the most rapacious casino in Biloxi, Mississippi. Nor are they explainable as correcting aberrations in the law, as each case had been decided in an opposite fashion by at least one lower federal court, all of which contain, one would assume, judges of sound mind.

With the Supreme Court setting the tone, the federal judiciary began slashing at even the procedural requirements of NEPA, cutting fish loose, then cutting the lines. One of the most critical elements of the statute is its timing—the application of the impact assessment process to transportation planning or forest management, for example, as opposed to the later approval of highway segments (e.g., Interstate-95 from DeKalb Avenue to 10th Street in Washington, D.C.) or to individual timber sales. It is in the planning that the central NEPA issues—alternatives and harm avoidance—are at issue. Once the plans are in place, the agencies busy themselves with defending them, and NEPA review becomes simply an element of the defense.

One of the first agencies to slip the net was the Federal Highway Administration, whose construction program caused such havoc in the 1960s, particularly in urban areas, that it generated its own literature and litigation revolution.<sup>51</sup> Starting in the 1970s, facing a spate of new highway-related NEPA lawsuits,<sup>52</sup> the federal courts began severing highway planning from NEPA, deferring the impact statement process to the end-game.<sup>53</sup> The Supreme Court reinforced this trend in *Kleppe v. Sierra Club*, interpreting NEPA's intentionally broad application to federal "actions" as requiring discrete, site-specific pro-

---

50. See ROGERS, *supra* note 9, at 838. Of these 22 cases, 12 have been decided exclusively on NEPA issues and, of course, against the application of the statute. See David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990). See also Antonio Rossmann, *NEPA: Not So Well at Twenty*, 20 ENVTL. L. REP. 10174 (1994).

51. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See also, e.g., ALBERT BENJAMIN KELLEY, *THE PAVERS AND THE PAVED: THE REAL COST OF AMERICA'S HIGHWAY PROGRAM* (1971); HELEN LEAVITT, *SUPERHIGHWAY—SUPERHOAX* (1970); A. Q. MOWBRY, *ROAD TO RUIN* (1969).

52. See LIROFF, *supra* note 30, at 35 & Table 2-2 (showing a rise in highway location lawsuits from single figures in the late 1960s to 17 in 1970, 27 in 1971 and 48 in 1972).

53. See *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

posals.<sup>54</sup> The result was the reduction of NEPA to smaller decisions, largely *faits-accomplis*, and the absence of NEPA when the major deals are done.<sup>55</sup> Nothing could be further from what Congress thought—and said—it was doing.

The federal courts have continued to drop the ball on other aspects of NEPA, none of them fatal in and of themselves, yet cumulatively debilitating. These decisions include:

- Restrictions on the consideration of alternative courses of action,<sup>56</sup> perhaps the single most important element in NEPA review. (If there are no alternatives to a proposed course of action, why bother to review environmental impacts?)
- Termination of requirements for the mitigation of environmental impacts,<sup>57</sup> allowing blithe predictions of remedial actions that will, in reality, never take place.
- Failures to require the consideration of worst-case scenarios,<sup>58</sup> allowing agencies to avoid conveying the really bad news.
- Questioning use of the process for legislative proposals,<sup>59</sup> although the first thing for which Congress stated the process would be required was “proposals for legislation.”

54. *See generally* *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

55. In 1991, this author wrote the Chairman of the Council on Environmental Quality as follows:

NEPA is missing the point. It is producing lots of little statements on highway segments, timber sales, and other foregone conclusions; it isn't even present, much less effective, when the major decisions on a national energy policy and a national transportation policy are made. On the most pivotal development questions of our time, NEPA comes in late in the fourth quarter, in time to help tidy up.

Mike, I have taught, researched and litigated this stuff for twenty years. As I see it, CEO's challenge is not, per your invitation, to make NEPA a “succinct review for a single project.” It is, rather, to make NEPA work for legislative proposals and for programs that all but conclusively determine what the subsequent projects will be.

Letter from Oliver A. Houck to Michael Deland, Chairman, President's Council on Environmental Quality (Feb. 19, 1991) (on file with author).

56. *See* *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 552-53 (1978) (rejecting the need to consider energy conservation). *See also* *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991) (confining alternatives that must be considered to only those meeting the main goals of the project).

57. *See* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (endorsing unaccepted, indeed not-even-proposed, local ordinances as sufficient mitigation “measures” against the effects of a ski resort complex).

58. *See id.* at 354. To be sure, the Council on Environmental Quality had weakened its own worst-case regulation to obscure this requirement. *Compare* *Sierra Club v. Sigler*, 695 F.2d 957, 969-75 (5th Cir. 1983) (interpreting the original worst-case regulation) *with* 40 CFR § 1502.22 (the revised worst-case regulation).

59. *See* *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 554 (D.C. Cir. 1993) (Randolph, J., concurring).

- Exemption of government actions abroad,<sup>60</sup> perpetuating the same blindness in domestic policy that gave rise to NEPA.

The list goes on, and it can get depressing; Dr. Caldwell has reason for his expression of despair. NEPA did not have to be interpreted this way. These are self-inflicted wounds. These are court-inflicted wounds by judges who would legislate another law, and who show little respect for what Congress actually did or why.

Yet, they have not killed NEPA, nor can they. Having whittled the statute down to its irreducible bottom, there is little further damage the courts can do short of finding it, or its enforcement, unconstitutional.<sup>61</sup> Nor is there much even the most hostile Congress can do, for the same reasons, short of the politically costly step of repealing the statute. So, NEPA lives on in agency practice and in litigation and—far more often—in the threat of litigation, nipping at the heels of federal decision-making, surfacing greener alternatives, employing its own cadre in every federal agency, and providing access for thousands of individuals and community groups who count on the impact statement process to give them notice and a fighting chance. Dr. Caldwell complains that NEPA is more than an Administrative Procedure Act.<sup>62</sup> His observation is certainly correct, but it underestimates the incredible, APA-like enfranchising power that this statute has brought to the (one million? easily more) Americans who have participated in the NEPA process over the past thirty years,<sup>63</sup> as well as the effect of this power on the federal establishment. Agencies know NEPA is out there, and they fear it. And that has been salutary.

So, yes, NEPA has not done what it was intended to do. No statute could have. Many of the major, long-overdue, and extremely difficult improvements in federal planning—improvements clearly aspired to in NEPA's substantive provisions—are coming about through other, more targeted laws with more specific requirements,

---

60. See *NRDC v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981) (refusing to apply NEPA to export of nuclear materials to the Philippines).

61. Given the Court's current disposition to revive Constitutional doctrines limiting the reach of environmental statutes and their enforcement, see Oliver A. Houck, *Environmental Law and the General Welfare*, 16 PACE ENVTL. L. REV. 1 (1998), a similar approach to NEPA is by no means inconceivable.

62. See Administrative Procedure Act, 5 USC §§ 551-706 (1994). The Act, *inter alia*, requires "notice and comment" for informal (i.e., not adjudicatory) agency decisions allowing all citizens to comment on federal proposals affecting, among other things, the environment. See *id.*

63. A single environmental impact statement to reintroduce endangered wolves to Yellowstone National Park and central Idaho drew 160,265 comments. See Sherry Devlin, *Wolf Provokes Inadvertent Howlers*, HIGH COUNTRY NEWS, Sept. 19, 1994.



such as the Endangered Species Act<sup>64</sup> and the section 404 (wetlands) program of the Clean Water Act.<sup>65</sup> Yet other federal laws have since reached out to address the impacts of private actions on air, water, soils, and nearly every conceivable medium.<sup>66</sup> NEPA could not have hoped to change a century of waste disposal practices, grazing dependencies, deforestation, water use, and energy waste practices that were largely unsustainable and largely supported by federal subsidies, tax write-offs, and cornucopias of federal money the size of the highway construction program.<sup>67</sup> Nor could NEPA have hoped to ensure environmental priorities in the White House, the Congress, or an agency run by an Ann Gorsuch or a James Watt.<sup>68</sup>

It is hard to imagine what single law could have done so and what that law would say. It is here that Dr. Caldwell's book is at its least compelling and offers little other than exhortations reminiscent of section 101(b) (e.g., "enlarge public understanding of the need for an effective environmental policy, which is also policy for people in relation to the environment, and of the importance of NEPA principles for America's future;"<sup>69</sup> "ensure that the importance of NEPA principles are present in the attention span of political party leaders and the shapers of public opinion"<sup>70</sup>) and the long-debated proposal

---

64. 16 U.S.C. §§ 1531-1544 (1994).

65. See Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1994).

66. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1994). Each of these and other laws impose highly specific requirements on industry and other private parties.

67. See, e.g., U.S. DEPARTMENT OF INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS (1994) (identifying 45 major federal subsidy programs encouraging the development of wetland ecosystems). For federal programs impacting other natural areas, see THE GREEN SCISSORS CAMPAIGN OF CITIZENS UNITED TO TERMINATE SUBSIDIES, THE GREEN SCISSORS REPORT: CUTTING WASTEFUL AND ENVIRONMENTALLY HARMFUL SPENDING AND SUBSIDIES (1995) (on file with author); JOHN YOUNG ET AL., WELFARE FOR WASTE: HOW FEDERAL TAXPAYER SUBSIDIES WASTE RESOURCES AND DISCOURAGE RECYCLING (1999); ROLAND HWANG, MONEY DOWN THE PIPELINE: UNCOVERING THE HIDDEN SUBSIDIES TO THE OIL INDUSTRY (1995); FRIENDS OF THE EARTH, POLLUTERS SAVE WHILE PEOPLE PAY: EXPOSING 15 OF THE TAX CODE'S MOST UNFAIR TAX BREAKS (1995).

68. Ms. Gorsuch and Mr. Watt served respectively, as Administrator of the Environmental Protection Agency and as Secretary of the Department of the Interior in the 1980s. The environmental officials of that era, appointed in large measure for their opposition to environmental programs, left a record of assault on these laws unmatched before or since. See generally JONATHAN LASH ET AL., A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT (1984).

69. CALDWELL, *supra* note 7, at 155.

70. *Id.*

for a constitutional amendment for environmental protection<sup>71</sup>—a remedy that, of course, would trump a NEPA substantive policy altogether.<sup>72</sup>

Lynnton Caldwell's *The National Environmental Policy Act* is a lament. At the end of the day, NEPA did not do all that it was intended to do. Its goals remain goals. Its impact statement mechanism has indeed become something of a catechism, an institutionalized ritual in which the original words have lost their meaning. The lament, however, is as wrong as it is right, and Dr. Caldwell deserves more credit for his original contribution to the statute than for this current criticism of its performance. Perhaps he does not realize it—perhaps it is difficult for a non-lawyer to realize it, although Dr. Caldwell's advocacy for an "action-forcing" mechanism was lawyering at its best—but no law can say "Be Environmental!" and make it stick. Congress has to define the conduct, as it has in subsequent laws.

NEPA's great contribution—and it is both magnificent in its simplicity and deceptive in its power—is the environmental impact statement. It is not what the statement says that is important. It is in what comes before, in what agencies have to investigate and learn and listen to, in what they have to fear from other agencies and from envi-

---

71. *Id.* For a sampling and thoughtful assessment of articles on the subject of a Constitutional amendment for environmental protection, see ROGERS, *supra* note 9, at 62-67 and sources cited therein.

72. Once the Constitution were to declare a policy of environmental protection, that declaration would, of course, trump statutory law. Nevertheless, that declaration would be subject to a multitude of interpretations by the Supreme Court, a prospect giving some observers pause. See ROGERS, *supra* note 9, at 67. At bottom, however, one finds the same difficulty in framing a constitutional amendment that confronted Congress in enacting the substantive policies of NEPA in 1969—the need to say something sufficiently general to be of wide application and sufficiently specific to be capable of enforcement. Even were it not enforceable as law, of course a constitutional amendment might well carry a moral force that would strengthen the interpretation of other environmental and public laws, particularly in the establishment of procedural rights such as standing to sue. See Rodger Schlickeisen, *Protecting Biodiversity for Future Generations An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994); see also *Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999) (holding that the Montana Constitution disallows exceptions to state water quality anti-degradation policy). NEPA itself carried such force in its early years, and it boosted a pro-environmental interpretation of other laws and programs. See *Zabe v. Tabb*, 430 F.2d 199 (5th Cir. 1970) (viewing NEPA as giving the U.S. Army Corps of Engineers a duty to protect wetlands and waters of the United States); *Akers v. Resor*, 339 F.Supp. 1375 (W.D. Tenn. 1972), (viewing NEPA as revitalizing the Fish and Wildlife Coordination Act). Constitutions of other countries contain environmental provisions, a few of which have been given similar force and effect. In the United States, however, these decisions have been made largely on the basis of statutory law. Indeed, the very success of statutory environmental law in the United States, beginning with NEPA, has removed much of the urgency and momentum for a proposed constitutional amendment.

ronmental groups, the press, and reviewing courts, and in the every day responses and accommodations that they have to make. This was blockbuster stuff in the United States circa 1969, and it remains very difficult stuff in areas like genetic engineering, bio-prospecting, international lending, World Trade Organization commitments, and the new horizon of year 2000. The NEPA ideas of disclosure, public participation, alternatives, and judicial review are blockbuster stuff as well for the developed countries of Europe and are absolutely revolutionary stuff for developing nations in Latin America and the Far East and for those, like Croatia and Cuba, who are also signing on. In this one regard, this one *huge* regard, NEPA has been the largest environmental success in the world.

To the extent he can legitimately claim credit for it—and the evidence is that he can—Lynton Caldwell should sit back and enjoy a good stiff millennial drink. Well done! Following which, like the rest of us who labor in this vineyard, he should come back out swinging, because we will never save the environment with the one big blow he longs for. But we have to keep on swinging.