

1-1-1976

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Recommended Citation

Claire L. McGuire, *Emerging State Programs to Protect the Environment: “Little NEPA’s” and Beyond*, 5 B.C. Env'tl. Aff. L. Rev. 567 (1976), <http://lawdigitalcommons.bc.edu/ealr/vol5/iss3/7>

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EMERGING STATE PROGRAMS TO PROTECT THE ENVIRONMENT: "LITTLE NEPA'S" AND BEYOND

*Claire L. McGuire**

I. INTRODUCTION

During the late 1960's concern arose that the traditional methods of environmental protection were inadequate. This concern prompted a search for new techniques to address the problems of environmental degradation unattended by the traditional methods. Search occurred on both the federal and state levels and has led to the development of a range of programs designed to protect the environment. This article will discuss several such programs intended for implementation on the state level. Specifically, it will discuss three key programs: first, state environmental impact review programs modelled on that required of the federal government; second, comprehensive permit procedures designed to alleviate the problems inherent in single-purpose permit procedures; and third, controls on the use of areas of critical environmental concern. The article will then discuss the interrelationships between these programs.

II. EMERGING STATE PROGRAMS

A. *State Environmental Impact Review: "Little NEPAs"*

In 1969, Congress enacted the National Environmental Policy Act (NEPA).¹ Through it Congress mandated that federal agencies consider the environmental implications of their various activities. Following the federal lead, a number of states have enacted similar

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The Board of Editors of ENVIRONMENTAL AFFAIRS wishes to acknowledge the editorial assistance of Mitchell J. Sikora, Jr., member Massachusetts Bar.

¹ 42 U.S.C. §§ 4321 *et seq.* (Supp. 1975).

environmental impact review statutes (“Little NEPAs”). To understand fully the “Little NEPAs” and their value as state environmental protection measures, it is necessary first to review their federal model, NEPA.

1. *The National Environmental Policy Act (NEPA)*

NEPA established a unique procedural mechanism. The Act required that any proposals for legislation or other “major Federal actions significantly affecting the quality of the human environment”² include a detailed statement describing the environmental impact of the proposed action,³ any unavoidable adverse environmental effects,⁴ alternatives to the proposal,⁵ the relationship between long- and short-term uses of the environment,⁶ and any irreversible commitments of resources which would necessarily be involved if the proposal were implemented.⁷ This environmental impact statement (EIS) is to accompany the proposal through any necessary agency review processes.⁸ The statute also established the Council on Environmental Quality (CEQ).⁹ The role of the CEQ was further defined by Executive Order.¹⁰ The function of the CEQ is to smooth implementation of NEPA, although the Council was not given any approval or veto power. The CEQ is to issue guidelines for the preparation of impact statements.¹¹ These guidelines elaborate procedures to be followed by federal agencies in the preparation of an EIS. The CEQ has interpreted NEPA to require that federal agencies consider the environmental ramifications of their decisions and proposals. The EIS should be prepared at the earliest point possible in the decision making process, should allow for the circulation of a “draft statement” to obtain comments and criticism by other agencies and the public before preparation of the final EIS, and before the final decision.¹² The comments received should be

² *Id.* § 4334(c).

³ *Id.* (i).

⁴ *Id.* (ii).

⁵ *Id.* (iii).

⁶ *Id.* (iv).

⁷ *Id.* (v).

⁸ *Id.* § 4332.

⁹ *Id.* Title II.

¹⁰ Exec. Order 11514, 3 C.F.R. 271 (Supp. 1974), 42 U.S.C. § 4321 (1970).

¹¹ *Id.*

¹² CEQ Impact Statement Guidelines, B.N.A. Federal Regulations § 1500.7 (hereinafter cited as CEQ Guidelines).

considered, and the final EIS should reflect this consideration by response to those comments.¹³ NEPA's Section 102 EIS Requirement, by implementation of the CEQ's specific procedural guidelines, has sought to effect changes in the agency decision making process. Federal agencies now have the statutory authority to consider environmental concerns in their programs. Soon after NEPA's enactment the courts confirmed the exercise of such authority on the occasion of an applicant's challenge to an Army Corps of Engineers' decision to refuse a dredge-and-fill permit. In *Zabel v. Tabb*¹⁴ a federal circuit court of appeals held that the Army could refuse to issue the permit on non-navigational, environmental grounds in accord with the national policy as set forth in NEPA.¹⁵

Federal agencies not only have the duty to consider environmental factors; they must also demonstrate their consideration of those factors through the preparation of an EIS. CEQ guidelines and the NEPA decisional law establish the duty of an agency to describe fully the proposed action and to discuss its direct and indirect or secondary impacts.¹⁶ Comments and criticism received as a result of the circulation of a draft statement must be discussed in the final statement and attached to the finished EIS.¹⁷ The procedural mechanism established by NEPA has forced federal agencies to document their decisions and to analyze the impact of those decisions. It is an action-forcing statutory regime. The question remains whether it may force substantive results.

NEPA did not establish an authority to review agency compliance with the policy and directives set out in the statute. This omission has left first-line enforcement of NEPA in the hands of the courts. No one has yet seriously questioned the ability of the courts to enforce the foregoing procedural mechanism of the Act's Section 102. The courts have been willing to force agencies to set forth all known environmental impact,¹⁸ to discuss all possible alternatives to the proposed action, even those outside agency control,¹⁹ and to consider the impacts of the overall effects of broad agency

¹³ *Id.* § 1500.10(a).

¹⁴ 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

¹⁵ *Id.* at 213.

¹⁶ CEQ Guidelines § 1500.8(3).

¹⁷ *Id.* § 1500.10(a).

¹⁸ *Environmental Defense Fund, Inc. v. Army Corps of Engineers*, 325 F. Supp. 749, 758 (E.D. Ark. 1971).

¹⁹ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

programs.²⁰ The questions remain, however, what control, if any, NEPA exerts over substantive agency decisions, and whether that control is judicially enforceable. It is apparent that without such substantive enforcement NEPA will become meaningless as agency officials grind out impact statements capable of withstanding the most rigorous procedural review. What is necessary is for the courts to require that an agency may not disregard gross imbalances in economic benefit as compared to environmental costs, even if the EIS submitted is procedurally correct.

The Supreme Court has established the standard of review to be applied in NEPA contests²¹ in *Citizens to Preserve Overton Park v. Volpe*.²² In that case, the Court determined first what standards did *not* apply to the Secretary of Transportation's determination—the substantial evidence test and de novo review.²³ The Court instead applied a standard of "substantial inquiry." The plaintiffs were seeking a determination that the Secretary of Transportation had violated certain statutes.²⁴ The Court applied the substantial inquiry standard to the Secretary's decision to build a highway through a city park, and determined the standard to consist of three stages. First, the Secretary's decision is entitled to a presumption of regularity, but that presumption can not operate to shield his actions from a probing, in-depth review. Second, the court must determine whether the Secretary acted within the scope of his authority. This inquiry requires a finding that the decision made was not arbitrary, capricious, abusive of discretion, or otherwise erroneous in law. Finally, the ultimate standard is a narrow one. The Court is not empowered to substitute its judgment for that of the agency. The language of *Overton Park*,²⁵ permits interpretation of

²⁰ *Scientists Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973).

²¹ Once the court has determined NEPA to be substantive rather than merely procedural. See discussion below.

²² 401 U.S. 402 (1971).

²³ *Id.* at 414. The substantial evidence test would only apply ". . . when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing." *Id.* at 414. De novo review is authorized ". . . when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action." *Id.* at 415.

²⁴ Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 1653(f) (1970) and the Federal Highway Act of 1968, § 18(a), 23 U.S.C. § 138 (1970).

²⁵ 401 U.S. at 416.

the standard as an in-depth, probing review or a simple finding that the administrator did not act arbitrarily.

The second question addressed by the Court was when to apply this standard. Judicial review is available under *Overton Park* except where there is a statutory prohibition of review or where the action of the agency is committed to agency discretion by law.²⁶ The first exception calls for a "showing of clear and convincing evidence of a legislative intent to restrict access to judicial review."²⁷ The second exception is narrow, and is applicable where a statute is drawn in such broad terms that in a given case there is no law to apply.²⁸ The latter instance calls for an initial determination by the court whether there is "law to apply." If so, the reviewing court must apply the "substantial inquiry" standard to the administrator's actions in order to determine whether those actions accorded with the law.

The central issue arises from the threshold question. If NEPA gives the courts law to apply, then the standard of review is established. However, if the court interprets NEPA as a procedural requirement only, there will be no applicable law and agency actions under NEPA will be committed to discretion. If a court finds substantive requirements in NEPA, it can apply them to the merits of an agency decision. The court may then actively review the bases of the agency decision to assure compliance with NEPA policy. Or it may still, more passively, restrict its review to the standard of simple arbitrariness.

The circuit courts have split on the question whether Section 101(b) of NEPA²⁹ provides enforceable standards governing the sub-

²⁶ *Id.* at 410.

²⁷ *Id.* (citations omitted).

²⁸ *Id.*

²⁹ 42 U.S.C. § 4331(b) (1974). In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal government to use all practical 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 aesthetically 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;

stance of an agency decision (whether NEPA is available as law to apply). Two circuits have held that NEPA provides only procedural requirements.³⁰ Four circuits have addressed the question directly.³¹ The Fifth Circuit in *Environmental Defense Fund, Inc. v. Army Corps of Engineers*³² held that "the majority and better reasoned rule favors such [substantive] review."³³ The review envisioned by the court would be, although "meaningful," a limited one.³⁴ The District of Columbia allowed for the possibility of substantive review in its leading case, *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*.³⁵ In that case Judge J. Skelly Wright allowed for circumstances in which a court could review an agency's substantive decision.³⁶ The court's language was

(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:

³⁰ The Court of Appeals for the Ninth Circuit in *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814, 822 n.13 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974) stated its policy in a footnote: "We do not read the National Environmental Policy Act to give the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared and circulated in accordance with the NEPA requirements." The Court of Appeals for the Tenth Circuit in *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) said: "As we view it, then, the purposes of the NEPA are realized by requiring the agencies to assess environmental consequences in formulating policies, and by insuring that the governmental agencies shall pay heed to environmental considerations by compelling them to follow out NEPA procedures."

³¹ Two circuits have not directly addressed the issue, but rather have affirmed district court opinions allowing substantive review. See *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2nd Cir. 1974), *vacated*, 423 U.S. 809 (1975); *Environmental Defense Fund, Inc. v. Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974). Cf. Comment, *Tilting at the Environmental Windmill—the Quest for a Substantive Right to a Clean Environment*, 9 SUFFOLK U. L. REV. 1286 (1975); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975) (hereinafter cited as *Substantive Review Under NEPA*).

³² 492 F.2d 1123 (5th Cir. 1974).

³³ *Id.* at 1139.

³⁴ *Id.*

³⁵ 449 F.2d 1109 (D.C. Cir. 1971).

³⁶ *Id.* at 1115. "The reviewing courts probably cannot reverse a substantive decision on its merits, under Sec. 101, [of NEPA] 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." According to one commentator, "The court is not . . . saying that no substantive rights exist. On the contrary, the recognition of such rights is inherent in the qualifying use of the word 'unless'." Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S. D. L. REV. 279, 285 (1974) (hereinafter cited as Yarrington).

interpreted to require a court to "examine the merits of the case"³⁷ in its determination whether environmental factors had received adequate consideration.³⁸ The Seventh and Fourth Circuits have also adopted the position that substantive review is available.³⁹

Once the court expresses its willingness to review the substance of the agency action a second problem arises. Section 101 provisions of NEPA are couched in such broad terms that courts have found it difficult to allocate weight to different factors (economic, biophysical, social, etc.).⁴⁰ The difficulty has led the courts to adopt variant formulations of the standard of review enunciated in *Overton Park*⁴¹ as a correct balance between environmental costs and economic benefits.⁴² Neither the language nor the legislative history of NEPA offers much light for this judicial effort.⁴³ One commentator believes that the "lack of meaningful standards will

³⁷ Rankin v. Coleman, 394 F. Supp. 647, 654 (E.D.N.C. 1975), *modified*, 401 F. Supp. 664 (E.D.N.C. 1975).

³⁸ One troublesome case remains in the District of Columbia Circuit. In *Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401, 1404 (D.C. Cir. 1971) the court stated ". . . [it] will not substitute its judgment for that of the secretary on the merits of the proposed program, but will require that the secretary comply with the procedural requirements of the National Environmental Policy Act. . . ." This decision has been characterized as carrying "little weight," *Environmental Defense Fund, Inc., v. Army Corps of Engineers*, 470 F.2d 289, 299 n.15 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

³⁹ *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973): ". . . we feel compelled to hold that an agency's decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA." *Conservation Council v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973): ". . . District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA." (citation omitted).

⁴⁰ See Note, *Substantive Review Under NEPA*, note 31, *supra*.

⁴¹ District of Columbia: "We further note that the court's substantive review of agency actions to NEPA is much more limited [than the review of compliance with NEPA's procedural mandates]." *Scrap v. United States*, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd*, 422 U.S. 289 (1975). Eighth Circuit: "The substantive review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors . . . and whether the actual balance of costs and benefits struck by the agency . . . was arbitrary or clearly gave insufficient weight to environmental factors." *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972) (citations omitted).

⁴² The balancing approach was first used by Judge J. Skelly Wright in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), where he stated: "To 'consider' the former [economic and technical considerations] 'along with' the latter [environmental amenities] must involve a balancing process." 449 F.2d at 1113.

⁴³ For a case illustrating this lack of standards, see *Environmental Defense Fund, Inc. v. Tennessee Valley Authority*, 492 F.2d 466 (6th Cir. 1974), where the court affirmed the dismissal of the plaintiff's suit, even admitting that the project under consideration would cause "considerable ecological damage and disturbance," 492 F.2d at 468 n.1.

induce the courts to accept agency decisions uniformly, except in the most extreme cases."⁴⁴ The uncertainty of a substantive inquiry into agency decisions and of the balance to be struck by the courts between competing values is traceable to NEPA itself. Even though many commentators have accepted NEPA as some guide for judicial review of the substance of agency decisions,⁴⁵ the courts have not yet halted a project completely, but prefer to require revision of the deficient EIS to their own satisfaction.⁴⁶

After six years, doubts still remain that under NEPA, agencies are adequately weighing environmental values. These doubts have received expression by a number of courts in major decisions, the landmark being *Greene County Planning Board v. Federal Power Commission*.⁴⁷ Judge Kaufman of the Court of Appeals for the Second Circuit there held that the Federal Power Commission could not delegate its responsibility to prepare an EIS because of the "potential, if not likelihood, that the applicant's statement will be based on self-serving assumptions."⁴⁸ The same court reaffirmed this view in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*.⁴⁹ Although NEPA has since been amended to allow for such delegation in limited instances,⁵⁰ the doubts expressed by

⁴⁴ See Note, *Substantive Review Under NEPA*, *supra* note 31, at 746 (citations omitted).

⁴⁵ See, e.g., Note, *Substantive Review Under NEPA*, *supra* note 31; Yarrington, *supra* note 36, n. 316; Comment, *The Quest for a Substantive Right to a Clean Environment*, *supra* note 31; Wayman, Dutton, and Dunn, *The Adequacy of Environmental Impact Statements and the Development of State Law*, 27 S.W.L.J. 630 (1973); Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 E.L.R. 50028 (1973).

⁴⁶ See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971).

⁴⁷ 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

⁴⁸ *Id.* at 420 (citations omitted).

⁴⁹ 508 F.2d 927 (2d Cir. 1974), *vacated*, 423 U.S. 809 (1975).

⁵⁰ 42 U.S.C. § 4332(2)(D) (1974), *as amended*, (Supp. 1976): Any detailed statement required under subparagraph (c) after January 1, 1970 for any major federal action funded under a program of grants to states shall not be deemed to be legally insufficient solely by reason of having been prepared by a state agency or official if:

- (i) the state agency or official has statewide jurisdiction and has the responsibility for such action;
- (ii) the responsible federal official furnishes guidance and participates in such preparation;
- (iii) the responsible federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976 the responsible federal official provides early notification to and solicits the views of any other state or any federal land management entity of any action or any alternative thereto which may have significant impacts upon such state or affected federal land management entity and, if there is any disagreement on such im-

the courts in these cases remain.⁵¹ These doubts stem from a realization that agencies are mission-oriented, and that often these missions are incompatible with environmental considerations.⁵² “[NEPA] does not take into account that for the most part the agencies which must do the ‘full’ good faith balancing of economic and social costs against environmental costs are generally structured to be advocates for economic expansion. As long as agencies are left to do the balancing, and as long as they have a *dual mandate* of environmental protection and economic development in their particular field . . . is not the environment *bound* to come out on the short end?”⁵³

This agency bias can directly affect the outcome of a lawsuit against an agency under NEPA. An irreducible amount of discretion inheres in an agency's consultation about, and articulation of, environmental impact for the final EIS. The case of *Environmental Defense Fund, Inc. v. Tennessee Valley Authority*⁵⁴ illustrates this point. Plaintiffs EDF were seeking to enjoin the TVA from completing construction of its Tellico Dam project on the basis of an alleged insufficiency of the EIS's treatment of the archeological loss that would result from construction. After hearing expert testimony regarding the archeological significance of the area to be inundated by the dam impoundment and after examining the EIS discussion of the archeological impact, the district court ruled that TVA had adequately complied with NEPA. On appeal, the Sixth Circuit affirmed,⁵⁵ stating that plaintiff EDF was “over critical” of the TVA's EIS. In light of the caution of *Overton Park* that “the Court is not empowered to substitute its judgment for that of the agency,”⁵⁶ an agency's presentation of its own balance between envi-

pacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

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

⁵¹ See, e.g., J. Sax, *Defending the Environment*, pp. 60-61 (Alfred A. Knopf, 1971).

⁵² See, e.g., SECOND ANNUAL CEQ REPORT (1971) at 26: “Some agencies or other components define their mission in a narrow sense which excludes adequate consideration of environmental protection.”

⁵³ Judge J. Oakes, *Developments in Environmental Law*, 3 E.L.R. 50008 (1973). Cf. testimony of Roger C. Cramton in *Joint Hearings on NEPA before Comm. on Public Works and Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess., ser. 92-H32, at 410 (1972).

⁵⁴ 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

⁵⁵ 492 F.2d 466 (6th Cir. 1974).

⁵⁶ 401 U.S. 402 (1971).

ronmental costs and economic benefits may swing the court's decision in its favor.

In summary, the imprecise standard of review along with the impracticability of substantive review of agency compliance with NEPA policy have cast doubt upon the success of the EIS process at the federal level.⁵⁷

2. "Little NEPAs"

The requirement of an environmental impact statement gained favor with environmentalists and legislators in many states, and led to the enactment of a host of state environmental impact review statutes modelled, to varying degrees, after NEPA.⁵⁸ Most of the state acts impose requirements that agencies consider impacts and demonstrate this consideration through preparation of a formal document termed variously an environmental impact statement (EIS) or an environmental impact report (EIR). Generally, the state acts closely follow NEPA and specify a range of factors to be considered in the impact review.⁵⁹ Further, all states with an impact statement requirement have designated an agency to coordinate the program or at least to develop guidelines.⁶⁰

The similarity of wording and intent between NEPA and its state counterparts has led state courts to borrow heavily from the voluminous federal case law construing NEPA's provisions. The leading California case best exemplifies this trend. In *Friends of Mammoth v. Board of Supervisors of Mono County*⁶¹ Justice Mosk of the California Supreme Court relied on the definition of the term "action" under NEPA to determine whether "project" under California's statute, the California Environmental Quality Act (CEQUA),⁶² included the grant of a conditional use permit by the County Board

⁵⁷ Stoel, *Environmental Decision Making by Federal Agencies*, 4 E.L.R. 50128 (1974).

⁵⁸ As of August 1, 1974, twenty-one states and Puerto Rico had adopted EIS requirements similar to NEPA. A number of cities have also adopted EIS requirements. FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 5 E.L.R. 50015 (1975) (hereinafter cited as FIFTH ANNUAL CEQ REPORT).

⁵⁹ See, e.g., Washington State Environmental Policy Act, WASH. REV. CODE § 43.21C.030(c)(i)-(v) (1974 Supp.) which sets out exactly the language of NEPA § 102(c).

⁶⁰ FIFTH ANNUAL CEQ REPORT, note 58 *supra* at 50017; see, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE § 21083 (West Supp. 1974): "The Office of Planning and Research shall prepare and develop guidelines for the implementation of this division by public agencies."

⁶¹ 104 Cal. Rptr. 761, 502 P.2d 1049 (S. Ct. 1972) (as modified).

⁶² CAL. PUB. RES. CODE §§ 21000 *et seq.* (West Supp. 1974).

of Supervisors.⁶³ The similarity of language between NEPA and "Little NEPAs," as well as the apparent early inclination of state courts to borrow from the federal case law, boded that NEPA's successes and shortcomings would be repeated on the state level. Experience proved otherwise as the states sought to apply the experiences and requirements of NEPA to their own administrative abilities and needs.

Most observers agree that the achievements of NEPA have not generally been repeated at the state level.⁶⁴ One of the major reasons is an inadequate amount of funding and staffing of EIS programs at the state level.⁶⁵ States may not be able to fund preparation of EIS's to the extent of the federal government, and are not always able to hire the staff necessary to implement fully an EIS program.⁶⁶ The state statutes do not uniformly make provision for a developer to pay for preparation of an EIS when seeking a license or permit from a state agency, and thereby leave the state to absorb the considerable cost of preparing an EIS.⁶⁷

The scope of coverage of the "Little NEPAs" is the second major difficulty. All state statutes apply to major actions undertaken directly by a state agency. Undoubtedly, these projects can pose serious threats to the environment, but many sub-state governmental activities remain beyond the scope of the statutes. At the county and local levels decisions are made which may directly affect the future growth of an area and have a significant impact on the environment.⁶⁸ If a state does not include all levels of governmental

⁶³ Other states have also applied the NEPA federal case law in their own courts. See, e.g., *Juanita Bay Valley Com. Ass'n v. City of Kirkland*, 9 Wash. App. 59, 510 P.2d 1140 (1973). "It is well settled that when a state borrows federal legislation it also borrows the construction placed upon such legislation by the courts." 510 P.2d at 1147 (citations omitted).

⁶⁴ AMERICAN BAR ASS'N, *Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection*, FINAL REPORT BY THE SPECIAL COMMITTEE ON ENVIRONMENTAL LAW 76 (hereinafter cited as ABA REPORT); FIFTH ANNUAL CEQ REPORT at 50016.

⁶⁵ FIFTH ANNUAL CEQ REPORT at 50016.

⁶⁶ For example, Massachusetts Division of Waterways has approximately a one year backlog in waterways permits occasioned by an inability to fund EIS review.

⁶⁷ It was estimated that the EIR program under CEQUA would cost the city of Los Angeles \$865,000 in 1973. "Even routine reports were costing \$2500." Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URBAN L. ANNUAL 3, 54 (1974) (hereinafter cited as *NEPA's Progeny*).

⁶⁸ Some writers argue that local government control over land policy has led to many of our environmental problems today. See, e.g., Comment, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U.L. REV. 736, 752 (1974):

On environmental grounds, the traditional policy of local control of land use manage-

activities, developers wary of the EIS process may revamp their projects so as to require only sub-state level approval. In this way, significant projects can escape EIS regulation completely.⁶⁹

For the most part, states enacted "Little NEPAs" to supplement existing governmental structures. In many states, the existing structure has caused considerable discontent with the superimposed EIS requirements. These structures require a developer to obtain multiple permits or licenses from different agencies before proceeding with his project.⁷⁰ The grant of each permit is a discretionary act within the provisions of an EIS requirement. If the proposal is by a state agency, some "Little NEPAs" allow for a lead agency concept, giving the EIS preparation responsibility to the agency that is primarily responsible for the project.⁷¹ Such a concept is not always available to a private developer who may require many permits from many agencies, no one of which could be deemed to have primary responsibility. This plurality leads to the necessity of many impact statements, resulting in delays, duplication of effort, and expense. These problems can cause dissatisfaction to developers and environmentalists. Developers are unhappy with the costly delays which they may view as inseparable from environmental controls. Environmentalists fear that the requirement of a great number of separate permits for a given project may lead to a less than thorough consideration of the total environmental impact of that action. At the same time regulators may feel that the existence of many environmental administrative requirements must be rationalized to prevent emasculation of existing controls in times of economic stress.⁷²

ment through zoning has contributed to urban sprawl, destruction of open space, shorelines, and wetlands, building in floodplains, concentrating industrial and other waste sources in vulnerable parts of the environment or near human living centers increasing exposure to pollution, noise, nuisance, and other environmental hazards. It has been argued that local authorities are too susceptible to political and economic pressure and cannot look beyond their jurisdictional boundaries (citation omitted).

⁶⁹ The number of EIS's prepared annually offers a good illustration. In California, which prepares a significant number of EIR's on private and local actions, it is estimated that 6000 statements per year are prepared. In Washington, which requires EIS preparation at county level, it is estimated that 200 EIS's are prepared per year. In other states, the range is between 10 and 50. FIFTH ANNUAL CEQ REPORT at 50017.

⁷⁰ For example, a developer wishing to undertake filling activities in certain wetland areas of Massachusetts would be required to obtain a waterways license, MASS. GEN. LAWS ANN. c. 91 (Supp. 1976), and a wetlands permit, MASS. GEN. LAWS ANN. c. 131 (Supp. 1976), as well as discharge permits, MASS. GEN. LAWS ANN. c. 21, § 43 (Supp. 1976). The EIS requirements of the Massachusetts Environmental Policy Act (MEPA) are applicable to most of these activities, MASS. GEN. LAWS ANN. c. 30, §§ 61, 62 (Supp. 1976).

⁷² Interview with John J. O'Brien, Assistant Counsel to Division of Water Pollution Control, Massachusetts Executive Office of Environmental Affairs, Nov. 17, 1975.

One notable aspect of the adoption by many states of "Little NEPAs" is the absence of a significant amount of reported case law under these statutes. It is difficult to determine the exact reason. Possibly, by careful observation of their model NEPA, the states have anticipated and avoided some of the problems arising under the federal statute.⁷³

B. *Comprehensive Permitting*

Traditionally, states have dealt with the protection of various environmental values by review or permit requirement for activities affecting those values.⁷⁴ This regulation has resulted, over time, in the requirement that a particular project obtain many such agency clearances before it may proceed. Developers may have already become dissatisfied with these procedures and attacked them as restrictive, dilatory, and expensive. With the imposition of EIS requirements on each individual permit procedure in many states, the impact of the sizeable number of such permit requirements became most apparent. Environmentalists saw a need to fill in the gaps between these programs in order to insure that all relevant issues were addressed as state agencies made decisions, and to make certain that limited state agency resources were employed efficiently and effectively in reviewing development proposals.⁷⁵ Faced with mounting environmental impact obligations, pressure from developmental interests to limit the individual resource protection permits required under state law, and insistence from environmentalists to tighten agency environmental review programs, some states sought to streamline their existing environmental protection programs. This led to the emergence of state agency permit or review procedures called Comprehensive Permit Plans (sometimes referred to as One-Stop Permitting).⁷⁶

There are two basic types of comprehensive permit plans. Under the first, a central state agency is established to issue one project permit superseding all permits or licenses previously required from many agencies. Various procedures may be established to enable central agency consultation with any smaller agency having estab-

⁷³ "The federal government has served as an experimental laboratory for the various states." Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 E.L.R. 50090 (1973).

⁷⁴ See note 70, *supra*.

⁷⁵ Interview with John J. O'Brien, note 72, *supra*.

⁷⁶ Such a program is under consideration in Massachusetts. Memo to Governor Dukakis from Frank Keefe, Director of Massachusetts Office of State Planning, Dec. 2, 1975.

lished expertise in an area affected by the proposed project and to enable public hearings to inform all concerned citizens about the development under consideration.

In the second type of one-stop permitting, a developer submits an application to a central agency acting merely as a "clearinghouse." The clearinghouse agency then circulates the application for the developer, establishes time limits within which any interested agencies must respond regarding the requirement of a permit or license, and time limits for their decision on the issuance of the permit. The smaller agencies retain their traditional role of granting or denying individual permits or licenses, while the central clearinghouse agency acts merely to consolidate the applications previously required.

Either system usually includes a particular threshold project of minimum size which will call the comprehensive procedure into play, and free smaller projects or particular classes of projects from the clearinghouse process.

A plan of the first type has been suggested for implementation at the state level by the Special Committee on Environmental Law of the American Bar Association.⁷⁷ The Committee proposed the creation of a new agency at the state level to be known as the Industrial Siting Council (ISC).⁷⁸ The ISC would have jurisdiction over all development of major environmental significance beyond local boundaries, with complete authority vested in the Council to license a development project.⁷⁹ The ISC would be responsible for conducting the environmental evaluation of the proposed project, with the factors to be studied to include bio-physical, social, cultural, and economic considerations.⁸⁰ Inherent in this plan is the need for furnished guidelines for the assessment of the costs and benefits of a proposed project. Under the Committee proposal, these guidelines would be established by the state legislature, which would determine the relative weight to be given competing values.⁸¹ The proposal includes a two-stage hearing process, with the first stage con-

⁷⁷ *Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection*. FINAL REPORT BY THE SPECIAL COMMITTEE ON ENVIRONMENTAL LAW OF THE AMERICAN BAR ASS'N, Approved Aug. 1974 (hereinafter cited ABA Plan); Greene, *Reforming Procedures for Industrial Siting*, 61 A.B.A.J. 449 (1975).

⁷⁸ ABA Plan at 2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 11-12.

⁸¹ *Id.* at 12-13. It is envisioned that the legislature would also provide criteria for membership on the Council. *Id.* at 14.

sisting of an informal, legislative type hearing.⁸² The first hearing would be held after the preliminary environmental evaluation⁸³ and would be open to the public so as to encourage maximum participation in the siting process.⁸⁴ The second stage of the anticipated hearing process would come into play only if unresolved conflicts arose. This second hearing would be adjudicatory in nature, with a record of the proceedings kept to enable judicial review by the highest appellate court of the state.⁸⁵

A plan of the second type, a clearinghouse agency concept, has been implemented in Washington state. The Environmental Coordinated Procedures Act (ECPA)⁸⁶ establishes the Department of Ecology (DOE) as the clearinghouse agency of the state.⁸⁷ The voluntary procedure envisioned by ECPA allows a developer to file a master application with the DOE requesting the issuance of all permits necessary for the completion of his project.⁸⁸ After receipt of the master application, the DOE requests statements of interest from sister agencies describing the permit or license programs to which the proposed project may be pertinent.⁸⁹ The DOE then supplies the developer with any necessary applications for permits identified in the statements of interest. The developer forwards the completed applications to the individual agencies for consideration.⁹⁰ At this point the DOE must publish notice of a public hearing on the proposed project.⁹¹ Agencies are directed to make final decisions on

⁸² *Id.* at 14.

⁸³ This preliminary environmental evaluation could consist of the preparation of a draft EIS pursuant to a "Little NEPA" in force in that particular state. See ABA Plan at 15.

⁸⁴ Under the Plan, interested state and federal agencies, local governments, and members of the public would be *invited* to comment on either the proposal itself or the environmental evaluation. In contrast, state agencies and units of local government which would have had jurisdiction over the project if their authority had not been preempted by the ISC would be *required* to report their recommendations with respect to the issuance of any necessary licenses or permits. *Id.*

⁸⁵ *Id.* at 15. Under the Plan, it would not be necessary for a person to participate in the first-stage informal hearing to seek judicial review, but only those who participated in the second-stage, formal hearing could initiate an appeal. *Id.* at 16-17. This arrangement would prevent all collateral attacks on the ISC decision. *Id.* at 17.

⁸⁶ WASH. REV. CODE § 90.62 (1974 Supp.).

⁸⁷ *Id.* § 90.62.040(1).

⁸⁸ *Id.*

⁸⁹ *Id.* § 90.62.040(2).

⁹⁰ *Id.* § 90.62.040(4). Coordination with SEPA should take place here, with preparation of an EIS. SEPA provides for the adoption of Rules by the DOE to insure that one detailed EIS will be utilized by all government agencies participating in the processing of a master application. WASH. REV. CODE § 43.21C.160.

⁹¹ WASH. REV. CODE § 90.62.050(1). If all agencies having an interest in the proposed project

the applications within a time limit to be specified by the DOE after completion of the hearing.⁹² Thereafter, ECPA provides for administrative review by the DOE for any aggrieved person, followed by judicial review.⁹³

Both ECPA and the ABA Plan set out to consolidate multiple permit procedures into one comprehensive process. Central, is a single forum at which public comment will be received: that is, the public hearings provided by the DOE under ECPA and the two-stage public hearing before the ISC afforded by the ABA Plan. ECPA accomplishes this consolidation without effect upon the traditional advocacy role of state agencies in their particular area of concern.

The ABA Plan, on the other hand, substantially changes this traditional role. It confers on the ISC power to grant one comprehensive permit and thereby replaces the smaller agency's licensing function. In some states this reorganization may be an undesirable centralization of power and require major legislative action for implementation. The centralized agency may well lack the expertise developed by the smaller state agencies in years of reviewing project permits or licenses for use of a state's natural resources.⁹⁴ Although under the ABA Plan a state agency may be invited or even required to comment,⁹⁵ its licensing function on major projects would pass to

agree that a public hearing "would not be of value taking into consideration the overall public interest," no public hearing will be held and the DOE shall give notice of the proposal and state that members of the public may comment in writing. *Id.* 90.62.050(2). No mention is made at this point in the statute of the availability of an EIS pursuant to SEPA, REV. CODE WASH. 43.21C. This has led to the criticism by one commentator that the public hearing would be an "illusory one for the public" because they will not yet have had access to an impact statement. Corker and Elliot, *The Environmental Coordinated Procedures Act of 1973, or ECPA! ECPA! Rah! Rah! Rah!*, 49 WASH. L. REV. 463, 491 (1974) (hereinafter cited as Corker, *ECPA! ECPA!*).

⁹² REV. CODE WASH. 90.62.060 (4). Where no public hearing is held pursuant to REV. CODE WASH. 90.62.050(2) (*see* note 90, *supra*), the DOE is to transmit any written comments received to the agencies and then establish a time limit by which final agency decisions must be made. REV. CODE WASH. 90.62.060(5).

⁹³ REV. CODE WASH. 90.62.080.

⁹⁴ In states with statutes requiring the preparation of an EIS, a check on these agencies' decisions may already exist and thereby provide for maximum expert comment on any proposed project. Massachusetts is an example, as the Massachusetts Environmental Policy Act (MEPA) requires state agencies to prepare an impact statement on a proposed project.

Through circulation of this EIS, individual agencies are required to comment in order to highlight areas of concern in need of further study. If the ABA Plan were enacted in a state, this circulation could be provided by coordinating EIS requirements with the preparation of the ISC's environmental evaluation. *See* note 79, *supra*, and accompanying text.

⁹⁵ *See* note 83, *supra*.

the ISC.⁹⁶ Consequently the smaller agency would have no authority to deny a permit or license, and therefore no power to stop a particular project thought to pose a major environmental threat. In states with an established agency review system, the procedure outlined in ECPA may be more acceptable. That procedure retains traditional agency licensing functions and still allows for a comprehensive process for review of a development proposal.

ECPA is not necessarily applicable to all development proposals. The Plan establishes certain prerequisites for the consolidated proceeding. In order for a developer to be able to use the ECPA process, he must first choose to do so. Compliance with the statute is not a prerequisite for obtaining state agency licenses or permits.⁹⁷ The developer must also require a permit from the Department of Ecology.⁹⁸ And, he must obtain a certificate of compliance from the appropriate local government that his project complies with all local zoning ordinances or a certificate that such ordinances are inapplicable.⁹⁹

These three prerequisites for utilizing the ECPA procedures permit many projects to fall outside the comprehensive review. At the outset, a developer may choose not to make use of the clearinghouse vehicle. Some projects posing environmental threats will pro-

⁹⁶ The ISC would have authority to license major industrial facilities and all land development proposals posing similar siting concerns. ABA Plan at 6.

⁹⁷ WASH. REV. CODE § 90.62.010(2)(a):

The purposes of this chapter are to:

- (a) Provide for an optional procedure to assist those who, in the course of satisfying the requirements of state government prior to undertaking a project which contemplates the use of the state's air, land, or water resources, must obtain a number of permits, from the department of ecology and one or more state or local agencies by establishing a mechanism in state government which will coordinate administrative decision-making procedures, and related quasi judicial and judicial review, pertaining to such documents.

⁹⁸ WASH. REV. CODE § 90.62.010(2)(a), note 97 *supra*.

⁹⁹ WASH. REV. CODE § 90.62.100(1):

No master application pertaining to a project filed under RCW 90.62.040 shall be processed under this chapter unless it is accompanied by a certification from the pertinent local government that the project is in compliance with all zoning ordinances, and associated comprehensive plans, administered by said local government relating to the location of the project: *Provided*, that if the local government has no such ordinances or plans, the certification from the local government shall so state and issue. . . . Local governments are authorized to accept applications for certifications as provided in this section and are directed to rule upon the same expeditiously to insure that the purposes of this chapter are accomplished fully. . . .

The requirement that local governments expeditiously issue the certificate of compliance has been criticized on the grounds that the "expeditious" decision necessarily takes place before a full consideration of environmental issues can be conducted at the local level. Corker, *ECPA! ECPA!* at 476.

ceed under the existing system, and continue the fragmented process originally provoking proposals for reform.¹⁰⁰ Even if a developer desires to utilize ECPA, he must require a permit from the Department of Ecology to be able to file a master application.¹⁰¹ Any project not requiring such a permit would be barred from the ECPA process.

The next prerequisite, the certificate of compliance, would effectively eliminate local governments from participation in the eventual comprehensive project review and thereby eliminate those who may be most affected by the project proposal.¹⁰² Realizing that the lack of jurisdiction over proposed development can frustrate the comprehensive review, to the detriment of environmental values as well as expeditious decisionmaking,¹⁰³ the ABA Plan provides for jurisdiction over all development in the ISC, with specific statutory exemptions to be set forth for those projects posing no serious environmental threat.¹⁰⁴ This approach avoids the shortcomings of thresholds, which permit projects scaled below applicable standards to escape and to defeat the purposes of the comprehensive review.¹⁰⁵ The key to the success of any comprehensive review program turns on the comprehensiveness of qualitative and quantitative threshold standards.

C. *Controls in Areas of Critical Environmental Concern*

State experience with developmental pressure in geographical areas of critical environmental concern has demonstrated the need for compliance with overall conservation planning. Legislative response has either supplanted or supplemented standard protection statutes with conservation plans prescribing the location, magnitude, and quality of development. The following legislation is illustrative.

¹⁰⁰ See note 75, *supra*, and accompanying text.

¹⁰¹ WASH. REV. CODE § 90.62.010(2)(a), note 97 *supra*.

¹⁰² See California Coastal Plan, Part III, 180.

¹⁰³ ABA Report at 6.

¹⁰⁴ *Id.*

¹⁰⁵ This weakness is most obvious when a threshold is set for projects of a certain size. For example, if a comprehensive review system is set up to cover only developments over a certain number of housing units or square feet, a developer may scale his project to below that size. The result could be a proliferation of small developments that possibly pose even greater environmental threats than one large development could.

1. *The New York Adirondack Park Agency Act*

The Adirondack Park is an area of approximately 9000 square miles in upstate New York. Sixty percent of the Park property is privately owned, with most of the remaining lands protected under the New York State Constitution.¹⁰⁶ Much of the privately owned Park areas are not covered by any local land use controls. That fact, in addition to its sheer size and constant use by many state residents, makes it specially suited to more than local controls.

The Adirondack Park Agency Act¹⁰⁷ establishes as its basic purpose the insurance of optimal overall “. . . conservation, protection, preservation, development, and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park.”¹⁰⁸ The Act seeks to balance potentially conflicting land uses. These uses are described in a land use and development map plan allowing for differing intensities of development. The map divides all of the private lands of the Park into six uses.¹⁰⁹ The purposes of these classifications are set out in detail in the Act, with listings of primary and secondary compatible uses.¹¹⁰ The Act also establishes specific restrictions applied, as a matter of law, to any new land use and development or subdivisions involving the Park's shoreline areas.¹¹¹ For certain projects fitting into the overall land use plan, but needing further controls by virtue of their complexity or size, the Act provides for more comprehensive review with an eye toward the critical state and regional interest in the preservation of the Adirondack area.¹¹²

The administration and enforcement of the land use and development plan rests with the Adirondack Park Agency (Agency). The Agency is composed of eleven members, with five to be full-time Park residents.¹¹³ Three members are to be residents of the state

¹⁰⁶ “Nearly all of the state's 2,250,000 acres are part of New York's forest preserve and as such are protected by the ‘forever wild’ clause of the New York State Constitution.” Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612, 614 (1975) (hereinafter cited as Booth, *Adirondack Park*).

¹⁰⁷ N.Y. EXEC. LAW art. 27, § 800 (McKinney 1974 Supp.).

¹⁰⁸ *Id.* § 801.

¹⁰⁹ *Id.* § 805: hamlet, moderate intensity use, low intensity use, rural use, resource management, industrial use.

¹¹⁰ *Id.* See also Booth, *Adirondack Park*, at 621.

¹¹¹ N. Y. EXEC. LAW art. 27, § 806 (McKinney 1974 Supp.).

¹¹² *Id.* § 809. These projects are termed either Class A or Class B regional projects, and include such uses as airports, ski centers, and junkyards. *Id.* § 810.

¹¹³ *Id.* § 802.

outside the Park, with the Commissioner of Environmental Conservation, the Secretary of State, and the Commissioner of Commerce completing the membership.¹¹⁴ In addition to the grant of general authority and responsibility,¹¹⁵ the Agency is empowered to review and to evaluate the land use and development plan,¹¹⁶ to amend the plan in certain instances,¹¹⁷ to hold public hearings,¹¹⁸ to grant variances in areas not governed by a local land use program,¹¹⁹ and to review and approve certain of the projects¹²⁰ which, because of complexity or size, pose problems of a regional nature.¹²¹ These projects must receive a permit from the Agency before proceeding,¹²² and the

¹¹⁴ *Id.* There is also created a local government board to advise and assist the Agency. *Id.* § 803-a. The membership of this board is composed of one representative from each of the twelve counties wholly or partially within the boundaries of the Park. *Id.*

¹¹⁵ *Id.* § 804:

The agency shall have the power:

1. To sue and be sued;
2. To make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this article;
3. To establish and maintain such facilities as may be necessary for the transacting of its business;
4. To appoint an executive officer, officers, agents, employees, and prescribe their duties and qualifications and fix their compensation;
5. To utilize to the extent feasible the staff and facilities of existing state agencies pursuant to an allocation to be made by the director of the budget;
6. To hold hearings and subpoena witnesses in the exercise of its powers, functions and duties provided for by this article;
7. To contract for professional and technical assistance and advice;
8. To contract for and to accept any assistance, including but not limited to gifts, grants, or loans of funds or of property from the federal government or any agency or instrumentality of the state, or from any other public or private source and to comply, subject to the provisions of this article, with the terms and conditions thereof, subject to the approval of the director of the budget;
9. To adopt, amend and repeal, after public hearing (except in the case of rules and regulations that relate to the organization or internal management of the agency), such rules and regulations, consistent with this article, as it deems necessary to administer this article, and to do any and all things necessary or convenient to carry out the purposes and policies of this article and exercise powers granted by law; and
10. To report periodically to the governor and the legislature on the conduct of its activities but not less than once a year, furnishing a copy of such report to the clerk of the county legislative body of each county wholly or partly within the park and to the review board.

¹¹⁶ *Id.* § 805(1)(b).

¹¹⁷ *Id.* (c).

¹¹⁸ *Id.* (e).

¹¹⁹ *Id.* § 806(3).

¹²⁰ *Id.* § 807(1).

¹²¹ *Id.* § 809. See note 112, *supra*, and accompanying text.

¹²² *Id.* (5), (6).

grant of such permit may be conditioned on the fulfillment of certain requirements imposed by the Agency.¹²³

The enforcement provisions provide for heavy penalties and for imprisonment, with the attorney general empowered to institute any appropriate action necessary to insure compliance with the Act.¹²⁴ The acts of the Agency are challengeable by any aggrieved person, including a local government appearing as a party in any proceeding before the Agency.¹²⁵

Local control over land use is not preempted by the Act's provisions, but is rather incorporated into the overall land scheme. The intent of the legislature was to leave much of the day-to-day details of enforcement in the hands of the local governments¹²⁶ in order to encourage the Park's local governments to adopt and effectively administer local land use programs fitting within the broad regional guidelines of the Act.¹²⁷ These local programs are to be reviewed by the Agency to insure compliance with certain criteria,¹²⁸ including the program's furtherance of the land use and development plan,¹²⁹ its reasonable application of the overall intensity guidelines,¹³⁰ and the adequacy of its provisions for administration and enforcement.¹³¹

In short, the Adirondack Park Agency Act seeks to protect the critical state interest in the Adirondack Park. The method adopted for this protection is a blend of regional and local controls, with a regional land use map guiding the development of the counties, towns, and villages existing within the bounds of the Park.

2. *The California Coastal Zone Conservation Act*

The California coastline extends for 1100 miles from the southern tip of Oregon to the Mexican border. Along this coast are strung many cities, towns, and villages having jurisdiction over a small piece of California's most vital natural resource. Because of the nature of the ocean itself, a town polluting the water within its own

¹²³ *Id.* (13).

¹²⁴ *Id.* § 813.

¹²⁵ *Id.* § 817.

¹²⁶ *Id.* §§ 807, 808.

¹²⁷ Booth, *Adirondack Park*, at 628.

¹²⁸ N. Y. EXEC. LAW art. 27, § 807(2) (McKinney 1975 Supp.).

¹²⁹ *Id.* (a).

¹³⁰ *Id.* (c). The local land use program may be *more* restrictive than the overall intensity guidelines. *Id.*

¹³¹ *Id.* (g).

boundaries might never feel the effects of that pollution. While sewage or other pollutants introduced into an area may not affect the water in that area, it can be carried to pollute the water of a town many miles further down the coast.¹³² Consequently a state-wide interest arises in the conservation of coastal resources. For this reason, the coastal zone requires more than local controls.

In 1972, the citizens of California approved an initiative measure creating the California Coastal Zone Conservation Commission (CCZCC) and six regional commissions.¹³³ These commissions were established to prepare a coastal conservation plan and administer an interim permit procedure designed to prevent overdevelopment of the coastal zone before adoption of the conservation plan. The CCZCC has jurisdiction over all development within an established "permit area"¹³⁴ during the interim permit procedures, and is mandated to prepare a conservation plan for the entire "coastal zone."¹³⁵ Before adoption of the conservation plan, a permit from the CCZCC will be required for any development¹³⁶ within the permit area. This permit will be additional to any license or permit previously re-

¹³² Comment, *Coastal Controls in California—Wave of the Future?*, 11 HARV. J. LEGIS. 463, 465 (1974).

¹³³ CAL. PUB. RES. CODE §§ 27000-27650 (West 1976).

¹³⁴ CAL. PUB. RES. CODE § 27104 (West 1976):

"'Permit area' means that portion of the coastal zone lying between the seaward limit of the jurisdiction of the State and 1,000 yards landward from the mean high tide line of the sea. . . ."

¹³⁵ *Id.* § 27100:

'Coastal zone' means that land and water area of the State of California from the border of the State of Oregon to the border of the Republic of Mexico, extending seaward to the outer limit of the state jurisdiction, including all islands within the jurisdiction of the state, and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego Counties, the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance.

¹³⁶ Development, as used in the Act, means

on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision of land pursuant to the Subdivision Map Act and any other division of land, including lot splits; change in the intensity of use of water, ecology related thereto, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility, and the removal or logging of major vegetation. As used in this section, 'structure' includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

Id. § 27103.

quired from other government agencies.¹³⁷ For most developments, a permit will issue on the affirmative vote of a majority of the Regional Commission.¹³⁸ For certain developments involving more than local impact, a two-thirds vote is needed for issuance.¹³⁹ The permit procedure will remain in effect after the adoption of the conservation plan, the standard for issuance being compliance with the conservation plan itself rather than compliance with the policy and objectives of the Coastal Zone Conservation Act.

On December 1, 1975 the QCZCC presented its conservation plan. In accord with its mandate in the Act,¹⁴⁰ the plan addresses itself to individual elements, including a recreation element, an energy element, and an element guaranteeing public access to the coast. Included within each element are far-reaching recommendations covering such areas as transportation, land acquisition by the state, and natural resource management. The plan's 162 policy recommendations seek not to stop growth, but rather to give it a reasoned direction.¹⁴¹

As an accommodation of the needs and desires of the myriad of people interested in the future of the coastal zone, the Conservation Plan sets certain priorities. The Plan promotes agricultural use, expansion of commercial fishing and fisheries research, acquisition of park land, and the restoration of the coastal environment.¹⁴² The Plan seeks also to promote viable neighborhood communities as coastal resources in themselves.¹⁴³ The Conservation Plan must harmonize such conflicting goals as resource protection, conservation, retention of natural areas and increasing coastal access, economic development, and urban expansion.¹⁴⁴ Most restricted under the Plan will be the dredging and filling of wetlands and other activities posing substantial environmental threats.¹⁴⁵

Like the Adirondack Park Agency Act, the California Coastal Plan places much of the responsibility for carrying out the plan in local governments. Each government entity along the coast is required to bring its general plans into conformity with the coastal

¹³⁷ *Id.* § 27400.

¹³⁸ *Id.*

¹³⁹ *Id.* § 27401.

¹⁴⁰ *Id.* § 27304.

¹⁴¹ Cal. Coastal Plan at 22.

¹⁴² *Id.* at 5.

¹⁴³ *Id.* at 8.

¹⁴⁴ *Id.* at 5.

¹⁴⁵ *Id.*

plan.¹⁴⁶ These local entities are to submit their plans to the appropriate regional commission. The commission itself is to expire when all local plans in a region have been certified. The CCZCC would remain in existence to continue the permit process while local plans are made to conform with the Coastal Plan,¹⁴⁷ and to afford a limited appeals process to insure that approved local plans are being followed.¹⁴⁸

Under the Coastal Plan, enforcement of its policies would be left to citizen suits.¹⁴⁹ If a plaintiff seeking to halt a violation of the Plan were to prevail, he would be entitled to recover his reasonable attorney's fees.¹⁵⁰

In summary, the California Coastal Plan sets out 162 policy recommendations designed to insure that conservation of the coastal zone be given priority. The Plan seeks to balance all uses of the coast, with special consideration for those uses best able to preserve uniqueness of the shoreline and maximum public access to the ocean. The citizens of the state have standing to enforce compliance with the Plan, with liberal provisions for award of attorney's fees.

III. INTERRELATIONSHIPS

The programs for environmental control discussed in this article are just emerging at the state level. The "Little NEPA's" have reached the most widespread use but are not as well defined and commented upon as their federal model. Even less advanced than the "Little NEPA's" are state proposals for comprehensive permitting and environmental controls in areas of critical concern.

The comparative efficacy of these programs is not yet clear. The difficulties of comparison arise from a number of sources. First, each of the programs adopts a different focus, concentrating on the one hand, on an individual agency, as in the comprehensive agency proceeding model, or, on the other hand, on the regional planning model, as in the critical geographical area efforts. The programs vary in coverage, as well as, differing levels of governmental activity.

The comparison becomes more difficult in the absence of a uniformly reliable base of experience in all cases, and especially in the

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.* at 190. Such provisions were written into the enabling act establishing the CCZCC, CAL. PUB. RES. CODE § 27485 (West Supp. 1974).

¹⁵⁰ Cal. Coastal Plan at 190.

absence of a federal model for the latter two programs. Additionally the programs may not be implemented uniformly from state to state. Inevitable differences will arise from variations in the state settings—legal, political, economic, and administrative—essential to the successful adoption and implementation of any system of environmental control.

A state might benefit most from a comprehensive blending of the three approaches. An eclectic regulatory scheme could promote both efficient governmental processes and full consideration of environmental issues on their merits. In every state the need has arisen for agencies at all levels to consider the environmental impact of their decisions. The documentation of this consideration is the preparation of an environmental impact statement. This preparation offers the possibility of participation in the agency decision making process, through comment and criticism, to many otherwise not afforded such an opportunity.¹⁵¹ The information of an impact statement is also educative of all concerned individuals as a cost-benefit analysis of the proposed project. As more impact statements are prepared, similar problems may be highlighted in projects once thought dissimilar. Concentrated effort can focus on particularly persistent or recurrent issues.

If a state has overlapping and inefficient procedures for environmental review of a project proposal, time and money are wasted and environmental values suffer. One forum should be provided for project review, allowing all relevant issues to be dealt with at one time and at one place. This perspective will allow for a better assessment of a project's environmental merits, particularly its major, rather than minor, drawbacks. Two methods for planning such a comprehensive review are available. The first involves the creation of a new agency to license all projects involving more than local impact. This agency would have primary responsibility for conducting an environmental evaluation and could document such an evaluation in the preparation of an impact statement. In states presently lacking a small agency system with substantial expertise in

¹⁵¹ Without the vehicle of an impact statement, it may will be impossible for individuals to participate in the agency decision-making process. "Effective participation in the administrative process, it is all too evident, is an enormously expensive undertaking. The persistent presence of skilled lawyers and experts in a wide variety of administrative contexts calls on scarce human resources and requires financial support of great magnitude." Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. WASH. L. J. 525, 526-27 (1972). The need for such participation is obvious, as agencies may not respond to interests that are not represented in their proceedings. *Id.* at 529.

environmental decision making, such a superagency model recommends itself. In those states having an agency system competent to weigh environmental considerations, such a major revision in the present structure may not be necessary. Often the sole need in such states is better coordination between agencies, with one agency (or even a newly created agency) designated as a clearinghouse. This clearinghouse would serve to correlate the application and hearing process, and to obviate the need for many small public hearings evaluating individual problems with a proposed project. This clearinghouse agency may be given either the duty of preparation of an EIS or authority to designate that responsibility in a smaller agency.

Necessary for any effective control process is a system of enforcement. Without such a system, the EIS preparation process may be an empty procedure without guarantee that the final development will, in fact, protect environmental values. This enforcement procedure may be a grant of police powers to the super- or clearinghouse agency, a liberal citizen suit provision allowing for the recovery of attorney's fees, or a combination of the two.

The preparation of impact statements should not be the extent of any state's environmental control system. In every state there are areas sensitive to all development. Ironically, these areas are often those subject to the heaviest development pressure as more and more people seek to live closer to areas of recreation and open space. For these critical areas, a system establishing land capabilities is necessary to accommodate the variant needs and preferences of a state's residents. Certainly, the vehicle of the impact statement has a place in any program of land capability planning.¹⁵² But the information produced by these statements must be tied to a plan evaluating and directing development.

In any system of environmental control it is necessary to involve a broad constituency. All levels of state government must be involved as the costs of environmental degradation are borne by all in equal measure. The state itself must determine which areas are of "critical concern" to its residents. Regional controls are needed to prevent individual localities from benefiting themselves to the detriment of their neighbors. And yet local involvement is a neces-

¹⁵² With this recognition the California Coastal Zone Commission is directed to make use of impact statements prepared pursuant to California's "Little NEPA," the California Environmental Quality Act (CEQUA). 14 CAL. ADM. CODE § 13211(7) (West 1974).

ity as the level at which most development decisions are felt, most accessibility to constituents is available, and greatest ease of management is possible.

In short, the programs outlined by this article should not be viewed separately. Rather they are part of a continuum of programs for environmental control. It remains for most states to tailor some combination of these administrative instruments to their own objectives.