Are the National Environmental Policy Act (NEPA) Rules Immutable—An Opportunity for Presidential Leadership on the Environment

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Businesses ask for regulatory certainty and stability. Environmentalists want protections to stay in place without backsliding. Government agency staff want standardized procedures that give them some discretion.

The National Environmental Policy Act (NEPA) Rules issued by the White House Council on Environmental Quality (CEQ) in 1978 do that and more (www.nepa.gov). The rules provide one set of federal government-wide regulations that tell federal agencies how to carry out NEPA, the first and only comprehensive United States (US) law on the environment, often called the nation's environmental Magna Carta.[1]

The NEPA Rules were adopted with the vocal support of major environmental, business, labor, government and citizen organizations, as well as prominent scientists, planners, and academics. They have had only one minor amendment in 1986 to clarify the "worst case analysis" requirement.

They have been upheld by the US Supreme Court more than once. They have passed muster by more than three presidential regulatory reform commissions in both Republican and Democratic administrations. They have been praised as one of the clearest set of regulations ever written.[2]

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The NEPA process, as it has come to be known—and more relevant, how the process is carried out—is not perfect or easy. Good rules can promote good behavior, but you can't legislate clear thinking or writing.

There are inherent tensions in the rules (such as the best time to start the formal process) and there are some difficult judgment calls (such as what is a reasonable alternative or a significant impact). There are pretty loose rules (such as how to involve and work with other agencies, Indian Tribes, and the public). There are rules more honored in the breach (page limits or adequate summaries that candidly highlight the real issues). There are rules hampered by lack of funding (timely and helpful involvement by cooperating agencies including indigenous peoples, and by nongovernmental organizations). There are gaps (more on these later). Like any rules in society, there are problems and abuses and lack of common sense in carrying out the rules that only good training and management, not good regulation, can address.[3]

And, of course, there is the basic question of whether the national environmental policy has any teeth or whether NEPA just an analysis and public disclosure law—whether NEPA is "substantive" or "procedural" in NEPA parlance. This basic question goes beyond the current rules yet is inextricably related to the purpose and role of the rules.

Even with these limitations, the seemingly immutable 36-year-old rules have been phenomenally successful and effective:

- They have changed the world, locally and globally. NEPA and the "impact" assessment it created—as defined by the NEPA Rules—are among the most emulated laws on earth. More than a dozen US states and thousands of municipalities have adopted similar procedures. More than 150 countries and their own states and cities perform environmental impact assessments.[4] Even more, the concept has been emulated in dozens of diverse areas, from fiscal impact analysis to small business impact analysis to social impact analysis to essential fish habitat impact analysis, to name just a few.

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- Most of all, the NEPA Rules have been remarkably successful in improving the transparency of public decisions and in giving *all* interests—from citizens to businesses to other government agencies—information and the chance to use the administrative, political, and sometimes judicial process to pay attention to concerns and better ideas (called reasonable alternatives in NEPA parlance). In fact, it was the NEPA Rules, not the statute, that required public involvement.
- The NEPA Rules created the "environmental assessment" to improve the environmental performance—usually through avoidance or other "mitigation"—of tens of thousands of government actions that do not receive detailed "environmental impact statements." Often the path not taken or the better thought-out proposal has resulted in cost savings.
- The NEPA Rules made "scoping" a common term now used in both the public and private sectors—in both the environmental and nonenvironmental space—to engage communities of interest at the outset of planning or consideration of a project.
- The NEPA process—which was created by the rules, not the statute (the statute itself contains only five sentences on impact assessment)—has changed the bottom line.

Even though the NEPA Rules are procedural, article after article, blog after blog, tweet after tweet, and ROD (Record of Decision) after ROD, all documents that the added transparency, the opportunity to engage, the increased participation by stakeholders, and political and judicial oversight under the NEPA Rules, have resulted in better proposals, better plans, and better projects—and have avoided many bad projects, harmful impacts, and unintended costs and consequences than would otherwise have occurred over the past decades.

And humans can do a helluva lot of damage to the earth and themselves in 40 years if given the chance.

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An obvious question, then, is why, with NEPA and the NEPA Rules in place—the law that requires foresight—are we facing the threats of climate change, the greatest domestic and global environmental challenge in memory?

Even without the stresses of climate change, how can so many species be threatened or going extinct? How can humans still be building communities that are inhospitable to people and gobble up natural resources?

This is the question for the future of the NEPA Rules. If NEPA cannot be made relevant to climate change and sustainability, why bother improving it?

And if NEPA can be made relevant to today's paramount issues for the quality of the human environment, won't the NEPA Rules need to be updated to do this?

* * *

This apparently rhetorical question is not so rhetorical.

There are at least two very good reasons for not changing the NEPA Rules. Politically, as noted at the outset, the rules have been stable and generally accepted. People tend to forget that NEPA directly regulates federal agencies. Because NEPA applies when a federal agency is making a decision, the NEPA Rules are regulations that apply to the federal government, not to the private sector. They apply when a federal agency makes grants, issues permits, or enters into contracts with other entities, for example, whether public or private. Therefore, the rules indirectly affect nonfederal agencies and the private sector, and many agencies allow or require their grantees or permittees to prepare NEPA documents, which is a pretty direct effect.

Federal agencies will strongly resist changing existing procedures, as they did when the NEPA Rules were developed by CEQ in 1976–78. Even the most recalcitrant agencies came around to supporting the rules and finding them an improvement from the original 1971 and 1973 CEQ guidelines, but it was tough sledding by CEQ to bring the agencies around. The agencies thought they had figured out how to do NEPA and didn't want to relearn or face judicial interpretation of new rules. The private sector felt likewise but had a stronger incentive to reform the process.

Likewise, those who appreciate NEPA's value, despite its warts, wouldn't want to risk having Congress or the Supreme Court review and interpret a new set of rules for the basic environmental impact assessment process in the US.

Even more to the point, changes in laws and regulations tend to risk further amendments that could gut the law or regulation being amended, especially in the current period of somewhat uncivil federal domestic political polarization. This is the main reason that some key environmental laws that just about everyone agrees should be improved—from the Endangered Species Act to the Clean Water Act—have not been touched. The risk of losing the protections in these laws is seen as far greater than the benefits of making the laws better.

Second, as a practical matter, although NEPA's scope and policy include climate change and sustainability—indeed its most basic policy goal of people living in "productive harmony" [Title I, Section 101(b)(1)] with and each generation acting "as trustee of the environment for succeeding generations" could hardly be a clearer expression—it is generally accepted that effective action on climate change requires its own regime (whether by tax, regulation, or some other means) and requires domestic action as well as an effective global compact. NEPA is highly unlikely to be the template or vehicle for a national or global protocol responding to climate change.

NEPA looks like a reasonable vehicle for articulating or reaching sustainability goals. However, four decades of the NEPA process has resulted in a strong public and political perception of NEPA as being about environmental *impact* assessment rather than about NEPA's core mission of building and managing sustainable communities. For many, impact has a negative connotation, and a law focused on impacts would rub the wrong way for those who see sustainability as a positive approach—one that relies on high tech entrepreneurship to find solutions. It really doesn't matter that NEPA's basic requirement to look for alternatives is exactly what this is all about. There's just a lot of baggage dealing with environmental assessments (EAs), environmental impact statements (EISs), and judicial review to overcome to "re-envision" NEPA as a suitable vehicle for taking sustainability seriously.

* * *

So why not leave well enough alone?

Climate change isn't doing a U-turn, and it's not at all certain when there will be political will in the US for Congress to act, domestically or on a treaty. Because NEPA regulates only federal agencies, NEPA is one of the easiest prime candidates for a President, through executive order or through the NEPA Rules, to take action on having the federal government and its agencies act now to respond to climate change.

The action would not, of course, have the kind of direct effect on limiting carbon dioxide emissions the way an Environmental Protection Agency (EPA) Clean Air Act regulation will. It might not change siting homes in floodplains the way changes in Federal Emergency Management Agency (FEMA) regulations could. However, we need a multiplicity of actions to deal with the challenges raised by climate change, from the management of our public lands and resources to our transportation and infrastructure—the very actions that federal agencies do, fund, or permit. NEPA is perhaps the most logical of any law on the books to have an executive order and an initial framework set of comprehensive rules (or goals enforceable through some accountability review by sister offices in the Executive Office of the President) for federal agencies to take on the climate change challenge.

What a legacy that would be for a President who can only get so far on the legislative or treaty front.

Increasingly, climate change is gaining attention to "provide for the common defense, insure domestic tranquility"—as the US Constitution refers to the national security and domestic policy roles of the federal government. The Executive Office of the President is the only place in the federal establishment where both of these worlds come together at the senior management level [(chief executive officer (CEO)/chief financial officer (CFO)/chief technology officer (CTO)] across all agencies. NEPA is one of the relatively few statutes expressly directed toward presidential implementation, which was the purpose of Title II of NEPA.[5]

Some people may view climate change and global warming as issues du jour. This is understandable, although it seems odd to discount such a profound threat to humans and other species, even if the earth will survive. Potential changes to the NEPA Rules need not be focused on responding to climate change alone.

Meeting the challenge of climate change requires acting sustainably, whether in the natural or built environments—as does meeting NEPA's purpose of people and nature living in productive harmony. Unlike conventional preservation approaches, sustainability and sustainable development do not put lands and resources out of bounds for human intervention.

Sustainability actually assumes people are interacting with their physical and social environment, that these are connected, and that healthy communities are essential to our survival and well-being, environmentally, economically, and socially. Precepts such as making decisions that meet current needs and keep options open for future generations or the precautionary principle about how to act when consequences cannot be known have been articulated in the literature and are becoming part of contemporary management guidelines.

NEPA's policies to "achieve a balance between population and resource use which will permit high standards of

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living and a wide sharing of life's amenities" and "attain the widest range of beneficial uses of the environment without degradation… or other undesirable and unintended consequences" (Section 101) and its mandate to study "irreversible and irretrievable commitments of resources" and "the maintenance and enhancement of long-term productivity" [Section 102(2)(C)(iv) and (v)] all sound prescient today. They are not about the typical boilerplate in environmental assessments about how many cubic yards of concrete a project will use. They are about sustainability and provide a legal basis for executive action.

One of the failures of NEPA's implementation has been its inability to force analysis and action on preventing environmental harm at a strategic planning level. The loss of species and habitat results in large measure from allowing small insults and impacts to head to large cumulative losses. Similarly, with climate change, many permits to pollute small amounts have resulted in big impacts.

Requiring accountability for mitigation commitments would be equally critical. Agencies regularly decide that mitigation measures will avoid or otherwise minimize expected impacts, yet few agencies are accountable for the effectiveness of the mitigation. As a start, CEQ adopted some good guidance on mitigation in January 2011. More needs to be done if NEPA is to fulfill its preventive maintenance role, a precept widely considered essential to short-term and long-term good health.

Had NEPA's foresight mandate been taken seriously, we would be in a different place today. The lesson we should learn is that it's not too late to get in the game. The challenge is how to make avoidance a real goal and turn it around into a positive search for better solutions—and to start at the level of a federal agencies' strategic planning, when there is a chance to set a better direction.

* * *

How would you do it?

There are basically two problems with the 1978 NEPA Rules: technical updating and the gaps.

For starters, one would want to be very cautious about changing the existing regulations. They have a carefully balanced level of detail. If they became more prescriptive, they could stifle innovation. If they became less prescriptive, minimum standards would be lost. If they are opened up, there could be strong political pressure to backtrack. If they are revised substantially, unfavorable judicial interpretation could result.

An alternative would be to limit the scope of rulemaking to: (a) updating the definitions (and making any corresponding technical revisions for internal consistency in the rules) and (b) adding new "Parts" to the rules dealing with the gaps. CEQ organized the NEPA Rules in eight topical Parts (Parts 1500 through 1508) for clarity and to preserve the flexibility to add additional Parts in the future (there are no other Parts between 1508 and 1515).

Adding onto the NEPA Process as We Understand It

The following are examples of additions to the NEPA Rules well within the scope of CEQ's existing authority to issue regulations on the procedural provisions of Section 102(2) of NEPA under Executive Order (EO) 11514 as amended and related executive orders.[6] They do not require many, if any, changes in the existing rules.

Terminology/Definitions

Apple Computer Company was formed in 1976 and sold its first Apple I computer in the same year the development of the NEPA Rules began. A mere 7,600 Apple computers were sold in 1978, the year the rules were issued.

Communications technology has come a long way in the past 36 years. Yet the rules don't recognize the myriad tools offered by the computer and the Internet—from access to supporting data, to visual presentation of information, to ways to inform and engage the public.

The references in the rules to snail mail are quaint, although still relevant where a community is not wired (more places than you might think in the US). It makes sense to recognize and encourage the use of technology—but this is both technical matter and a gap. On the technical side, it would be easy to change the terminology and definitions in Part 1508 to account for technology without changing the rest of the existing rules. On the gap side, see the later discussion about preparation of environmental documents and about public engagement.

Likewise, definitional corrections relating to Indian Tribes are long overdue. The requirement to cooperate with tribal governments should not be limited to reservation lands (terminology plainly inconsistent with EO 13175 issued

in 2000). It would be equally logical to update the definition of mitigation in 40 CFR 1508.20 to add "(f) monitoring the impact and taking appropriate corrective measures, including use of adaptive management," as some states have done. These are simple matters of updating the terminology in the rules to be consistent with federal law, policy, and practice and CEQ guidance.

Steps can also be taken to improve the EIS process that don't require changes in the rules. For example, EPA could be instructed or decide not to accept for filing EISs that exceed the page limits or that fail to contain a summary with the required elements. As Nancy Reagan put it about drug addiction: "Just say no."

Without evaluating content, EPA would simply not accept for filing an EIS whose summary is a glorified table of contents instead of highlighting the key issues and trade-offs for decision makers as required by the NEPA Rules. If necessary, EPA could be required to take these actions by executive order or by directive to the EPA administrator.

There are any number of other steps or creative tools that could be used to improve NEPA performance by federal agencies, ranging from requiring senior management personally to certify they have read the environmental assessment (internally oriented) to better formatting in a digital age (externally oriented). Of course, these actions could be mandated by methods other than rulemaking, such as executive orders or CEQ memoranda to heads of agencies.

Here are a few examples of new Parts that could be added to the NEPA regulations in 40 CFR 1500. These are my top three. They are not an exhaustive list. Others may see a need for a Part on "Preparation of Environmental Analyses," which would not be limited to EISs but could address mechanisms for improving the quality of any NEPA document by directing higher-level agency staff be involved or how contractors may be used. Others may want to address misuse of categorical exclusions or other critical needs, but it seems the success of the CEQ NEPA Rules is their clarity and avoidance of excessive detail, thanks in large measure to Nick Yost, CEQ's general counsel at that time. It's a principle as relevant today as in 1978.

In short, there's really no need to mess with 40 CFR 1502–1506, but it wouldn't hurt to add separate Parts after the existing rules in a few key areas, such as public involvement, EAs and mitigation, and strategic environmental assessment.

Public Engagement

One gap in the NEPA rules is that the public involvement relates almost entirely to the EIS process. One of the breakthroughs of the NEPA rules was a shift from preoccupation with EISs to the concept of the environmental review process under NEPA—namely, that environmental review is a continuum where less detail is needed for more routine proposals and more detail for proposals with bigger issues.[7] The rules set up this framework but could do more on the non-EIS components, which are mandatory but briefly covered in Part 1502 of the rules.

The rules could use a separate Part dealing with effective participation by all communities of interest in the environmental review process. Both on paper and in practice, other laws since NEPA have put better and more innovative procedures in place for public participation. In NEPA's earlier days, community and environmental groups and the proponents of a proposal tended to get involved. In recent decades, however, technology, consensus-building approaches, and younger generations who expect sustainable solutions have changed this dynamic a bit.

Now, many people—whether from an environmental, business, or independent bent—want to weigh in with constructive ideas. Many people, especially younger generations, may appreciate the role of government yet remain skeptical of the government's ability to solve problems. The high tech era has reinforced the potential for creativity and entrepreneurship. Younger generations growing up in the face of climate change are less likely to perceive antagonism between a healthy environment and a healthy economy.[8]

In addition, some agencies have done more to combine their planning and NEPA processes into an iterative process where stakeholders help to develop, or are invited to review, the scope of the plan, issue papers, and topical drafts from which a preferred plan or options emerge. Some agencies have used this type of process for potentially controversial projects, as well. This give-and-take with the community, using relevant information including environmental data and analysis, aligns well with NEPA's original purposes and the intent of the NEPA Rules. It is not, however, the typical review-and-comment process outlined by the regulations (nor do they preclude it).[9]

There will still be the big controversial project whose dynamic won't be much different than in the pre-NEPA and early NEPA days. Yet experience over the past couple

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decades has also shown that real public participation—not just the opportunity to comment or to organize politically—can reduce controversy and reach solutions in many cases.

An EIS "blackbox" model of formal comment on a draft EIS (input)—where an agency disappears for months or years and issues a final EIS with the written response to comments (output)—is not a model of engagement with people interested in finding better solutions. Many agencies still do not understand that the scoping process continues until the NEPA document is actually issued, even though preliminary scoping determinations and agreements are essential for a timely, well-managed process. All of the components of scoping, whether document content or other environmental review and permit requirements, continue to be refined as environmental information is received and alternatives, including mitigation measures, are developed. Using the environmental analysis developed during document preparation, as well as working with agencies, applicants, and the public to resolve issues early, are, after all, basic purposes of the NEPA process. Both in the EIS situation and, equally importantly, in the non-EIS situation, the NEPA Rules can do better for all interests.

Mitigation and Environmental Assessments

Similarly, environmental assessments (EAs) have increased, both because federal EISs have tended to become unwieldy and time-consuming (a management, not a regulatory, problem) and because EAs have become a more routine part of doing business. It may be worth considering whether some rules of the road are needed as a separate Part of the NEPA Rules. If, however, the main need relates to mitigated EAs and FONSIs (Findings of No Significant Impact), this could be handled in a new Part on mitigation.

Mitigation includes avoiding impacts, not just ameliorating or compensating for them. Given the degradation of the earth and its human and natural habitats in 1969 when NEPA was passed, in 1978 when the rules were adopted, and today, and the statute's concern for the effects of urbanization and population growth, NEPA calls for restoration and enhancement—not simply avoiding impacts—as essential to achieving and maintaining environmental quality. Restoration, too, is included in the definition of mitigation. More importantly, restoration is a concept that should be integral to any NEPA Rules on sustainability. If humans don't improve the current environment, we surely will not have, in NEPA's words, "safe, healthful, productive, and aesthetically and culturally pleasing surroundings," "an environment which supports diversity, and variety of individual choice," and a "wide sharing of life's amenities" [Section 101(b)(2),(4), and (5)].

Comparing the pros and cons of different options inevitably means making assumptions about what will happen in the future—in the short and long term. People usually have to make decisions with imperfect information. When uncertain or missing information is important, and you can state a desired outcome—including how effective a mitigation measure will be—it makes sense to track the effects and modify your actions to toward achieving that outcome. Of course, use of "adaptive management" depends on performing the monitoring and proceeding only with those decisions that do not have irreversible consequences. Otherwise the decision won't be preserving any options for the future, and preserving options is a cornerstone of acting sustainably.

It's long past time for the NEPA Rules to require accountability for promises made in the NEPA process to address impacts. If the environmental review process—or the statute itself—cannot "dictate a particular substantive result," as the phrase goes, then it can, as a minimum procedural matter, require an analysis of the effectiveness of mitigation measures in *both* their selection and their implementation.[10]

To put it simply, what's the point of the NEPA process if commitments made are not met?

Strategic Environmental Assessment

One of the bedeviling issues has been requiring or encouraging agencies to integrate environmental analysis with its strategic planning. If an agency does this, the agency is as a practical matter "doing NEPA" by considering environmental information at the earliest time. But if the agency is doing NEPA and is not issuing formal NEPA documents such as EAs and EISs, then the agency is faulted for not complying with the NEPA Rules (that is, issuing these documents as close as practical to the time the agency has a proposal). The current process has therefore created a disincentive for agencies to incorporate environmental information and values early in strategic planning. It doesn't make sense, considering climate change and the environmental challenges we face.

It's past due for all interests to come together and give a little to make this work for federal agencies. Just as the NEPA Rules provide a different process for a legislative statement in 40 CFR 1506.8, a new Part of the rules could create a different process for strategic environmental studies

(SES or any acronym other than the existing EA or EIS). They could be internal documents that, as a general matter, would not need to be subject to judicial review. This approach would give wide discretion on the form of the documents so that they are part of the agency's strategic planning rather than forcing the strategic planning to take the form of what most people now associate with a NEPA document. The rules could provide for some kind of peer or panel review of the information, whether confidential (as in national security matters) or not. The point is to prepare and use the information for strategic choices, not to dictate the form the documents take.

If the agency chose to rely on the strategic study for efficiency to tier plan or project proposals and their NEPA documents, it would seem fair to require the strategic environmental study to undergo public review and be subject to challenge, whether administratively or judicially. An agency could issue the strategic study or prepare a policy, plan, or program EA or EIS based on the strategic assessment.[11]

In short, without incentives and some structure for strategic environmental assessment, agencies are reluctant to step into this space, which is the least desirable result at a time when the federal government needs to act strategically to respond to climate change, develop programs that are environmentally sustainable, and meet critical environmental challenges now and in the future. This foresight is what NEPA was trying to get the federal government to exercise in 1969. The need is no less today.

Adding onto the NEPA Process as We Have Yet to Understand It

Now for the hard Part: how to make NEPA relevant to today's biggest environmental challenges.

What would it mean for a federal agency—as required in Section 102(1) of NEPA—to administer and interpret US policies, regulations, and public laws to the fullest extent possible in accordance with the national environmental policy set forth in NEPA? How is the agency to be a "trustee of the environment for succeeding generations" [Section 101 (b)(1)] or "assure the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" [Section 101(b)(3)] as stated in that national policy?

The answer is not a shorter or more perfect environmental assessment. It's about setting goals, making commitments, taking action, and being held accountable for performance. For those who think the federal government should act more like a private business model, here's your chance to step up with thoughtful procedures and incentives.

CEQ's existing rulemaking authority may not be enough, or, even where it is, it may take a concerted partnership within the Executive Office of the President to achieve effective change.

Take the federal response to climate change. As noted earlier, NEPA is perhaps the most logical of any law on the books to have an executive order and an initial framework set of comprehensive rules for federal agencies to take on the climate change challenge. The same is true regarding a concerted effort by federal agencies to promote sustainability and prevent environmental degradation before resources become severely threatened.

For example, NEPA Section 102(2)(E) does not merely require the study of alternatives, but mandates agencies to "develop" alternatives where there are unresolved conflicts in the use of available resources, which is the crux of the response to climate change and sustainability. Section 102 (2)(B) requires agencies to develop methods in consultation with CEQ to ensure that environmental values are given appropriate consideration in decision making along with economic and technical considerations. Section 102(2)(F) mandates federal agencies to lend support, where consistent with US foreign policy, to programs designed to maximize international cooperation in "anticipating and preventing a decline in the quality of mankind's world environment." Was this law drafted in 2014?

The President, unlike CEQ, currently has the authority to direct federal agencies to comply with NEPA Section 102(1) —which requires all federal agencies to carry out the national environmental policy to the fullest extent possible. Section 105, one of NEPA's most important provisions, expands the mission of every federal agency to include NEPA's Section 101 goals and policies. The President also has the authority to delegate additional responsibilities to CEQ under Titles I and II of NEPA. The President has the authority to direct staff in the offices in the extended White House—the Executive Office of the President, which includes the Natural Security Council, the Office of Management and Budget, CEQ, and others—to work together in holding Cabinet and other agencies accountable for their performance in carrying out NEPA Section 101.[12] Due to the Muskie-Jackson compromise reflected in NEPA Section 104, NEPA authority cannot be used to undermine

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pollution control limits in other laws.[13] That hardly seems to be an impediment to act.

Responding to climate change and achieving sustainability are both within the scope of the national environmental policy, as noted earlier. NEPA offers a powerful tool for acting in the absence of—or in tandem with—other legislation.

It is beyond the scope of this article to propose what these mechanisms and rules should be. There is ample authority and opportunity to use the NEPA Rules as a vehicle to realize NEPA's original potential, without changing or weakening the existing rules for the NEPA environmental impact assessment process.

The task is urgent. The opportunity is now.

Notes

1. For all CFR references, see CEQ (1978). For NEPA, see US Congress (1970a). For an excellent background on NEPA and issues relating to NEPA, see *Environmental Policy and NEPA: Past, Present and Future*, edited by Ray Clark and Larry Cantor (1997), and *NEPA: A Study of Its Effectiveness after 25 Years* (CEQ, 1997), both published on the occasion of NEPA's 25th anniversary. For recent retrospectives, see the proceedings of NEPA's 40th anniversary symposium sponsored by CEQ, the Environmental Law Institute (ELI), and George Washington University in March 2009 (McElfish et al., 2010), and related articles published in a special issue of the *Environment Law Reporter* 39(7), July 2009 ("NEPA at 40: How a Visionary Statute Confronts 21st Century Environmental Impacts"), and the bipartisan White House 40th anniversary event for NEPA in February 2010 (CEQ, 2010a). For an overview of NEPA's fundamental mandates and the only comprehensive section-by-section description of the NEPA Rules and their legislative history written to date, see Kenneth S. Weiner, "Basic Purposes and Policies of the NEPA Regulations," in *Environmental Policy and NEPA: Past, Present and Future* (1997). For an excellent article on the development of the regulations, see Dick Kirschten, "Paperwork Is Having a Big Impact on Environmental Statements," *National Journal*, July 16, 1977. Former CEQ General Counsels Dinah Bear, Nick Yost, and Gary Widman have written excellent articles about the regulations. Richard Lazarus's article "The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains" in the *Georgetown Law Review* 100 (2012) provides a thoughtful recent comprehensive analysis of leading court decisions and includes citations to authoritative references and articles on NEPA by William H. Rodgers, Daniel Mandelker, Nicholas Robinson, and Nick Yost, among others. The nomenclature regulations is historically important because, under Executive Order (EO) 11514 (Nixon, 1970), the rules replaced CEQ guidelines, which were advisory. The current rules have been mandatory and binding on all federal agencies since their issuance in 1978. An excellent resource for NEPA is www.nepa.gov.

2. Remarks by William H. Rodgers, Jr. (CEQ, 2010a), at the NEPA's 40th anniversary symposium at George Washington University (March 2009). Also see Rodgers (2000), as well as Rodgers (2005), where Professor Rodgers notes, "It [CEQ] has never relinquished its position as the ruler of the 'comfort zone' on all things pertaining to NEPA. CEQ's 'binding' 1978 guidelines have matured into the famous 'frozen rules' whose influence endures to the present day. Judicial innovations in interpreting NEPA constantly use the CEQ rules as the lawmaking raw material" (pp. 393–394).

3. Both leading up to the development of the current NEPA Rules and periodically over the past decades under virtually every presidential administration, CEQ has evaluated the effectiveness of NEPA and the NEPA Rules. Each of these reviews has identified the critical importance of NEPA training and management and key improvements that can be made without revising the rules. These assessments include *NEPA: Five Years Experience by 70 Federal Agencies* (CEQ, 1975), *NEPA: A Study of Its Effectiveness after 25 Years* (CEQ, January 1997), and the current NEPA (2010b) initiative at http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa. Also see www.nepa.gov for updated information and resources on NEPA.

4. The era of expanding environmental impact assessment, or EIA as it is known, globally began after the Economic Commission for Europe meeting in Villach, Austria, in 1979 (United Nations, 1981), where the world's industrialized nations issued in the first communiqué calling for all nations to conduct environmental impact assessment.

5. Title II of NEPA is the less-known article that established a presidential environmental adviser and White House Council on Environmental Quality (accompanied by the Environmental Quality Improvement Act of 1970 [42 USC 4372 (US Congress, 1970a)], which provided environmental staff for the President). Many of the NEPA sponsors believed this would have the biggest impact of the law, in light of the influence of the President's chief national security and economic advisers on international and domestic policy, the two other offices in the Executive Office of the President of the US, on which CEQ was mainly patterned. Title II of NEPA can continue to provide an important basis for presidential action. One of CEQ's roles is to "review and appraise" whether federal programs and activities are "contributing to the achievement" [NEPA Section 204(3)] of the national environmental policy set forth in Title I (NEPA's substantive goals and policies) and "to make recommendations to the President with respect thereto" (42 USC 4344; see also note 6 regarding the US president's NEPA authority).

6. Numerous US presidents have issued executive orders to mandate and promote federal leadership and improve federal stewardship on environmental quality, both comprehensively and in discrete areas, to implement or augment legislation and to act when Congress has not done so. Given that the executive power is vested in the President under Article II of the US Constitution and that the scope of NEPA's legislative mandate includes, among other things, "The Congress authorizes and directs that, to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" [NEPA Section 102(1) (42 USC 4332)], it is logical and appropriate that NEPA provides a source of authority for many of these executive orders. Some notable examples, from Presidents Nixon to Obama, include EOs 11514, 11593, 11988, 11990, 11991, 12114, 12191, 12852, 12856, 12893, 12902, 12962, 13423, 13514, and 13653. The wide-ranging subject matter of the orders includes NEPA and environmental assessment for federal actions abroad, protection of the cultural environment, wetlands, floodplains, pollution prevention and control at federal facilities, energy and water efficiency at federal facilities, principles for federal infrastructure investment, sustainability, and climate change.

7. Weiner, 1996, p. 63, see also pp. 77–78. This concept is one of the most misunderstood in the NEPA process, resulting in the inordinate and almost Talmudic parsing of the term "significantly" in order to establish

a theoretically defensible bright line and avoid preparing an EIS. The drafters of the NEPA Rules thought that removing the disincentives to preparing EISs, on the one hand (such as developing a track record of briefer, properly scoped EISs that do not take years and cost millions of dollars), and recognizing the diversity of EAs and use of tiering, on the other, would produce a more useful, efficient approach. Regrettably, this vision has not yet been realized.

8. From the time they were issued, the NEPA Rules were built on a business model of decision making that coincides with corporate sustainability approaches. For a brief article on the similarities between business decision making and the NEPA Rules process, published shortly after the NEPA Rules were issued, see Weiner (1980), "NEPA Is Good Business: The Close Relationship between Environmental Impact Assessment and Sound Business Practice.

9. For three case studies of robust public engagement, see the examples of the Port of Seattle Harbor Development, the St. Paul Waterway Cleanup and Habitat Restoration Project, and the Regional Water Quality Plan and West Point Treatment Plant in Weiner (2009, pp. 10679–10680, 10682–10683), "NEPA and State NEPAs: Learning from the Part, Foresight for the Future".

10. See, for example, the following article, guidance, and report that articulate both the need for accountability for mitigation and the use of NEPA's procedural provisions to assure its substantive mandates are actually fulfilled: Weiner (2010); for guidance, CEQ (2011); and, also notable for its attention to landscape-scale mitigation strategies, the report by Clement et al. (2014).

11. These opportunities are discussed further in Weiner (2009, p. 10686) and "NEPA at 40" (2009). There is a fair amount of confusion about *programmatic* assessments, but NEPA Rules carefully define the 4Ps that constitute federal action: policies, plans, programs, and projects [40 CFR 1508.18(b)]. The three categories that are not projects are described in limited terms: adoption of official policy, adoption of formal plans, and adoption of programs, each with specific criteria so that an agency can distinguish between preliminary or informal policy making and proposed actions that require a NEPA document. The current NEPA Rules leave a lot of room, therefore, to define and deal with the gap for strategic plans and policies.

12. See note 6 and examples of executive orders issued toward this end. Analyses of the Supreme Court's NEPA decisions (see note 1) indicate that the court's jurisprudence and its deference to executive branch policy decisions would accept presidential directives to federal agencies to further the national environmental policy set forth in NEPA. The presidential proclamation issued by President Barack Obama on the 40th anniversary of NEPA's signing by President Richard Nixon highlights NEPA's connection to sustainability:
NEPA was enacted to "prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." It established concrete objectives for Federal agencies to enforce these principles, while emphasizing public involvement to give all Americans a role in protecting our environment. It also created the Council on Environmental Quality to lead our Government's conservation efforts and serve as the President's environmental advisor.… With smart, sustainable policies like those established under NEPA, we can meet our responsibility to future generations of Americans, so they may hope to enjoy the beauty and utility of a clean, healthy planet. (Obama, 2009).

13. Senator Muskie's focus was on strict, specific pollution control requirements, such as the standards in the Clean Air Act and Clean Water Act, to be administered by environmental and health regulatory agencies. Senator Jackson's focus was on mandating and expanding the authority of all federal agencies to conduct their activities in an environmentally responsible way. The environmental assessment process—bringing good environmental information to bear on decisions—gave discretion to each agency to revise, condition, or deny proposals based on their environmental impacts and the availability of environmentally better alternatives. The compromise was that NEPA would expand the authority of every agency and give the agency the discretion to restore and protect environmental quality as long as the decision did not undermine specific pollution control standards.

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