

September 1987

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### Recommended Citation

Philip Weinberg, *A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts*, 5 Pace Env'tl. L. Rev. 1 (1987)

DOI: <https://doi.org/10.58948/0738-6206.1240>

Available at: <https://digitalcommons.pace.edu/pelr/vol5/iss1/1>

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# A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts

Philip Weinberg\*

Recent court decisions construing the National Environmental Policy Act (NEPA)<sup>1</sup> and the state laws which are companions to New York's State Environmental Quality Review Act (SEQRA)<sup>2</sup> furnish a chiaroscuro sketch for the practitioner — some advances for environmental protection, some retreats. In some of the most significant cases, described in this article, the courts have been vigilant in insisting on compliance with environmental quality review laws, halting major projects when they found contraventions of the statutes. These decisions, however, must be weighed against others which show reluctance to implement these laws and timidity in their judicial enforcement.

First, this article will discuss several salient decisions interpreting NEPA in recent years.<sup>3</sup> It then will analyze the most meaningful recent decisions and statutory amendments in the states with laws similar to SEQRA.<sup>4</sup>

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1. 42 U.S.C. §§ 4321-4370a (1982 & Supp. III 1985).

2. N.Y. Env'tl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1987).

3. For earlier background, see Orloff, *SEQRA: New York's Reformation of NEPA*, 46 Alb. L. Rev. 1128 (1982), and the articles cited therein, discussing NEPA litigation up to 1982.

4. Pre-1982 statutes and decisions are ably analyzed in Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 Alb. L. Rev. 1155 (1982).

### I. Recent NEPA Decisions

In recent years, the federal courts, in construing NEPA, have amply shown that failure to satisfy NEPA's mandate will jeopardize the most immense of projects. The litigation halting New York's Westway dramatized this fact, and signaled that environmental quality review is a weapon to be taken seriously.

Westway seemed a juggernaut, impossible to stop. The proposed interstate highway along Manhattan's west side, accompanied by a landfill to be used for real estate development and a riverside park, had received its required air quality permit under the Clean Air Act,<sup>5</sup> and its permit to place fill in the Hudson River under the Clean Water Act, section 404.<sup>6</sup> The United States District Court upheld the air permit and rebuffed a challenge to the environmental impact statement for failure to consider alternatives.<sup>7</sup> The dredge-and-fill permit, however, was enjoined because the Army Corps of Engineers failed both to adequately consider the impact of the proposed filling on the fish resources of the Hudson, particularly the economically important striped bass, and to disclose this impact in its environmental impact statement (EIS).<sup>8</sup>

Following this decision, the plaintiffs amended their complaint to name the Federal Highway Administration. The court heard additional proof and confirmed its original injunction, finding that the Corps contravened both NEPA and the Clean Water Act in issuing the permit.<sup>9</sup> The court of appeals, affirming the district court, found "amply supported by the record" its finding that the EIS "contained false statements depicting the interpier region as 'biologically impoverished' and as a 'biological wasteland,' when, in fact, the interpier

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5. 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985). The highway needed and received an indirect source permit under the Clean Air Act. *Id.* § 7410(a)(5).

6. 33 U.S.C. § 1344 (1982).

7. *Action for Rational Transit v. West Side Highway Project*, 536 F. Supp. 1225 (S.D.N.Y. 1982), *aff'd sub nom. Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1011 (2d Cir. 1983).

8. *Id.*

9. *Sierra Club v. United States Army Corps of Eng'rs*, 541 F. Supp. 1367 (S.D.N.Y. 1982), *aff'd*, 701 F.2d 1011 (2d Cir. 1983).

area in winter harbored a concentration of juvenile striped bass.”<sup>10</sup>

It further noted that the Corps, although it purported to respond to critical comments from the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Environmental Protection Agency, had failed to perform new studies or collect new data.<sup>11</sup> Describing the Corps’ approach as “cavalier,”<sup>12</sup> the court upheld the injunction “unless and until the [Federal Highway Administration] and the Corps reconsider the matter of impact on fisheries in accordance with NEPA and the Clean Water Act.”<sup>13</sup>

The Corps prepared a supplemental EIS (SEIS) in which, as in its earlier EIS and other documents, it characterized Westway as primarily a transportation project, with attendant real estate development benefits. But the Corps’ District Engineer, in granting the landfill permit anew, candidly stated that Westway “is better termed a ‘redevelopment’ project” and that “if [he] had characterized Westway as a highway project, he could not have granted the landfill permit.”<sup>14</sup> Since the *raisons d’etre* for this huge project were so blatantly misstated in the EIS and in the decision granting the permit, District Judge Thomas F. Griesa found the EIS wanting, and again enjoined the project.<sup>15</sup> The court noted:

Not only should this characterization of the project have been disclosed to the public in the SEIS, but the discussion of alternatives to Westway was required to be stated in terms of redevelopment. The choice among alternatives was basically the choice between real estate and park development through the Westway landfill project, recognizing that Westway is not needed for transportation purposes, and other types and degrees of development

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10. *Sierra Club v. United States Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).

11. *Id.* at 1030-31.

12. *Id.* at 1031.

13. *Id.* at 1049.

14. *Sierra Club v. United States Army Corps of Eng’rs*, 614 F. Supp. 1475, 1479, (S.D.N.Y.), *aff’d*, 772 F.2d 1043 (2d Cir. 1985).

15. *Id.* at 1517.

without Westway. An analysis of this kind would inevitably have included a thorough discussion of potential private development, undoubtedly on a lesser scale than Westway, but at a lesser cost both in money and in effects on the environment, and without the expenditure of public funds. This analysis would have focused on the real issue the decision makers had to deal with.

The SEIS in the present case largely avoided this issue and was thus materially deficient. The requirements of NEPA and the 1982 judgments of this court have not been complied with.<sup>16</sup>

Similarly, the Corps' Draft Supplemental EIS found that the landfill would significantly affect the striped bass habitat of the Hudson, but the final statement described that impact as "minor and inconsequential."<sup>17</sup> The judge found the Corps' view that "there was no change in its basic conclusion as to impact" to be "incredible."<sup>18</sup>

Affirming the district court once again in this respect, the court of appeals held: "A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief. This case is capsulized in that solitary simile."<sup>19</sup>

Although the court of appeals set aside the lower court's injunction permanently barring the Corps from issuing a permit, it upheld its finding that the shift from the "significant adverse impact" foretold in the Draft Supplemental EIS to the rosy view expressed in the final statement was "a post-hoc rationalization unworthy of belief."<sup>20</sup>

It therefore affirmed the judgment vacating the permit — sounding the death-knell of the project, as it proved. Shortly after the decision of the court of appeals, New York traded in

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16. *Id.* at 1479-80.

17. *Id.* at 1480.

18. *Id.*

19. *Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d 1043, 1046 (2d Cir. 1985).

20. *Id.* at 1055. Judge Mansfield dissented as to this issue and would have affirmed the injunction as well.

Westway<sup>21</sup> in favor of federal funding for a less prodigious road coupled with hundreds of millions in capital improvements for the City's mass transit system.<sup>22</sup> The NEPA process, rigorously insisted on by the courts, proved to be the Achilles' heel of a fatally flawed, but seemingly inexorable proposal.

NEPA's obligation that federal agencies consider alternatives to a project, as well as whether or not the proposal requires an EIS, has been examined in another major decision, *City of New York v. United States Department of Transportation*.<sup>23</sup> NEPA section 102(2)(E)<sup>24</sup> 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." This obligation is broader than the requirement that federal agencies prepare environmental impact statements before undertaking "major Federal actions significantly affecting the quality of the human environment."<sup>25</sup>

In *Natural Resources Defense Council, Inc. v. Morton*,<sup>26</sup> the leading precedent on the ambit of the need to consider alternatives, the Court of Appeals for the District of Columbia Circuit held that such alternatives to an offshore oil-leasing program as increased imports, and available alternate resources of energy such as natural gas and nuclear power, should be considered.<sup>27</sup> The court held that "[t]he mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion."<sup>28</sup>

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21. 16 Env't. Rep. Current Dev. (BNA) 902 (Sept. 20, 1985).

22. N.Y. Times, Jan. 8, 1987, at B3, col. 1.

23. 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

24. 42 U.S.C. § 4332(2)(E) (1982).

25. 42 U.S.C. § 4332(2)(C) (1982). See *Hanly v. Kleindienst*, 471 F.2d 823, 834-36 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

26. 458 F.2d 827 (D.C. Cir. 1972).

27. *Id.* The case dealt with the discussion of alternatives in an EIS prepared by the Department of the Interior.

28. *Id.* at 837. But see, *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975) (holding that agencies need not consider "alternatives which could only be implemented after significant changes in governmental policy or

*City of New York v. DOT*,<sup>29</sup> expressing disagreement with *NRDC v. Morton*, severely limited the need to discuss alternatives. The litigation stemmed from the agency's promulgation of rules to govern the shipment of large quantities of radioactive materials by road. The regulation at issue allows shipment on interstate highways, including those traversing the City of New York.<sup>30</sup> The city, whose local law barring such shipments was presumptively preempted by the federal regulation,<sup>31</sup> applied to the Department of Transportation (Department or DOT) for a "non-preemption ruling" — in effect, a dispensation from the federal regulation's otherwise preemptive effect.<sup>32</sup> While this application was pending, the city sued, together with the state, contending *inter alia* that the Department neglected to consider alternatives such as barging nuclear materials instead of shipping them by truck.<sup>33</sup>

The court, reversing the district judge, narrowed the view expressed in *NRDC v. Morton*, holding that only those alternatives need be weighed which lie within the statutory objectives of the action proposed.<sup>34</sup> It observed that the agency's finding of no significant impact, allowing it to dispense with

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legislation").

29. 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

30. 49 C.F.R. §§ 171-73, 177 (1987). The regulations mandate use of a beltway around a city when available, *id.* § 177.825(b), but none exists around the City of New York.

31. Hazardous Materials Transportation Act § 112(a), 49 U.S.C. § 1811(a) (1982).

32. *City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 739 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). The city's request to be exempted from federal preemption was subsequently denied by the Department of Transportation, and the city has commenced new litigation to annul that denial. *City of New York v. United States Dep't of Transp.*, No. 87 Civ. 1443 (S.D.N.Y.). The state of Connecticut and a number of utility companies have intervened in that action as defendants, and motions by both sides for summary judgment are pending before Judge Cedarbaum. Interviews with Barry Schwartz, Assistant Counsel, Department of Environmental Protection, City of New York (Nov. 6, 1985 and Feb. 29, 1988).

In addition, legislation was introduced to reverse the presumption in the Hazardous Materials Transportation Act that local laws are preempted. This bill would place the burden on the Secretary of Transportation to overturn a local law such as New York's. See H.R. 1146, 99th Cong., 1st Sess. introduced in 1985 by Rep. Weiss. This bill did not pass.

33. *City of New York*, 715 F.2d at 741.

34. *Id.* at 743.

an EIS, permits it "to consider a narrower range of alternatives than it might be obliged to assess before undertaking action that would significantly affect the environment."<sup>35</sup> Since the regulation dealt only with highway shipment, the court held that the Department need not consider barging as a nationwide alternative.<sup>36</sup> Further, the court noted, barging could be weighed in the context of the city's request for a non-preemption ruling.<sup>37</sup> It also rejected the consideration of barging around New York as irrelevant to a nationwide consideration of alternatives.<sup>38</sup>

This constricted view of the hitherto weighty mandate that agencies consider alternatives amounts to a shell game. It renders all but illusory a major purpose of considering alternatives: to compel agencies to focus their attention on reasonably available substitutes for the action proposed, such as barging around New York instead of trucking nuclear materials through densely populated urban areas.

The Second Circuit went on to rule that no EIS was required since the rule did not significantly affect the environment.<sup>39</sup> This issue led the court into the thicket of risk assessment: weighing the likelihood of a highway accident involving nuclear materials as well as its likely consequences. The DOT had relied on a worst-case analysis prepared by a consultant who concluded that the most lethal credible accident could cause 1800 cancer deaths, but that the probability of such an occurrence was so low — once every three hundred million years, according to the consultant — that it did "not contribute significantly to expected values of risk."<sup>40</sup>

The district court had set aside the Department's environmental assessment for failing to adequately discuss scien-

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35. *Id.* at 744.

36. The court pointed out that twenty-six percent of the country's nuclear facilities are not directly accessible to navigable waters. *City of New York*, 715 F.2d at 744, n.12. But that means the remaining seventy-four percent are, and even the minority could have nuclear materials brought by barge to or from the nearest port instead of being trucked across the country.

37. *Id.* at 744. *See supra* note 32.

38. *Id.* at 744.

39. *Id.* at 745.

40. *Id.* at 747.



tific disputes as to the projected numbers of shipments, the reliability of containers, and the risks of sabotage and terrorism. Reversing, the court of appeals held the agency should be granted broad latitude in determining how seriously to take such factors.<sup>41</sup> It is difficult to argue with that platitude, but its application here undermines the purpose of NEPA to insure that the agency honestly weighs those risks, instead of blandly rubber-stamping the predictable views of its consultants.<sup>42</sup>

Finally, the court of appeals rejected the district judge's view that "a proposal entailing a credible risk of catastrophe demands treatment as one 'significantly affecting the quality of the human environment.'"<sup>43</sup> In this, the crux of its decision, the appeals court concluded that the remote possibility of even a catastrophic risk, as a matter of law, does not constitute a significant impact triggering an EIS.<sup>44</sup> With risk assessment as problematic as it is, and as fraught with uncertainty and exercises of subjective judgment, this conclusion tears at the fabric of NEPA.<sup>45</sup>

41. *Id.* at 748-51.

42. *Cf. Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), in which the same court held, half a decade before NEPA:

[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

The courts have cautioned against federal agencies "reflexively rubberstamping" the impact statements of their consultants. *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied sub nom. Sierra Club v. Hills*, 421 U.S. 994, *cert. denied sub nom. Edwards Underground Water District v. Hills*, 422 U.S. 1049 (1975). See also *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), discussed *infra* note 50. "[P]rivate consultants play an important, if sometimes troubling, role in modern government. See, e.g., D. Guttman & B. Willner, *The Shadow Government* (1976)." *Sierra Club*, 695 F.2d at 963 n.3.

43. *City of New York v. United States Dep't of Transp.*, 539 F. Supp. 1237, 1274 (S.D.N.Y. 1982), *rev'd*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

44. *City of New York*, 715 F.2d at 752 n.20.

45. In related contexts, the courts have adopted views more protective of the public health. See *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976): "the statutes — and common sense — demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."

Dissenting, Circuit Judge Oakes found the DOT's quantifications of risks "absurd on their face."<sup>46</sup> He noted that the agency was bound by the guidelines of the Council on Environmental Quality (CEQ) implementing NEPA,<sup>47</sup> which mandate that federal agencies weigh, in deciding whether action is likely to "significantly affect" the environment, "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."<sup>48</sup> Judge Oakes pointed out that, in fact, the report on which the Department acted omitted human errors resulting in vehicular accidents (as opposed to errors leading directly to nuclear incidents). The report candidly admitted that the data on these two types of error were "vastly different."<sup>49</sup>

The Fifth Circuit reached a quite different result the same year in examining an agency's worst-case analysis in *Sierra Club v. Sigler*.<sup>50</sup> The litigation challenged the Army Corps of Engineers' issuance of permits to build a deepwater port in Galveston Bay, allowing supertankers to supply oil to the refineries abounding in the Houston-Texas City area. Here, unlike the *City of New York* case, the Corps prepared an EIS. But it failed to perform a worst-case analysis of a supertanker spill resulting in a total loss of its cargo.

Noting that the CEQ's worst-case regulation codified a judicially created "'common law' of NEPA,"<sup>51</sup> the court held "the Sierra Club's catastrophic worst case is precisely what the CEQ intended: 'to alert the public . . . to *all known possible* environmental consequences of agency action.'"<sup>52</sup> The Corps, it ruled, must consider the impact of a total cargo loss by a supertanker in the bay despite its unlikelihood. As Cir-

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46. *City of New York*, 715 F.2d at 753.

47. 40 C.F.R. § 1500-08 (1987).

48. 40 C.F.R. § 1508.27(b)(5) (1987).

49. *City of New York*, 715 F.2d at 757.

50. 695 F.2d 957 (5th Cir. 1983).

51. *Id.* at 969-70. The court cited Scientists' Inst. for Pub. Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and other pivotal NEPA cases. *Id.* at 970.

52. *Sigler*, 695 F.2d at 972 (emphasis in original)(citing, CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,032), (1981)).

cuit Judge Oakes, dissenting in *City of New York v. DOT*,<sup>53</sup> aptly pointed out:

"Worst-case" accidents have a way of occurring — from Texas City to the Hyatt Regency at Kansas City, from the Tacoma Bridge to the Greenwich, Connecticut, I-95 bridge, from the Beverly Hills in Southgate, Kentucky, to the Coconut Grove in Boston, Massachusetts, and from the Titanic to the DC-10 at Chicago.<sup>54</sup>

The CEQ amended its worst-case analysis requirement shortly after these cases were decided. The rule now requires discussion of "reasonably foreseeable significant adverse impacts," defining "reasonably foreseeable" to include "impacts which have catastrophic consequences, even if their probability . . . is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."<sup>55</sup> Thus the requirement of worst-case analysis continues so long as credible scientific evidence of the impact exists.

## II. Recent State Law Developments

The six years since the Albany Law Review Symposium on SEQRA<sup>56</sup> have witnessed both case-law development and changes in the statutes of New York's sister states — precedents from which New York attorneys can learn. The observation that NEPA's broad, constitution-like phrases have gener-

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53. See *supra* notes 46-49.

54. *City of New York*, 715 F.2d at 753. See also Weinberg, *Cargo of Fire: A Call for Stricter Regulation of Liquefied Natural Gas Shipment and Storage*, 4 Fordham Urban L.J. 495, 514 (1975-76), describing the catastrophic Halifax harbor fire of 1917 as "prov[ing] beyond dispute that human fallibility can cause the most frightening consequences despite what appears to be a surfeit of precautions."

55. 40 C.F.R. § 1502.22 (1987)(as amended 1986). For a view that worst-case analysis survives this amendment and is alive and well, see Note, *The National Environmental Policy Act and the Revised CEQ Regulations: A Fate Worse than the "Worst Case Analysis?"*, 60 St. John's L. Rev. 500 (1986). See also *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051 (9th Cir. 1987) (worst case analysis still required).

56. 46 Albany L. Rev. 1097 (1982).

ated a federal "common law of NEPA"<sup>57</sup> applies equally to the state acts which stem from the federal statute. As noted in the Albany Symposium,<sup>58</sup> most of the fifteen state environmental quality review acts were derived from NEPA<sup>59</sup> and track it with varying degrees of closeness. The past six years have shown that these states take environmental review seriously and do not hesitate to halt projects which contravene their statutes. At the same time some recent amendments and court decisions evince a narrowing of the statutes' scope — sometimes a salutary streamlining, sometimes a blunting of the laws' effectiveness.

This part of the article will examine recent cases and statutory amendments relating to the state statutes' coverage, the need for an EIS, EIS procedure, requirements for mitigation and consideration of alternatives, and judicial review of administrative actions.

#### A. Coverage

Three states recently amended their statutes to broaden or reduce their applicability in important regards. California, whose Environmental Quality Act<sup>60</sup> is the single most important such state law outside New York, amended the Act in 1984 to expressly provide "that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration . . . as that of pri-

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57. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976)(Marshall, J., concurring and dissenting); *Sierra Club v. Sigler*, 695 F.2d 957, 965, 970 (5th Cir. 1983); *Isle of Hope Historical Ass'n, Inc. v. United States Army Corps of Eng'rs*, 646 F.2d 215, 220 (5th Cir. Unit B 1981).

58. Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 Albany L. Rev. 1155 (1982).

59. *Id.* at 1157. States with environmental quality review acts include: California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin. In addition, the commonwealth of Puerto Rico has enacted such a law.

60. Cal. Pub. Res. Code §§ 21000-21177 (West 1986 & Supp. 1988). The Act is ably discussed, along with the decisions interpreting it, in Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. Davis L. Rev. 197 (1984).

vate projects required to be reviewed by public agencies."<sup>61</sup> This amendment stemmed from concern expressed to the legislature by developers that private projects were given more exacting scrutiny than public agency projects.<sup>62</sup>

The California legislature also riddled the Act with a series of exceptions. It now no longer applies, *inter alia*, to long-range coastal development plans by localities,<sup>63</sup> grade crossing eliminations,<sup>64</sup> or public school closings.<sup>65</sup> This regressive policy of excepting entire areas of government action from environmental review has, to the credit of our legislature, not been adopted in New York.

New Jersey, enlarging rather than hacking away at its environmental review statutes, now requires both economic and environmental impact statements prior to the adoption of certain bills by the legislature. At the request of a majority of the committee considering a bill, the Commissioner of Environmental Protection is to prepare an EIS as to that bill within ninety days.<sup>66</sup> A parallel provision authorizes economic impact statements by the Commissioner of Labor and Industry at a committee's request.<sup>67</sup> No comparable procedure exists in New York, where SEQRA<sup>68</sup> is limited to "actions" by state and local agencies of the executive branch and by local governing bodies. The New York statute applies to local, but not state, legislative actions.<sup>69</sup>

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61. Cal. Pub. Res. Code § 21001.1 (1986).

62. Conversation with Prof. Daniel P. Selmi, Loyola Law School (Oct. 30, 1985). Prof. Selmi headed the California State Bar Association Environmental Section task force which helped draft the 1984 Amendments to the Act.

63. Cal. Pub. Res. Code § 21080.9 (1986)(as amended 1984). The Act does, however, expressly apply to such plans devised by the State Coastal Commission. *Id.*

64. *Id.* § 21080.13.

65. *Id.* § 21080.18. In addition, a 1986 amendment exempts municipal waste incinerators burning exclusively wood waste, animal waste, or certain other substances from the need to prepare an environmental impact statement. Cal. Pub. Res. Code § 21151.1 (Supp. 1988).

66. N.J. Stat. Ann. § 52:13f-4 (West 1986).

67. *Id.* § 52:13f-3.

68. N.Y. Env'tl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1988).

69. *Id.* § 8-0105(1)-(5). Note that, as stated in the text, legislative actions of localities are subject to the Act. See *Niagara Recycling, Inc. v. Town Bd. of Niagara*, 83 A.D.2d 335, 443 N.Y.S.2d 951 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 859, 438 N.E.2d 1142,

Washington, a state whose act, like California's, antedates New York's, amended it to exclude consolidations of cities or towns and annexations by cities or towns of all of another city or town.<sup>70</sup> This step backwards was designed to reduce the impact of *City of Bellevue v. King County Boundary Review Board*,<sup>71</sup> a landmark decision holding the annexation of a parcel of largely vacant land by a municipality to require environmental review under the Act.

A Washington decision also held that condemnation of land does not trigger the state's Environmental Policy Act.<sup>72</sup> *In re Port of Grays Harbor*<sup>73</sup> followed a state regulation and exempted the condemnation of land by a port agency from the Act, though it held that the amendment of the agency's comprehensive development plan, of which the land acquisition was a step, did fall within the statute.<sup>74</sup> This grudging decision restricting environmental quality review — probably, in fairness to the court, mandated by the apposite state regulation — is in contrast to New York where land acquisition by government is plainly within SEQRA.<sup>75</sup>

### B. *Environmental Impact Statement Procedure*

Several recent decisions, as well as an amendment to California's statute, have shed light on whether an EIS is needed, its contents, and the public notice required.

A 1983 California decision holds that an agency's failure to act, even if the action not taken would significantly affect

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453 N.Y.S.2d 427 (1982); *Tri-County Taxpayers Ass'n, Inc. v. Town Bd.*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).

70. Wash. Rev. Code Ann. § 43.21c.225, (Supp. 1988) added by 1985 Wash. Laws ch. 281, § 29.

71. 90 Wash. 2d 856, 586 P.2d 470 (1978). See also *Spokane County Fire Protection Dist. No. 8 v. Spokane County Boundary Review Bd.*, 27 Wash. App. 491, 618 P.2d 1326 (1980), to the same effect.

72. Wash. Rev. Code Ann. §§ 43.21c.010-.914 (1983 & Supp. 1987).

73. 30 Wash. App. 855, 638 P.2d 633 (1982).

74. *Id.* at 865, 638 P.2d at 639.

75. See the Department of Environmental Conservation's regulations, N.Y. Comp. Code R. & Regs. tit. 6, § 617.12(b)(4) (1978), explicitly providing that acquisition of one hundred or more acres by a state or local agency is a Type I action pre-emptively requiring an EIS.

the environment, requires no EIS. In *City of National City v. State*<sup>76</sup> the state's Department of Transportation rescinded its earlier decision to build a highway, for a portion of which it had prepared an EIS. National City, through which part of the road was to have been built, contended a supplemental EIS was needed prior to rescission under the Act, which requires such a supplement when "[s]ubstantial changes are proposed in the project which will require major revisions."<sup>77</sup> But the court held "[t]he decision not to go forward would not cause a significant change in the environment,"<sup>78</sup> so that no EIS was needed. (Both parties conceded that an EIS was required before selling the right-of-way the state had acquired.)<sup>79</sup>

The court relied on *State of Alaska v. Andrus*,<sup>80</sup> which held that no EIS was required where the Secretary of the Interior decided not to bar a state from allowing a wolf hunt on federal lands.<sup>81</sup> But it ignored a closer precedent, *National Helium Corp. v. Morton*.<sup>82</sup> There an earlier Secretary of the Interior determined to halt the agency's purchase of helium. The court found that ending the purchases would soon deplete the nation's supply of helium, a by-product of natural gas which, if not extracted, disappears into the air. It directed the Secretary to prepare an EIS. Here, too, the agency did not simply fail to act; it cancelled a previous commitment. The failure to build the road will certainly affect traffic and influence land-use patterns. An EIS should have been directed.

California amended its Act in 1984 to state explicitly that

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76. 140 Cal. App. 3d 598, 189 Cal. Rptr. 682 (1983).

77. Cal. Pub. Res. Code § 21166 (1986 & Supp. 1988). The California Act refers to environmental impact reports in place of statements. This article follows the practice of the California courts themselves and uses the universally accepted terms "statement" or "EIS."

78. *City of Nat'l City*, 140 Cal. App. 3d at 602, 189 Cal. Rptr. at 684.

79. *Id.* at 605, 189 Cal. Rptr. at 685.

80. 591 F.2d 537 (9th Cir. 1979).

81. See, to the same effect, *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980). Note that the Council on Environmental Quality Guidelines define "Major Federal action" to include "circumstance[s] where the responsible officials fail to act and that failure to act is reviewable by courts." 40 C.F.R. § 1508.18 (1987).

82. 455 F.2d 650 (10th Cir. 1971).

public controversy over the effects of a project shall not in itself mandate an EIS.<sup>83</sup> This was done to overrule the California Environmental Quality Act Guidelines,<sup>84</sup> and cases following them,<sup>85</sup> holding that an EIS should be prepared where there is substantial public controversy. This amendment makes sense. Surely public controversy alone should not dictate, or even strongly impel, the need for an EIS.<sup>86</sup>

The creation of a unified school district, allowing students to attend a high school five to seven miles closer to home, was held by the California courts to be a "project" within the meaning of the Act.<sup>87</sup> The court noted the plan would likely result in building a new high school and changes in bus routes and schedules and traffic flow. The State Board of Education was ordered to prepare an environmental assessment to determine whether a full EIS would be needed.<sup>88</sup> The court, analogizing the plan to a conditional use permit or an annexation proposal, held the project need not itself immediately affect the environment so long as the actions thereunder may culminate in environmental impact. This bolsters the parallel view taken by New York's Court of Appeals in the *Tri-County*

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83. Cal. Pub. Res. Code § 21082.2 (1986 & Supp. 1988).

84. Cal. Admin. Code, tit. 14, § 15081 (1986).

85. See e.g., *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

86. See *Hanly v. Kleindienst*, 471 F.2d 823, 838 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), where the court construed the Council on Environmental Quality's NEPA Guidelines which then stated that actions with "highly controversial" environmental impact "should be covered" by the EIS requirement. (The current guidelines, 40 C.F.R. § 1508.27(b)(4) (1986), state that "the degree to which the effects on the quality of the human environment are likely to be highly controversial" is an element the agency should consider.) In *Hanly*, the court found that "controversial" refers to "cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition." *Hanly*, 471 F.2d at 830. It wisely noted that to find that "controversial" means engendering opposition "would surrender the determination [whether to prepare an EIS] to opponents of a major federal action, no matter how insignificant its environmental effect." *Id.* at 830 n.9a.

87. *Fullerton Joint Union High School Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 187 Cal. Rptr. 398, 654 P.2d 168 (1982).

88. Cf. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984 & Supp. 1988) providing for environmental assessments. See, to similar effect, *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 227 Cal. Rptr. 899 (1986).



case,<sup>89</sup> holding a referendum as to the creation of a sewer district to be an action triggering SEQRA.

Wisconsin, on the other hand, unrealistically narrowed its statute by holding it inapplicable to the socioeconomic impact stemming from a proposed shopping mall.<sup>90</sup> Like many a large suburban mall, the impact of this development on downtown Appleton was predicted to be severe. But the Wisconsin Supreme Court held that the statute is limited to physical impacts, and sustained an environmental assessment weighing only the effects of the mall on streams, vegetation and the like.

This view is unduly narrow. A major shopping mall will likely drain traffic and business from downtown stores and offices, eventually leading to new construction around the mall and perhaps boarded-up stores on Main Street. As the courts have consistently held, these are environmental impacts under any realistic definition of that term, in light of the purposes of environmental quality review laws.<sup>91</sup> This is especially true of New York's statute, which expressly requires agencies to weigh economic as well as environmental impacts.<sup>92</sup>

A broader view of the California act was taken in *San Franciscans for Reasonable Growth v. City and County of San Francisco*.<sup>93</sup> The court held the city's planning commission failed to consider adequately the cumulative impact of four new high-rise office buildings. The EIS predicted that 6.3 to 8.8 million square feet of related satellite development would be generated by the new buildings, although it con-

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89. *Supra* note 69. *But see* Engle v. Pulver, 80 A.D.2d 598, 43 N.Y.S.2d 39 (2d Dep't 1981)(closing a school not an "action" within SEQRA).

90. Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Dep't of Natural Resources, 115 Wis. 2d 381, 340 N.W.2d 722 (1983)(construing Wis. Env'tl. Policy Act of 1971, Wis. Stat. Ann. § 1.11 (West 1986 & Supp. 1987)).

91. *See* H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979)(increased traffic from stadium); Jackson County v. Jones, 571 F.2d 1004 (8th Cir. 1978)(proposed relocation and closure of Air Force base).

92. N.Y. Env'tl. Conserv. Law § 8-0109(1) (McKinney 1984).

93. 151 Cal. App. 3d 61, 198 Cal. Rptr. 634 (1984). *See* the discussion in Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. Davis L. Rev. 197, 243-45 (1984).

ceded elsewhere that that number would likely rise to twelve to eighteen million square feet. The court found the failure to consider cumulative impact undermined the effectiveness and validity of the entire EIS. This holding dovetails with the holdings of New York courts that environmental impact review requires literal compliance with the Act,<sup>94</sup> consonant with its salutary goals.

### C. *Alternatives and Mitigation Measures*

Today, only a rotunda with a spectacular colored glass ceiling dome remains of San Francisco's City of Paris department store, incorporated into the modern Neiman-Marcus building that replaced it. The demolition of this landmark led to an important decision on the consideration of alternatives and mitigation measures in an EIS.<sup>95</sup> The statement prepared by the city's Board of Permit Appeals concluded the historic shop did not meet current seismic standards and lacked escalators and a sprinkler system. Noting that rehabilitation would be far more costly than the proposed new building, the court held that saving the existing building was not a feasible alternative. Nor was sale to another purchaser who planned to save the building, since his offer was for one million dollars less than Neiman-Marcus paid for the site. The court held that preserving the rotunda and dome constituted "major mitigation of the significant historic, visual, and urban design impacts of the Project."<sup>96</sup> Although California's Act, like New York's, contains a substantive mandate to mitigate adverse environmental impacts,<sup>97</sup> the court found ample support in

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94. See *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981); *Schenectady Chemicals, Inc. v. Flacke*, 83 A.D.2d 460, 446 N.Y.S.2d 418 (3d Dep't 1981). See also *Stevens v. City of Glendale*, 125 Cal. App. 3d 986, 178 Cal. Rptr. 367 (1981) (overturning an EIS as to a city's general plan for failure to furnish adequate public notice).

95. *Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco*, 106 Cal. App. 3d 893, 165 Cal. Rptr. 401 (1980).

96. *Id.* at 912, 165 Cal. Rptr. at 412.

97. Cal. Pub. Res. Code §§ 21002, 21002.1 (1986 & Supp. 1988). Cf. N.Y. Env'tl. Conserv. Law §§ 8-0103(9), 8-0109(2)(f) (McKinney 1984); *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 222, 430 N.Y.S.2d 440, 446 (4th Dep't 1980).

the record for the board's decision to reject rehabilitation and allow destruction of the historic structure. Certainly a major element in this decision was the earlier refusal of the city to confer landmark status on the building. Landmark status would have shielded it, unless the owner could show an inability to earn a reasonable return.<sup>98</sup>

In contrast, a more recent California decision set aside an EIS for failure to adequately consider alternatives to a proposed cemetery requiring county approval of its site.<sup>99</sup> The site contained endangered plant species and a bald eagle habitat, which were both discussed in the EIS. But the state-ment's discussion of alternatives was limited to the assertion that "[d]evelopment of this project at another location within the Big Bear area may result in similar adverse impacts."<sup>100</sup> In fact, the court found that other less environmentally damaging sites were available and had been discussed at the agency's hearings, though not in the EIS.<sup>101</sup> The court rejected the statement and remanded the case for preparation of an adequate EIS.<sup>102</sup>

#### D. Judicial Review

California has amended its Act to provide specifically for settlement meetings in proceedings to challenge or review agency actions involving environmental quality review.<sup>103</sup> Within twenty days after service of a petition or complaint on

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98. *Architectural Heritage*, 106 Cal. App. 3d at 916-17, 165 Cal. Rptr. at 413. Cf. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). This decision has been widely criticized along the lines suggested here. See Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 Calif. L. Rev. 112, 129-131 (1981): "The City of Paris case . . . illustrates the danger that courts employing the substantial evidence test will fail to review the agency's exercise of discretion in choosing goals, even though the Act limits the agency's discretion." *Id.* at 130. A recent California case held a demolition permit for an historic building could not issue until completion of the entire environmental review procedure under the act. *Orinda Ass'n v. Board of Supervisors*, 182 Cal. App. 3d 1145, 227 Cal. Rptr. 688 (1986).

99. *San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino*, 155 Cal. App. 3d 738, 202 Cal. Rptr. 423 (1984).

100. *Id.* at 751, 202 Cal. Rptr. at 428.

101. *Id.* at 752-53, 202 Cal. Rptr. 429-30.

102. *Id.*

103. Cal. Pub. Res. Code § 21167.8 (1986).

a public agency, the agency must notify the parties of a settlement conference to be held within forty-five days following service of the petition or complaint. The petitioner has the burden of serving a presettlement statement on all parties, summarizing the case and its issues. The statute requires the parties to "meet and attempt in good faith to settle the litigation and the dispute which forms the basis of the litigation," and to prepare and sign a settlement agreement describing issues settled and those left unresolved.<sup>104</sup> The court or any party may then schedule a settlement conference before a judge other than the judge who will hear the case.<sup>105</sup> Failure of any party to participate without good cause may result in sanctions; failure of the petitioner to do so "shall result in dismissal with prejudice."<sup>106</sup> It will be interesting to see how effectively this 1984 addition to the Act reduces or speeds litigation, and whether other states will follow California's rather draconian approach.

Finally, two recent cases deal with the perennially nettlesome issue of standing to review agency action. New York's SEQRA, like its federal counterpart, nowhere expressly provides for judicial review. Like NEPA, however, it has been vigorously enforced by the courts. But several decisions have limited standing to challenge agency actions under SEQRA to those asserting an environmental, as opposed to economic, injury.<sup>107</sup> The federal courts, in contrast, impose no such limitation on those challenging actions under NEPA.<sup>108</sup>

This restriction on standing is an arbitrary one which the New York Court of Appeals should reject. Yet the courts in Washington and Wisconsin have adopted a similar view, and dismissed suits by persons asserting economic injury. In *Con-*

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104. *Id.* §§ 21167.8(c), (e).

105. *Id.* § 21167.8(f).

106. *Id.* § 21167.8(g).

107. See *County of Franklin v. Connelie*, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (3d Dep't 1979); *New York State Builders Ass'n v. State*, 98 Misc. 2d 1045, 414 N.Y.S.2d 956 (1979). These decisions stand in sharp contrast to the liberal view of standing adopted by the court of appeals in land use cases such as *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974).

108. See *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Shifler v. Schlesinger*, 548 F.2d 96 (3d Cir. 1977).

cerned *Olympia Residents for the Environment v. City of Olympia*,<sup>109</sup> a property owner and an environmental group sued to enjoin construction of a new hospital wing for, *inter alia*, non-compliance with the Washington act. The individual petitioner claimed the proposed hospital expansion would detrimentally affect his nearby property, and cause him "injury in fact, both economic and physical."<sup>110</sup> In addition, he alleged imminent financial loss on another parcel that he owned across town. A different hospital had placed an option on this second parcel which, he asserted, it would not exercise were the first project to go ahead.<sup>111</sup>

The court, after giving "short shrift" to the financial loss as to the optioned parcel, ruled that the petitioner's initial claim failed to "set forth any evidentiary facts to prove that he will sustain an 'injury in fact.'"<sup>112</sup> Although the petitioner had alleged a variety of environmental impacts to a nearby creek and peat bog, changes in drainage, traffic, and the like, the court noted that there was no showing that any of these would impact on his property.

Finally, the court concluded that the environmental group "has no more standing than that provided by one of its members," since "[t]here is no attempt here to assert [the group's] standing other than that provided through [the individual petitioner]."<sup>113</sup> The group had evidently failed to assert, or was unable to assert, the kind of specific injury in fact sufficient to support standing under *Sierra Club v. Morton*.<sup>114</sup> No one, it seemed, had standing to litigate the asserted failure to comply with the statute. While the petitioners should have shown injury more adroitly, or enlisted additional allies with property impacted by the project, the court's view seems an atavistic return to discredited hypertechnical rules of standing.

A Wisconsin case likewise found a disparate group of pe-

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109. 33 Wash. App. 677, 657 P.2d 790 (1983).

110. *Id.* at 681, 657 P.2d at 792.

111. *Id.*

112. *Id.* at 683, 657 P.2d at 794.

113. *Id.* at 684, 657 P.2d at 794.

114. 405 U.S. 727 (1972).

titioners to share one trait: all lacked standing to review an assertedly inadequate EIS.<sup>115</sup> Here, however, the court's reasoning and justification seem far more persuasive than in *Olympia*. The court held neither a district attorney nor the relatives of prisoners had standing to challenge the EIS prepared prior to building a new maximum-security prison in Portage, about one hundred miles from Milwaukee.<sup>116</sup>

The Milwaukee County District Attorney argued that placing a prison in Portage would make family visits difficult for inmates from Milwaukee County. Since half the state's inmates were from Milwaukee County, this would, he contended, add to recidivism as well as disintegration of families, and therefore would increase welfare costs in Milwaukee. The court found these claims to be too remote to constitute injury in fact. The similar contentions of the prisoners' relatives were equally unavailing. The court observed:

They do not and in fact cannot allege that any of their relatives will actually be incarcerated in the prison in Portage. [In any event] the effect on Fox, et al.'s family lives of having their relatives incarcerated in Portage versus another facility . . . is at best speculative and uncertain. . . . Further, the kind of injury which appears to be claimed here — disruption of the prisoner's relatives' family lives — does not have a close causal relationship to a change in the physical environment in Portage.<sup>117</sup>

Although a Portage environmental group and residents adjacent to the proposed prison intervened, each of whom would have had standing had they been petitioners, the court held them time-barred. The court noted that "the subject matter jurisdiction of the trial court never properly attached to the original petitioners"<sup>118</sup> so that there was no pending suit, and "intervention will not be permitted to breathe life

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115. *Fox v. Wisconsin Dep't of Health & Social Serv.*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983).

116. *Id.* at 527-28, 334 N.W.2d at 541.

117. *Id.* at 533, 334 N.W.2d at 541.

118. *Id.* at 537-38, 334 N.W.2d at 543.

into a 'non-existent' lawsuit."<sup>119</sup> While this decision is more defensible than *Olympia*,<sup>120</sup> both represent a retrogressive narrowing of standing rules and point in the opposite direction from that laudably taken by the federal courts.

### III. Conclusion

New York stands in the forefront of states vigorously implementing their environmental quality review statutes. Our courts have steadfastly construed SEQRA to impose substantive requirements on state and local government agencies,<sup>121</sup> and have not hesitated to enjoin major projects for non-compliance.<sup>122</sup>

Experience in other states and with NEPA has shown the prodigious importance of environmental quality review in insisting that government stop, look, and listen prior to embarking on irreversible projects. Beneath the visible litigated cases are thousands of uncelebrated administrative decisions to reject, or mitigate the impact of, proposals which would otherwise have harmed the natural resources all of us must share. New York's courts and agencies should continue to set their course at full speed toward the goal of SEQRA — to insure that government agencies weigh the consequences of the actions they perform, fund, or license, and to avoid environmental impacts which will cause lasting damage.

Perhaps the implications of insuring consideration of environmental values transcend the conservation of resources and preservation of scenic beauty. Long before environmental

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119. *Id.* at 536, 334 N.W.2d at 543 (citing *Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965)). See also *Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Dep't of Natural Resources*, 115 Wis. 2d 381, 406-07, 340 N.W.2d 722, 735 (1983) (upholding the denial of standing at the administrative level under a statute); Wis. Stat. Ann. § 227.064(1)(c) (West 1982) (requiring injury different in kind or degree from that suffered by the general public, in order to contest a decision not to prepare an EIS). The Wisconsin statute was renumbered from § 227.064 to § 227.42 by 1985 Wis. Legis. Serv. 182, § 28 (West).

120. *Supra* note 109.

121. See e.g., *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

122. See *Tri-County Taxpayers Ass'n, Inc. v. Town Bd.* 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).

concerns were the subject of statutes and frequent court decisions, George Orwell perceptively wrote:

By retaining one's childhood love of such things as trees . . . one makes a peaceful and decent future a little more probable, and by preaching the doctrine that nothing is to be admired except steel and concrete, one merely makes it a little surer that human beings will have no outlet for their surplus energy except in hatred and leaderworship.<sup>123</sup>

In their way, NEPA, and SEQRA and its companion laws, when taken seriously by administrators and the courts, help steer us toward the goal Orwell sought.

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123. B. Crick, *George Orwell: A Life*, 303-04 (1982).