The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection

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I. Introduction

In 1973 the Maryland General Assembly enacted the Maryland Environmental Policy Act ("MEPA")[1] as a measure to aid in the protection, preservation and enhancement of the state's environment.[2] For the reasons described below, MEPA has had virtually no effect in achieving the lofty goals that it purports to serve, and it has been entirely ignored since the early 1980's. This Article re-examines the statute with a view to suggesting how it might be resurrected and put to use in service of protecting the environment in Maryland.

MEPA was patterned after the National Environmental Policy Act (NEPA),[3] which Congress passed in 1970, as were the many similar laws passed by other states during an era of great public concern over environmental problems.[4] Like the federal model, MEPA begins with a ringing declaration of the importance of environmental protection. This is followed by a two-pronged procedural mandate directed at all state agencies. The first prong, following the NEPA precedent, requires that agencies prepare an environmental effects report (EER) "in conjunction with each proposed state action significantly affecting the quality of the environment."[5] Although as originally introduced this requirement was as broad as NEPA's analogous requirement of Environmental Impact Statements (EISs), as discussed below, the General Assembly effectively gutted it by adopting an extremely narrow definition of "proposed State action." The second prong, again patterned after NEPA, requires state agencies to identify, develop, and adopt methods and procedures that will assure that" environmental considerations are given due weight in agency decisions.[6]

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[1] Md. Code Ann., Nat. Res. §§ 1-301 to 1-305 (West) (hereinafter "MEPA").

2 Id. at § 1-302.

[3] 42 U.S.C.A. § 4321. *See Pitman v. Washington Suburban Sanitary Comm'n*, 279 Md. 313, 315, 368 A.2d 473, 475 (1977) (describing the legislative history of MEPA).

[4] As many as 32 states have enacted some version of an environmental policy act. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek behind the Curtains*, 100 GEO. L.J. 1507, 1520 (2012). *See also* Daniel Mandelker, NEPA LAW AND LITIG. § 12:1 (2013).

[5] *Id*. at § 1-304. Section § 1-304 reads: "[A]ll State agencies shall prepare, in conjunction with each proposed State action significantly affecting the quality of the environment, an environmental effects report including, but not limited to, a discussion of:

(1) The effects of the proposed action on the environment, including adverse and beneficial environmental effects that are reasonably likely if the proposal is implemented or if it is not implemented;

(2) Measures that might be taken to minimize potential adverse environmental effects and maximize potential beneficial environmental effects, including monitoring, maintenance, replacement, operation, and other follow-up activities; and

(3) Reasonable alternatives to the proposed action that might have less adverse environmental effects or greater beneficial environmental effects, including, the alternative of no action."

[6] MEPA § 1-303 reads:

Finally, MEPA requires that "[t]he policies, rules, regulations, and public laws of the State shall be interpreted and administered in accordance with the policies set forth in this subtitle."[7] This provision is again modeled on NEPA's requirement 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."[8] This language has a substantive ring to it, the effect of which is explored below.[9]

Notwithstanding MEPA's clear mandate that state agencies take environmental considerations seriously in carrying out their mission, its provisions have remained essentially dormant since it was adopted in 1973. There are only three reported judicial opinions that discuss the substance of the statute, all of which concern only the very narrow requirement regarding the filing of an EER. Only three state agencies have adopted any formal "methods and procedures" to assure the protection of the environment.

This Article begins with a discussion of the principal features of MEPA, including its strong declaration of policy, its specific requirements regarding the preparation of EERs, and the largely ignored broader requirements to adopt "methods and procedures" to assure the protection of the environment. It then examines the potential substantive effect to be given to MEPA's requirement that "[t]he policies, rules, regulations, and public laws of the State shall be interpreted and administered in accordance with the policies set forth in [the statute]." It reviews the limited judicial gloss that the Maryland courts have added to the statute, the potential application of the federal courts' reading of the similar language in NEPA, and the precedent from several other state "mini-NEPAs." It finally suggests how the language of MEPA (and its cousins in many other states) could be used by environmentalists to require government agencies to make relevant information more available; to strengthen their arguments in rule-making proceedings; to challenge inadequate or imperfect permits; and otherwise steer agency actions in the direction of more effective protection of the environment.

II. MEPA

A. The Statement of Policy

MEPA's statement of policy commences by declaring, "The protection, preservation, and enhancement of the State's diverse environment is necessary for the maintenance of the public health and welfare and the continued viability of the economy of the State and is a matter of the

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"All State agencies, except where existing law expressly prohibits, shall identify, develop, and adopt methods and procedures that will assure that:

(1) Environmental amenities and values are given appropriate consideration in planning and decision-making along with economic and technical considerations;

(2) Studies are undertaken to develop and describe appropriate alternatives to present policies, programs, and procedures that involve significant adverse environmental effects or unresolved conflicts concerning uses of available resources; and

(3) Planning and decision-making involving environmental effects are undertaken with the fullest practicable provision of timely public information and understanding and in coordination with public and private organizations and individuals with jurisdiction by law, special expertise, or recognized interest."

[7] MEPA § 1-302(k).

[8] National Environmental Policy Act § 102, 42 U.S.C.§ 4331 (hereinafter NEPA).

[9] *See* notes 32 through 95, *infra*, and accompanying text.

highest public priority." It then goes on to elaborate on this broad theme, articulating the obligations of state agencies to protect the environment, the rights of persons to a healthful environment, the need for cooperation with the federal government and other state governments, the need to find the optimum balance between economic development and environmental quality, the need to consider the beneficial effects of protecting the environment, etc..[10]

Reading this part of the statute is, for those who were politically aware in 1973, a bit like entering an alternative universe. It is a shock to recall, over forty years later, the strength of public support in that era for laws that were protective of the environment and environmental values. In that earlier time, there was little discussion about "trade-offs" between environmental protection and economic concerns.[11] Instead, there was a general understanding that the human economy is an element of the complex ecosystem of which the natural environment is an equally important element; and that treating the two as separate and largely unrelated is a recipe for long-term undesirable consequences. At the time of its passage, the policy declarations of MEPA were a reflection of a broad consensus that environmental values had been underweighted and should be given greater prominence in guiding the activities of governments. It is an unfortunate fact of today's political climate that the awareness of the importance of the environment and the need to protect it has been significantly eroded by thoughtless rhetoric about "job-killing regulations," and willful disregard of the large, but often unquantifiable benefits of a healthy environment.

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[10] MEPA § 1-302 reads in its entirety:

In general

(a) The General Assembly of Maryland finds and declares the facts and policies set forth in this section.

Public priority to protect, preserve, and enhance State's environment

(b) The protection, preservation, and enhancement of the State's diverse environment is necessary for the maintenance of the public health and welfare and the continued viability of the economy of the State and is a matter of the highest public priority.

Obligation to protect environment

(c) All State agencies must conduct their affairs with an awareness that they are stewards of the air, land, water, living and historic resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

Right of persons to healthful environment

(d) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to contribute to the protection, preservation, and enhancement of the environment.

Cooperation with federal government, other state governments

(e) It is the continuing policy of the State to cooperate with the federal government, other state governments, the District of Columbia, the political subdivisions of the State, and other concerned public and private organizations and individuals, in a manner calculated to protect, preserve, and enhance the environment.

Optimum balance between economic development and environmental quality

(f) The determination of an optimum balance between economic development and environmental quality requires the most thoughtful consideration of ecological, economic, developmental, recreational, historic, architectural, aesthetic, and other values.

Beneficial environmental effects of proposed actions

(g) Beneficial environmental effects of proposed actions can be identified and measures devised to obtain these benefits if environmental evaluations are made a part of the decision-making process of the State.

Anticipation, minimization of adverse environmental effects

(h) Adverse environmental effects of proposed actions can be anticipated, minimized, and often eliminated if environmental evaluations are made a part of the decision-making processes of the State.

[11] *See generally*, Lynton Caldwell, The National Environmental Policy Act: An Agenda for the Future, Chapter 1 (1998).

B. The Procedural Provisions

1. Environmental Effects Reports

Like NEPA, MEPA contains two procedural mandates. The first is the requirement that State agencies prepare an Environmental Effects Report (EER) "in conjunction with each proposed State action significantly affecting the quality of the environment."[12] In the original draft of the bill, "proposed State action" was defined as "requests for legislation, promulgation of rules or regulations, or actions involving the use of state funds or state owned lands."[13] As passed, however, the definition was limited to "requests for legislative appropriations or other legislative actions."[14]

Since the enactment of MEPA in 1973, there have been only three reported judicial decisions interpreting it. In *Pitman v. Washington Suburban Sanitary Commission*[15] the Court of Appeals unsurprisingly applied the EER requirement literally, holding that MEPA did not require the preparation of an EER for the purchase of land for disposal of sewage sludge because the funds for the purchase came from a bond issue by the Commission and not from funds appropriated by General Assembly. While this decision is undoubtedly a correct reading of the statute, it is neither enlightening nor useful.

The Court extended *Pitman* in *Mayor & City Council of Baltimore v. State*,[16] holding that the Department of Public Safety and Correctional Services was not required to prepare an EER for action it was taking pursuant to a legislative direction of the General Assembly. These two decisions put an end to any hope that MEPA could be used to require an EER for any agency action that did not involve a request for a legislative appropriation or other legislative action, effectively depriving MEPA of what has proved to be the most important tool for environmental protection under its federal cousin. In the only remaining decision that interprets MEPA, *Leatherbury v. Peters*,[17] the Court of Special Appeals held that MEPA applied only to actions by state agencies and did not create a right enforceable in a private action for nuisance.

Unfortunately, because of MEPA's restricted definition of "proposed State action" it has been deprived of the beneficial action-forcing effects that NEPA has had on federal actions. Therefore if MEPA is to achieve the lofty policy goals it proclaims, it is necessary to look

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[12] MEPA § 1-304(a).

[13] 1973 Laws of Maryland, Ch. 702, p. 1478. *See Pitman v. Washington Suburban Sanitary Comm'n*, 279 Md. 313, 315 n. 1, 368 A.2d 473, 475 n. 1 (1977).

[14] MEPA § 1-301(d). *See Pitman v. Washington Suburban Sanitary Comm'n*, 279 Md. 313, 315, 368 A.2d 473, 475, note 1 (1977), in which the Court of Appeals described the legislative history that resulted in the narrow definition of 'proposed State action.' The Senate Bill containing MEPA was introduced in 1973, modeled loosely after the National Environmental Policy Act. However, before the bill was adopted, amendments were submitted, including one that revised the definition of 'proposed State action' to its present form, which were eventually adopted without modification.

[15] 279 Md. 313, 368 A.2d 473 (1977).

[16] 281 Md. 217, 378 A.2d 1326 (1977).

[17] 24 Md. App. 410, 332 A.2d 41 *aff'd sub nom. Leatherbury v. Gaylord Fuel Corp*., 276 Md. 367, 347 A.2d 826 (1975).

beyond the narrow confines of the small number of instances in which a Maryland agency is required to prepare an EER.[18]

2. Adoption of "Methods and Procedures"

In addition to the specific, though narrow, requirement that agencies prepare EERs when seeking legislation that would have a potential significant effect on the environment, MEPA also contains a much broader directive regarding agency procedures. Section 1-303 directs all state agencies to:

> identify, develop, and adopt methods and procedures that will assure that:
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> (1) Environmental amenities and values are given appropriate consideration in planning and decision-making along with economic and technical considerations;
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> (2) Studies are undertaken to develop and describe appropriate alternatives to present policies, programs, and procedures that involve significant adverse environmental effects or unresolved conflicts concerning uses of available resources; and
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> (3) Planning and decision-making involving environmental effects are undertaken with the fullest practicable provision of timely public information and understanding and in coordination with public and private organizations and individuals with jurisdiction by law, special expertise, or recognized interest.[19]

This provision also appears to have been based in part on language in NEPA that requires federal agencies to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[20] It also requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[21]

Despite the breadth of the language of § 1-303, it appears to have been largely ignored by state agencies. So far as appears in the Maryland Code of Regulations, only three state agencies have adopted written procedures in accordance with its mandate: the Department of Planning,[22] the Department of Transportation,[23] and the Department of Labor, Licensing, and Regulation.[24] Interestingly enough, neither the Department of the Environment, the Department of Natural Resources, nor the Department of Agriculture, all agencies whose activities are likely to have significant effects on the environment, appear to have adopted any such rules.

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[18] Given the total absence of reported cases discussing MEPA since 1977 it is possible that MEPA has been so forgotten that agencies are not preparing EERs in even those unusual cases in which the statute would actually require one.

[19] MEPA § 1-303.

[20] NEPA § 102(2)(B).

[21] NEPA § 102(2)(E).

[22] Md. Code Regs. 34.01.02.

[23] Md. Code Regs. 11.01.08.

[24] Md. Code Regs. 09.01.01.

The rules of the Department of Planning are brief:

> If the Department initiates any proposed State action affecting the quality of the environment, or if the Department receives for review or coordination notice of any proposed State action, the Department shall consider:
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> A. Adverse or beneficial environmental effects that are reasonably likely if the proposal is implemented or if it is not implemented;
>
> B. Measures that might be taken to minimize potential adverse environmental effects or maximize potential beneficial environmental effects; and
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> C. Reasonable alternatives to the proposed action that might have less adverse environmental effects or greater beneficial environmental effects, including the alternative of no action.[25]

In the unlikely event that the Department makes a legislative request that would require the preparation of an EER, its rules also require that a copy of the EER be provided to a Clearinghouse maintained by the Department of Natural Resources.[26]

Among all state agencies, the Department of Transportation is one of the few that might regularly be required to prepare EERs. It also has the most extensive set of rules under MEPA. They begin with a general policy statement:

> A. It is the policy of the Department of Transportation that the Department, and each of its administrations, agencies, boards, commissions, and other units, conduct its affairs with an awareness of its responsibility for the protection of the environment for the present and future. The Maryland Environmental Policy Act (Act), Chapter 703 of the Laws of 1973, as codified in §§1-301-1-305, Natural Resources Article, Annotated Code of Maryland, mandates that State agencies, in balancing economic development and environmental quality, shall engage in thoughtful consideration of the environmental effects of their proposed actions, including: ecological, socio-economic, developmental, recreational, historic, architectural, aesthetic, and other values. Environmental assessment forms (EAF) and environmental effects reports (EER), as defined in the guidelines of the Department of Natural Resources adopted pursuant to the Act, will be utilized by the Department to accomplish this purpose, . . . as well as to increase public participation in the planning of Departmental projects and to provide the General Assembly with additional social, economic, and natural environmental information to assist it in deciding upon legislative appropriations for projects in the annual capital budget.[27]

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[25] Md. Code Regs. 34.01.02.03.
[26] Md. Code Regs. 34.01.02.04.
[27] Md. Code Regs. 11.01.08.01.

The rules go on to codify various aspects of the procedures to be followed in preparing an EER.[28]

The only other state agency to have adopted rules pursuant to § 1-303 is the Department of Labor, Licensing and Regulation. Its rules are brief, [29] effectively adopting by reference regulations published by the Department of Natural Resources in 1973.[30]

In sum—to the extent that it is possible to determine 40 years after MEPA's enactment—it appears that state agencies have interpreted § 1-302 to require no more than the establishment of rules governing the filing of an EER. They have ignored the broader injunction to "develop and adopt methods and procedures that will assure that" environmental considerations are given appropriate weight in agency decision-making. As discussed below, there are several areas in which § 1-302 could be useful in requiring agencies to do more to promote the goals of the statute.

C. A Substantive Mandate?

1. Background

Section 1-302(k) of MEPA declares, "The policies, rules, regulations, and public laws of the State shall be interpreted and administered in accordance with the policies set forth in this subtitle."[31] Although this provision appears in a section of the statute that purports to be a declaration of "facts and policies," its plain language consists of a clear directive to state agencies about the way they are to interpret and apply the laws they administer. Read together with MEPA's broad policy statement this injunction raises a strong implication that the legislature must have intended MEPA to have some effect beyond the requirement that agencies file EERs on the rare occasion that they make a request of the General Assembly for appropriations or other actions that might affect the environment.

Section 1-302(k) was evidently based on § 102 of NEPA, which begins, "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." In the years immediately following the enactment of NEPA, there was some thought that it might have a significant substantive impact on judicial review of agency actions. Some suggested that NEPA authorizes a court reviewing an agency action to set it aside

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[28] Md. Code Regs. 11.01.08.03.

[29] The operative provision of the rules reads: "All Boards, commissions, and agencies within the Department of Licensing and Regulation shall give appropriate consideration to possible environmental effects which may arise in conjunction with any Agency proposal or action. Environmental Assessment forms and Environmental Effects reports shall be used in the decision making process in compliance with standards established by the Department of Natural Resources." Md. Code Regs. 09.01.01.03.

[30] Although these rules are specifically referenced in the Department of Labor, Licensing and Regulation's rules, they are not published as part of Maryland's Code of Regulations and the author has been unable to obtain a copy of them. *See* MD. Code Regs. 09.01.02.

[31] MEPA § 1-302(k).

as inconsistent with the broad statements of policy found in §§ 2 and 101 or with some other declaration of environmental policy.[32]

As discussed below, however, judicial construction of NEPA took another path, focusing predominantly on determining when the statute requires the preparation of an EIS and, when it does, how extensive it must be. That is not to say that NEPA is entirely devoid of substantive effect, and to the extent it still has substantive teeth, they can be used as precedent in interpreting MEPA.

The Maryland legislature chose to go in a different direction with MEPA, confining its requirement to prepare EERs to the rare case in which an agency makes a request for an appropriation or other legislative action that will have environmental effects. There is thus no equivalent to NEPAs EIS process for most decisions by state agencies. But MEPA places a series of substantive obligations on state agencies, including that they (1) interpret and administer the policies, rules, regulations and public laws of the state in accordance with the policies articulated in the statute (§ 1-302(k)), and (2) "identify, develop, and adopt methods and procedures" that assure that appropriate weight is given to environmental concerns in planning and decision making and that the public can be fully informed on the relevant issues (§ 1-303). Whereas the courts have found that federal agencies can usually satisfy the analogous substantive requirements of NEPA through the EIS process, there is no equivalent process under MEPA for most state agency decisions. Accordingly, if MEPA is to have any meaningful effect in achieving its stated goals, its language must be read to impose obligations on state agencies going beyond the need to prepare an EER should they have occasion to request some action by the legislature.

The sparse judicial record under MEPA suggests that there have been little or no efforts to explore how its mandatory language might be used. After describing that brief record, this section examines the limited, but relevant ways in which NEPA can be said to have been given effects that might be considered "substantive," and considers the substantive use of NEPA-like statutes in three other states.

2. The Judicial Gloss

There are only two reported opinions that allude to the force of the broad language of MEPA regarding the obligations of state agencies to protect the environment. In *Bausch & Lomb Inc. v. Utica Mutual Insurance Co.*,[33] the most recent case to cite MEPA, the Court of Appeals was called on to decide whether a comprehensive general liability insurance policy covered the

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[32] *Envtl. Def. Fund, Inc. v. Corps of Engineers of U. S. Army*, 470 F.2d 289, 298-99, 470 F.2d 289 *cert. denied*, 412 U.S. 931 (1973). (8th Cir. 1972) ("Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits.") *See* Richard Arnold, *The Substantive Right to Environmental Quality Under the NEPA*, 3 E.L.R. 50028 (1973). For an excellent discussion of the evolution of the substantive application of NEPA *see* Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 213-23 (1992).

[33] 330 Md 758, 625 A.2d 1021 (1993).

costs of remediation of chemical contamination at an industrial site.[34] In passing, the Court offered a clear endorsement of the importance of MEPA and its meaning for State agencies:

> The 1973 Maryland Environmental Policy Act declared that *the protection of the environment is necessary for the public health and welfare as a matter of the highest public priority*, and that each person has a "fundamental and inalienable right" to a healthful environment. The same statute in Section 1-302(c) *directs that State agencies must conduct their affairs as "stewards of the air, land, [and] water ... resources"*; in common usage, a steward is one who cares for the property or interests of another.[35]

The only other reference to the potential substantive impact of MEPA was in *Leatherbury,* discussed above. In its opinion, the Court of Appeals offered a similar comment on the obligations of State agencies under MEPA. Although it gave a literal and narrow interpretation of the meaning of "proposed State action," it recognized that §§ 1-303 and 1-304 "impose certain responsibilities and duties only upon state agencies. For example, the agencies must undertake studies 'to develop and describe appropriate alternatives to present policies, programs, and procedures that involve significant adverse environmental effects or unresolved conflicts concerning uses of available resources.'"[36]

3. The Federal Precedent

The interpretation of NEPA offers an interesting though hardly definitive perspective on how the substantive language of MEPA might be interpreted. At they have applied it, the federal courts have treated NEPA's procedural provisions—embodied in the requirement that agencies conduct formal, rigorous analyses of the environmental consequences of any major federal action—as largely sufficient to assure the achievement of NEPA's substantive goals. Consequently, particularly in more recent years, the courts have generally treated the mandatory language of § 102 as satisfied when agencies follow the EIS process. As described below, however, the courts have not confined NEPA exclusively to its procedural aspects, but have still left some teeth in its broader substantive-sounding language in situations to which the EIS process does not apply.

Among other things, there remains unchallenged precedent that (1) NEPA authorizes agencies to take environmental considerations into account, even if their organic statutes do not;[37] (2) agencies may not *refuse* to consider the environmental consequences of their actions;[38] (3) an agency that fails to take adequate notice of environmental consequences, in particular to consider alternatives to a proposed action, may be acting arbitrarily or capriciously in violation

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[34] The policy covered only liabilities to which the insured became liable as a result of some injury to a third party. Bausch & Lomb argued that the contamination had injured the State by polluting groundwater that belonged to it. The Court held that under Maryland law, although the State had a strong interest in regulating groundwater, it was not the "property" of the State for purposes of construing an insurance policy.

[35] 330 Md. at 786, 625 A.2d at 1035 (emphasis added).

[36] 276 Md. at 380, 347 A.2d at 834 (internal citations omitted).

[37] *See, e.g., Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, infra, n. 62.*

[38] *See, e.g., Environmental Defense Fund v. Mathews, infra, n. 65.*

of the Administrative Procedure Act;[39] and (4) agencies must consider alternatives that may have less harmful environmental consequences in their decisions even when no EIS is required.[40]

In the years immediately following the passage of NEPA, there seemed a possibility that its broad language would have consequences extending well beyond the requirement that agencies prepare EISs. Several decisions of District Courts and Courts of Appeal made a point of saying that NEPA required more of federal agencies than the fulfillment of a paperwork obligation. Notwithstanding those cases, by the mid-1980s NEPA litigation had come to focus almost exclusively on the need for, or the adequacy of, an EIS. Nevertheless, the early decisions to the effect that the broad language of the statute demands that agencies do more than just comply with the EIS mandate, have never been overruled. Even though rarely cited today, they would seem to remain good law.

Judge Skelly Wright's ground-breaking opinion in *Calvert Cliffs*[41] was the first to consider the nature and extent of the obligations NEPA imposes on federal agencies. The plaintiffs had charged that certain rules promulgated by the Atomic Energy Commission failed to comply with § 102 of NEPA. Judge Wright held that NEPA "makes environmental protection a part of the mandate of every federal agency and department."[42] It "mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties."[43] No longer could an agency claim, as had the Atomic Energy Commission, that its particular statutory mandate did not allow it to take environmental considerations into account in carrying out its mission.[44] The (then relatively new) NEPA did not always dictate an outcome favorable to the environment; but agencies were henceforth required to take the environmental consequences of their decisions into account. The opinion emphasized the procedural nature of NEPA, while nevertheless leaving open the possibility that, in some cases, it might have substantive effect:

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101 unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[45]

Judge Wright wrote that Congress intended the procedural provisions of NEPA to be "action-forcing."[46] He took this expression from a statement by Senator Jackson, the principal sponsor of NEPA, who said that a major result of the passage of the statute would be that "[n]o agency will [now] be able to maintain that it has no mandate or no requirement to consider the

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[39] *See, e.g., Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, infra notes 65-75.*

[40] *See, e.g., Trinity Episcopal Sch. Corp. v. Romney, infra notes 78-79.*

[41] 449 F.2d 1109 (1971).

[42] Id. at 1112.

[43] Id. at 1115.

[44] Id. at 1112.

[45] 449 F.2d at 1115. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek behind the Curtains*, 100 GEO. L.J. 1507, 1517 (2012).

[46] Id. at 1112-13.

environmental consequences of its actions."[47] The "action-forcing" characterization of NEPA has subsequently been widely adopted by the federal courts.[48]

NEPA thus requires more than that agencies go through the motions of considering the environmental effects of proposed actions. They must take a "hard look" at the environmental consequences of their actions. This metaphor first appeared in *Natural Resources. Defense Council, Inc. v. Morton*,[49] was adopted by Justice Powell in his opinion in *Kleppe,*[50]and has since been thoroughly established as a part of NEPA jurisprudence.[51] It also makes an appearance in cases decided under several state environmental statutes.[52]

Notwithstanding the broader language of some of the early cases under NEPA, the Supreme Court's 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[53] had the effect of diverting the course of much of the subsequent NEPA litigation into a relatively narrow channel. NEPA, the Court wrote, was to be considered "essentially procedural."[54] Although recognizing that, "NEPA does set forth significant substantive goals for the Nation,"[55] it said that its primary purpose "is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency."[56]

Since *Vermont Yankee*, litigation under NEPA has focused largely, though not exclusively, on the necessity for, and adequacy of, EISs associated with major federal actions. This has hardly meant that NEPA has been ineffective in achieving its policy goals. In *Calvert*

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[47] Hearings on S. 1075, S. 237 and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). Just before the Senate finally approved NEPA, Senator Jackson said on the floor that the Act "directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking." 115 Cong. Rec. (Part 30) 40416 (1969).

[48] *See, e.g., Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the "action-forcing" characteristics of § 102(2)(C) would be lost."); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) ("Section 102(2)(C) is one of the 'action-forcing' provisions intended as a directive to 'all agencies to assure consideration of the environmental impact of their actions in decisionmaking.'") *See also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 47 (2008); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

[49] 458 F.2d 827, 838 (D.C. Cir. 1972).

[50] 427 U.S. at 410 n. 21, 96 S.Ct. at 2730 n. 21.

[51] *See, e.g., Robertson v. Methow Valley Citizens Council, supra*, 490 U.S. at 349; *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

[52] *See, e.g., Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, Wis. 282 2d 250, 376, 700 N.W.2d 768, 829 (2005); *Ebbetts Pass Forest Watch v. Dep't of Forestry & Fire Prot.*, 123 Cal. App. 4th 1331, 1345, 20 Cal. Rptr. 3d 808, 817 (2004); *H. O. M. E. S. v. New York State Urban Dev. Corp*., 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (1979).

[53] 435 U.S. 519 (1978) (citations omitted). *See also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 98, (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

[54] *Vermont Yankee*, 435 U.S. at 558.

[55] Id.

[56] Id.

Cliffs Judge Wright predicted, "These cases are only the beginning of what promises to become a flood of new litigation – litigation seeking judicial assistance in protecting our natural environment."[57] His prediction was accurate. A search of Westlaw turns up over 4,000 federal judicial decisions mentioning "NEPA" and "environmental impact statement."

In part as a result of this litigation, and in part the result of regulations adopted by CEQ spelling out the requirements for EISs, NEPA has caused federal agencies to prepare thousands of them – according to one estimate at the rate of some 500 a year.[58] In addition, agencies prepare some 50,000 "environmental assessments" (EAs) each year in determining that the environmental impact of a proposed action is not "significant" and therefore no EIS is required.[59] The analytical process thus "forced" by NEPA often leads agencies to alter their projects to make them more environmentally acceptable. Moreover, these statements have provided environmental organizations and citizens' groups with information they could not have developed on their own, allowing them to be more effective in their advocacy of environmental causes they might otherwise have been.[60]

This does not mean, however, that NEPA is limited *only* to requiring EAs or EISs, or that it is entirely without substantive teeth. Its "action-forcing" essence means that agencies must not only identify any significant environmental consequences of a proposed action, but, having done so, they must give due consideration to those consequences in making their decisions. Even when NEPA does not require the preparation of a formal EA or an EIS, agencies cannot ignore it in making decisions with environmental consequences.

This position is supported by the rules of the Council on Environmental Quality (CEQ). Section 102 of NEPA directs agencies to consult with the CEQ in identifying "methods and procedures" to assure that they give adequate weight to environmental concerns. The CEQ's rules make clear that its regulations implementing that section "are not confined to sec. 102(2)(C)(environmental impact statements). The regulations apply to the whole of section 102(2)."[61]

At a minimum, despite the Supreme Court's insistence on its "essentially procedural" nature, NEPA clearly *permits* agencies to take the environmental policies it articulates into account in their decisions, even when the statutes they administer make no mention of environmental concerns. The courts have recognized this in a variety of different contexts. One is rulemaking proceedings. For example, in *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma* ,[62] the Supreme Court held that, because of a clear conflict between the provisions of the Interstate Land Sales Full Disclosure Act[63]and NEPA's EIS requirement, HUD was exempt from preparing and EIS before allowing a "disclosure statement" to become final under the

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[57] 449 F.2d at 1111. *See* Lazarus, *supra* note 45, at 1516.

[58] Lois J. Schiffer, The National Environmental Policy Act Today, With an Emphasis on Its Application Across U.S. Borders, 14 DUKE ENVTL. L. & POL'Y F. 325, 326 (2004).

[59] Id.

[60] *See* Lazarus, *supra* note 45 at 1518-19.

[61] 40 C.F.R. § 1500.3.

[62] 426 U.S. 776, 96 S. Ct. 2430 (1976).

[63] 15 U.S.C. § 1701 et seq.

Disclosure Act. Nevertheless, the Court insisted that this did not mean that NEPA was totally without effect. Pointing out that the Disclosure Act required disclosures regarding some environmental aspects of a subdivision, and that the Act authorized the Secretary to require additional disclosures, the Court said, "Therefore, if the Secretary finds it necessary for the protection of purchasers or in the public interest, the Secretary may adopt rules requiring developers to incorporate a wide range of environmental information into property reports to be furnished prospective purchasers; and respondents may request the Secretary to institute a rulemaking proceeding to consider the desirability of ordering such disclosure."[64]

Environmental Defense Fund v. Mathews[65] decided just before *Flint Ridge*, went a step farther. Not only does NEPA authorize agencies to consider the environment in their decisions, it held, but they may not refuse to do so. The case was a challenge to an amendment to FDA rules that eliminated environmental concerns as a factor in agency decisions, effectively limiting them to the grounds authorized under the Food, Drug and Cosmetic Act (FDCA).[66] The District court had no difficulty granting summary judgment to the plaintiffs, holding that,

> In the absence of a clear statutory provision excluding consideration of environmental factors, and in light of NEPA's broad mandate that all environmental considerations be taken into account, we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified in the FDCA and FDA's other statutes. . ..
>
> This is not to say that NEPA requires FDA's substantive decisions to favor environmental protection over other relevant factors. Rather, it means that *NEPA requires FDA to consider environmental factors in its decision-making process* and supplements its existing authority to permit it to act on those considerations.[67]

A series of three related decisions involving rule-making by the Securities and Exchange Commission made the consideration of environmental concerns in accordance with NEPA an element of the "arbitrary or capricious" test of the Administrative Procedure Act.[68] They hold that NEPA not only *permits* agencies to consider the environment in rule-making, but that their decision may be arbitrary and capricious if they do not. In *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*,[69] three nonprofit organizations, relying in part on NEPA, had filed a petition with the SEC requesting it to adopt a rule requiring public companies to make extensive disclosures to shareholders regarding environmental matters. The Commission first declined to issue the rules proposed by petition, instead requiring disclosures of environmental issues only to the limited extent that they had material financial consequences to the company. The plaintiffs appealed the denial of their petition to the District Court for the District of Columbia, which remanded the case to the SEC on the grounds that the agency's

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[64] 426 U.S. at 792, 96 S. Ct. at 2440.
[65] 410 F. Supp. 336 (D.D.C. 1976).
[66] 21 U.S.C. §§ 301 et seq.
[67] Id at 338 (emphasis added).
[68] 5 U.S.C.A. § 706.
[69] 389 F. Supp. 689 (D.D.C. 1974). The petition also requested rules regarding the disclosure of employment practices.

rulemaking proceedings fell short of the requirements of the Administrative Procedure Act.[70] In a decision rendered before *Vermont Yankee*, Judge Richey made clear his belief that any future review of the SEC's rule was not confined solely to compliance with procedural requirements but that he was empowered to examine the substance of the SEC's decision in light of NEPA:

> "Indeed this Court can set aside SEC rules which do not meet the NEPA mandate, if the Court finds that the SEC rulemaking is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). Reviewing courts have authority and responsibility to scrutinize agency decisions closely in order to ensure that they proceed from a proper understanding of the relevant laws and in order to correct those decisions which are inconsistent with Congressional mandates, fall short of the statutory policies, or strike an improper balance among conflicting interests."[71]

In response to District Court's ruling, the SEC conducted further rulemaking proceedings in an effort to cure the procedural defects of its first decision, but again determined to require only limited environmental disclosure. The plaintiffs again appealed, and again the District Court ruled in their favor, holding that the Commission had acted arbitrarily and had failed to "consider alternatives to its actions which would reduce environmental damage."[72]

On appeal the D.C. Circuit reversed, holding that the appropriate scope of substantive review by the courts was a narrow one, which the District Court had exceeded.[73] Nevertheless, it recognized that NEPA was not entirely without substantive effect. The petitioner-appellees had argued that the SEC had violated NEPA by failing to consider an alternative rule that would have limited required environmental disclosures to proxy statements. Citing *Vermont Yankee*, the court acknowledged that this argument was "essentially procedural." It went on to say, however, that the argument "necessarily involves a substantive element." If a proposed agency action would have adverse environmental consequences, NEPA expressly requires that the agency consider alternatives that would be less harmful to the environment.[74] It follows, therefore, that, "[i]f the court is to determine whether an agency has fulfilled its procedural NEPA duties by 'considering' alternatives, it must exercise at least a minimal scrutiny over the rationality of the agency's reasons for rejecting likely alternatives. *To this extent at least, appellees' NEPA contentions can be thought of as raising mixed questions of substance and procedure*."[75]

Another context in which NEPA's extra-procedural character has been brought to bear is challenges to the issuance of permits. One of the earliest such cases was *Zabel v. Tabb,*[76] in which landowners sued the Corps of Engineers seeking to require it to grant a permit to dredge and fill in Boca Siega Bay, near St. Petersburg, Florida. The plaintiffs had argued that the Rivers and Harbors Act did not authorize the Corps to deny the permit unless the proposed activity

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[70] Id.
[71] Id. at 688-89.
[72] *Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 432 F. Supp. 1190, 1207 (D.D.C. 1977) (quoting *Calvert Cliffs, supra,* 449 F. 2d at 1128), rev'd, 606 F.2d 1031 (D.C. Cir. 1979).
[73] *Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031 (D.C. Cir. 1979).
[74] NEPA §§ 102(C)(iii), 102(E).
[75] 606 F.2d at 1044 (emphasis added).
[76] 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873.

would interfere with navigation and was not authorized to take environmental considerations into account. Although the Corps had denied the permit before the passage of NEPA, it reached the Court of Appeals after its passage. In upholding the decision of the Corps, the court relied on the policy articulated in the statute, which it said "essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment."[77] The court thus recognized that, at a minimum, NEPA's mandate 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" requires agencies to take environmental concerns into account in their decision-making unless their organic statute prohibits it.

Trinity Episcopal Sch. Corp. v. Romney[78] was a challenge to a decision to build a low income housing project on Manhattan's Upper West Side. Although the plaintiffs did not claim that NEPA required the Department of Housing and Urban Development to prepare an EIS, they argued that it was nevertheless required to consider alternatives that might alleviate the project's environmental impact. The Second Circuit agreed, saying that "HUD failed to comply with the mandate of § 102(2)(D) of [NEPA] and that compliance therewith is a prerequisite to any further federal action on the Site 30 project. . . . *Federal agencies must consider alternatives under § 102(2)(D) of NEPA without regard to the filing of an EIS*."[79]

4. Precedent from NEPA-Like Statutes in Other States

The enactment of NEPA set in motion a chain of adoptions by the states of similar statutes. By 1981 some 28 states had done so.[80] Many of these statutes are patterned closely on NEPA, and others (including that of Maryland) depart from to a greater or lesser degree.

Depending on the statutory language and judicial predilection the states have varied significantly in the extent to which they provide for substantive review of administrative decisions. Many states have effectively followed the federal courts' lead, holding that their statutes are primarily procedural. A few, however, have leapfrogged federal law in the application of their statutes, being far more aggressive in permitting them to be used to limit harm to the environment.[81] The laws of California, Washington and New York are notable for going the farthest in that direction.

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[77] Id. at 211. *Accord Di Vosta Rentals, Inc. v. Lee*, 488 F.2d 674 (5th Cir. 1973).

[78] 523 F.2d 88 (2d Cir. 1975).

[79] Id. at 92-93 (emphasis added). *Accord, Aertsen v. Landrieu*, 637 F.2d 12, 20 (1st Cir. 1980) ("The . . . obligation to describe alternatives is not limited to a proposed major action significantly affecting the human environment, for otherwise it would add nothing to § 102(2)(C)(iii) of NEPA which already imposed an obligation upon a Federal Government agency to make with respect to a proposed major action a statement of 'alternatives to the proposed action.'"); *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975) (The requirement to consider environmental consequences "is independent of and of wider scope than the duty to file the EIS, This requirement is independent of and of wider scope than the duty to file the EIS.")

[80] See Nicholas Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155, 1157 (1982).

[81] For a discussion of the co-evolution of NEPA and its state equivalents, *see* Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10675 (2009).

Friends of Mammoth v. Bd. of Supervisors,[82] an early case in California, is among the most cited decisions in state environmental protection law. Relying on the extensive legislative history of the California Environmental Quality Act (CEQA),[83] the California Supreme Court ruled that private development activities that required governmental permits were subject to CEQA. In a much-quoted passage, the court said that the statute should be "interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[84] It went on to make it clear that CEQA *required* changes to a project to the extent necessary to mitigate adverse environmental consequences: "Obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved. In making these determinations concrete concepts, not mere aphorisms or generalities, must be considered."[85] Since *Friends of Mammoth* was decided, the California legislature has amended CEQA several times to strengthen it, including codifying the holding of the case.

Washington's State Environmental Policy Act of 1971 (SEPA)[86] was patterned closely on NEPA. While, as in NEPA, the focus of the statute has been on the need for and adequacy of environmental impact statements, one early case established clearly that SEPA would have an effect on the construction by the courts of other statutes. *English Bay Enterprises, Ltd. v. Island County,*[87] involved the construction of an aspect of the state's Shoreline Management Act.[88] In holding that the Act applied to the issuance of a permit to harvest clams, the Court said, "A liberal construction of the act is also mandated by the State Environmental Policy Act."[89] That principle is apparently firmly established in Washington jurisprudence.[90]

New York was the last of these three states to adopt the State Environmental Quality Review Act (SEQRA),[91] its NEPA-like statute.[92] SEQRA's analogue to MEPA's § 1-302(k) states, "It is the intent of the legislature that all agencies . . . regulate . . . activities so that due consideration is given to preventing environmental damage."[93] The New York courts have construed this language to authorize courts to strike down administrative decisions that failed to give appropriate weight to environmental considerations. In *Town of Henrietta v. Department of Environmental Conservation of New York*, citing *Calvert Cliffs, supra,* the court observed that, "requirement of environmental consideration 'to the fullest extent possible" sets a high standard which must be enforced by the reviewing courts. Failure to employ this balancing analysis may

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[82] 8 Cal. 3d 247, 502 P.2d 1049 (1972) *disapproved of by Kowis v. Howard*, 3 Cal. 4th 888, 838 P.2d 250 (1992).

[83] Pub. Resources Code, §§ 21000—21151.

[84] 8 Cal. 3d at 258, 502 P.2d at 1056.

[85] 8 Cal. 3d at 264, 502 P.2d at 1060.

[86] 1971 Wash. Laws Ch. 109 (codified as amended at WASH. REV. CODE ANN. §§ 43.21C.010.914).

[87] 89 Wash. 2d 16, 20, 568 P.2d 783, 786 (1977).

[88] RCW 90.58.030(3)(d).

[89] 89 Wash. 2d at 20, 568 P.2d at 786.

[90] E.g., Herman v. State of Washington Shorelines Hearings Bd., 149 Wash. App. 444, 459, 204 P.3d 928, 935 (2009).

[91] N.Y. Envtl. Conserv. Law §§ 8-0101 to 0117 (McKinney 1997.

[92]Robinson, *supra* note 80 at 1159.

[93] N.Y. Envtl. Conserv. Law § 8-0103(9) (McKinney 1997).

be grounds for nullifying an administrative decision"[94] In *E.F.S. Ventures Corp. v. Foster* the New York Court of Appeals made it clear that SEQRA was not merely a procedural statute, saying, "[O]ur statute, unlike many others, imposes substantive duties on the agencies of government to protect the quality of the environment for the benefit of all the people of the State."[95]

III. Resurrecting MEPA

For most of its life, MEPA has lain dormant. It has been mentioned in only five reported opinions of the Maryland courts, the last of which was in 1993;[96] and it appears never to have been used successfully to challenge a decision of a state agency. This dormancy is both unfortunate and unnecessary. There is nothing unclear about the goals the legislature declared in the statute. Nor is there any ambiguity about MEPA's requirement that agencies administer the law, including adopting appropriate methods and procedures, in a manner that advances those goals. It is true that the General Assembly chose not to make the preparation of EERs for agency actions that may affect the environment the kind of tool that EISs is under NEPA. But that only means that the other parts of the statute should be given greater significance. In short, it is time that MEPA grew up.

There are several ways that advocates for the environment could make MEPA the powerful tool that it was intended to be. These include (1) enforcing the requirement that agencies adopt procedures so assure that they give environmental considerations appropriate weight in carrying out their missions, especially with respect to the information they make readily available to the public; (2) challenging the grants of permits or approvals affecting the environment; and (3) assuring that agencies consider the environment when adopting new or amended rules.

A. Adoption of Methods and Procedures

MEPA requires state agencies to "identify, develop, and adopt methods and procedures" to promote the inclusion of environmental protection in their decisions. Nevertheless, as mentioned above, only three agencies have published any rules whatsoever under MEPA.[97] Two sets of these rules are skeletal, at best, and the third, issued by the Department of Transportation limited to those to be followed in the preparation of EERs.

Section 1-303 of MEPA reads in its entirety:

> All State agencies, except where existing law expressly prohibits, shall identify, develop, and adopt methods and procedures that will assure that:

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[94] 76 A.D.2d 215, 223, 430 N.Y.S.2d 440, 447 (1980) (citations omitted); s*ee generally*, John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393 (2001).

[95] 71 N.Y.2d 359, 371, 520 N.E.2d 1345, 1351 (1988).

[96] *See* notes 15 to 17 and 33 to 35, *supra*, and accompanying text. The fifth was *Hampton Associates Ltd. P'ship v. Baltimore Cnty.*, 66 Md. App. 551, 505 A.2d 537 (1986), in which the court mentioned MEPA in passing only in describing the holding in an earlier decision.

[97] *See* notes 22 through 30, *supra*, and accompanying text.

(1) Environmental amenities and values are given appropriate consideration in planning and decision-making along with economic and technical considerations;

(2) Studies are undertaken to develop and describe appropriate alternatives to present policies, programs, and procedures that involve significant adverse environmental effects or unresolved conflicts concerning uses of available resources; and

(3) Planning and decision-making involving environmental effects are undertaken with the fullest practicable provision of timely public information and understanding and in coordination with public and private organizations and individuals with jurisdiction by law, special expertise, or recognized interest.

This language could hardly be clearer or more straightforward. It requires that *all* agencies adopt "methods and procedures" to protect the environment; and there is no suggestion that they be limited to the procedures to be followed in preparing an EER. Why should not the agencies whose work is of particular environmental sensitivity—including the Departments of Agriculture, the Environment, and Natural Resources—be required to elaborate on how they will take environment concerns into account in carrying out their missions?

Here, again, the administrative implementation of NEPA can serve as a guide. Section 102(2)(B) directs agencies to consult with the Council on Environmental Quality in establishing "methods and procedures" to insure that environmental considerations are "given appropriate consideration in decisionmaking." In furtherance of that directive, the CEQ has adopted regulations spelling out what is expected of agencies.[98] Among other things, these rules state,

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. [99]

Although the principal focus of the CEQ's rules is the adoption of procedures necessary to comply with the provisions of NEPA dealing with EISs, they also address the need to include environmental considerations more broadly in agency decision-making, including:

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

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[98] 40 C.F.R. Part 1500.
[99] 40 C.F.R. § 1500.6.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.[100]

The rules are also quite explicit about the obligation of agencies to make environmental information available to the public and to encourage public participation.[101]

In that regard, the last clause of § 1-303 of MEPA, which requires "the fullest practicable provision of timely public information," is of particular relevance. Fuller compliance with that directive has the potential for providing the public much better access to information about permitting and enforcement.[102] For example, the federal Environmental Protection Agency makes available on its website detailed information on the issuance of permits under the national pollution discharge elimination system of the Clean Water Act.[103] By contrast, the Maryland Department of the Environment occasionally issues press releases announcing enforcement actions and publishes an annual report with statistics summarizing its enforcement activities; information about particular enforcement actions is not generally available on the Department's website. The Maryland Department of Agriculture, which manages and enforces a nutrient management program intended to reduce pollution in surface waters, is equally opaque about the details of its enforcement activities. Given the importance of enforcement to assuring that anti-pollution laws are being followed, "timely information" about these agencies' enforcement programs would be of great value to the ability of the public to monitor how well they are carrying out their statutory duties.

Virtually every federal agency whose activities might affect the environment has adopted rules to comply with NEPA's mandate. The focus of most agency rules is the preparation of EAs and EISs. Most, if not all, however, refer to, or incorporate by reference, CEQ's rules.[104] As pointed out above, these include the more general mandate that agencies take environmental consideration into account in *all* their activities, whether or not they implicate NEPA's formal procedural requirements. Some have recognized that in their own rules. For example, the Department of Agriculture's rules specify that

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[100] 40 C.F.R. § 1505.1.

[101] 40 C.F.R. § 1506.6.

[102] Although much of the language § 1-302 is drawn from § 102 of NEPA, the federal statute has no provision equivalent to § 1-303(3).

[103] *E.g.*, http://www.epa.gov/reg3wapd/npdes/index.htm (last visited July 21, 2014).

[104] *E.g.*,. 40 C.F.R. § 6.100 (EPA); 7 C.F.R. § 1b.1(a) (Department of Agriculture); 10 C.F.R. § 1021.103 (Department of Energy); 43 C.F.R. § 46.20(a) (Department of the Interior); 33 C.F.R. § 230.1 (Army Corps of Engineers).

> All policies and programs of the various USDA agencies shall be planned, developed, and implemented so as to achieve the goals and to follow the procedures declared by NEPA in order to assure responsible stewardship of the environment for present and future generations.[105]

It is also of interest is that, in many cases, agencies have designated a particular official as the individual responsible for compliance with NEPA.[106] Were Maryland agencies to charge a single official with responsibility for compliance with MEPA, the likely result would be much greater sensitivity to environmental concerns.

B. Permits and Authorizations

Among the more consequential environmental actions by state agencies is the issuance of a variety of permits and licenses. The Maryland Department of the Environment, for example, issues discharge permits under the Clean Water Act[107] and the Clean Air Act[108] pursuant to delegated authority from the Environmental Protection Agency. These permits have obvious effects on the environment. The Maryland Department of Agriculture's nutrient management program requires agriculturists to file "nutrient management plans" and "annual implementation reports" on their compliance with those plans.[109] As agriculture is one of the largest contributors to nutrient pollution in the Chesapeake Bay watershed, this program, too, has important environmental ramifications.

At the federal level, the issuance of a permit or license with potential environmental consequences triggers the procedural aspects of NEPA, requiring the preparation of an EA, and often an EIS. Although MEPA does not require state agencies to prepare an EER before issuing a permit or license, it still requires that they "interpret and administer" their statutes in accordance with the policies of the statute. Section 1-303 also requires that they adopt "methods and procedures that will assure that [e]nvironmental amenities and values are given appropriate consideration in . . . decision-making." There is nothing in the statutory language to suggest that that these statutory directives do not apply to decisions regarding the issuance of permits or licenses.

Viewed thus, MEPA is simply an overlay to whatever statutory regime governs the issuance of a particular license or permit. To fail to take due account of environmental consequences in granting a license or permit would violate MEPA's mandate to "interpret and administer" the law in accordance with the policies elaborated in MEPA and to give "appropriate consideration" to "environmental amenities and values." Such a decision would then be subject to challenge under Maryland law, which empowers courts to set aside government actions that are "affected by . . . [an] error of law" or are "arbitrary or capricious."[110]

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[105] 7 C.F.R. § 1b.2(a).

[106] *E.g.*, 40 C.F.R. §§ 6.102(b)(8), 6.103 (EPA); 7 C.F.R. § 1b.2 (c) (Department of Agriculture); 10 C.F.R. § 1021.105 (Department of Energy); 33 C.F.R. § 230.5 (Army Corps of Engineers).

[107] *See* 33 U.S.C. §§ 1342, et seq.; Md. Code Ann., Envir. §§ 9-30, et seq. (West).

[108] 42 U.S.C §§ 4201, et seq.; Md. Code Ann. Envir. §§ 2-401, et seq.

[109] *See* Md. Code Ann., Agric. §§ 8-801, et seq. (West).

[110] Md. Code Ann., State Gov't § 10-222 (West).

C. Rulemaking Proceedings

While state agencies only infrequently make rules to which MEPA would be relevant, when they do, MEPA would seem to require that they must take into account any potential environmental consequences of the proposed rule. *Flint Ridge* and *NRDC v. SEC*, discussed above,[111] provide instructive examples of how citizens might use MEPA to improve agency rules. In *Flint Ridge*, the Supreme Court suggested that, though NEPA's procedural requirements did not apply to the approval of a disclosure statement under the Interstate Land Sales Full Disclosure Act, NEPA might require that HUD's regulations require more environmental information in such statements. In *NRDC v. SEC* the Court of Appeals made clear that in reviewing agency rule-making, courts may consider whether the agency has paid adequate attention to NEPA's mandate that they consider the environment.

Just as with the issuance of licenses or permits, therefore, MEPA would appear to require that in adopting or amending their rules, agencies take due account of any potential adverse environmental consequences. The agency must therefore consider those consequences and evaluate alternatives with lesser adverse consequences, adopting the version of the rule with the minimum effect on the environment and only when the other considerations for the rule outweigh any negative environmental effects. And the agency should do so explicitly, and on the record. Failure to do so despite MEPA's mandate to "interpret and administer" the law in accordance with the policy set forth in MEPA and to give "appropriate consideration" to "environmental amenities and values" would subject the rule to challenge as being affected by an error of law or otherwise "arbitrary or capricious."

IV. Conclusion

MEPA has lain essentially dormant since it was enacted in 1973, largely because the narrow definition of "proposed state action" makes its EER feature – which has been the principal focus of attention under its federal forebear – largely useless. The most obvious road to modifying MEPA so that it can contribute to the achievement of the lofty goals set forth in its preamble[112] would be to amend it to redefine "proposed state action" to include all proposed actions with a potential to have a significant effect on the environment, not just requests for action by the legislature. Such legislation would undoubtedly face serious political opposition, and while it could result in strengthening MEPA's "action-forcing" aspects, it is unclear whether the political costs of accomplishing such an amendment are worth it.

In the meantime, however, there are other provisions of the statute that have been entirely overlooked and that have the potential to give environmental concerns appropriate weight in agency activities. There are a number of steps agencies whose actions are likely to have environmental consequences should take to bring them into compliance with these provisions. First, they should adopt rules to assure that environmental concerns receive adequate consideration in agency decisions. In particular, these rules should assure that those concerns are given due weight in the issuance of permits or licenses. They should also designate individuals who have particular responsibility for seeing that environmental considerations are taken into

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[111] Notes 62 through 75 and accompanying text.
[112] *See* MEPA § 1-302.

account in agency decisions and procedures. Second, agencies, such as the Department of the Environment and the Department of Agriculture should, in compliance with the final clause of § 1-303 of MEPA, take steps to make information of environmental concern more readily available to the public. Finally, agencies should assure that environmental concerns are clearly and expressly considered in their rulemaking proceedings.

MEPA has been largely ignored by state agencies almost since its passage in 1973. An effort to implement its clear language in service of the policies it so clearly and powerfully articulates is long overdue.