

The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute[†]

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We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror.¹

The late 1960's witnessed a surge of concern for the environment.² Faced with the diminishing quality of the natural environment and the public's perception that federal activities were accelerating this decline,³ the United States Congress enacted the National Environmental Policy Act of 1969.⁴ At the heart of this Act lies a powerful action-forcing provision.⁵ When considering an action which will significantly affect the quality of the environment, all federal agencies must prepare a detailed statement outlining the action's environmental impact.⁶ In passing this Act, Congress not only hoped to force federal agencies to consider the environmental effects of their actions but also sought to encourage state governments to follow suit and take their own steps to protect their environments.⁷

Inspired by Congress, many states enacted their own environmental policy acts.⁸ These acts are significant, for they recognize that most environmental

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1. WILLIAM SHAKESPEARE, *Measure for Measure*, in WILLIAM SHAKESPEARE: THE COMPLETE WORKS act 2, sc. 1, lines 1-4 (Stanley Wells & Gary Taylor eds., Clarendon Press 1988) (1603). As an esoteric example of how the law may become too flexible to carry any real authority, note Captain Renault's comment in *Casablanca*: "I have no conviction, if that is what you mean. I blow with the wind." *CASABLANCA* (Warner Bros. 1942).

2. In 1969, one U.S. Senator characterized the mood of the country as follows:
[T]here is a new kind of revolutionary movement underway in this country. This movement is concerned with the integrity of man's life support system—the human environment. The stage for this movement is shifting from what had once been the exclusive province of a few conservation organizations to the campus, to the urban ghettos, and to the suburbs.
115 CONG. REC. 40,417 (statement of Sen. Jackson) (1969).

3. *Id.* at 19,010 (1969) (Excerpt from the Committee on Interior and Insular Affairs Report on S. 1075) (giving examples of "rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation").

4. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1992)).

5. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 1.01, at 1-1 (2d ed. 1994).

6. 42 U.S.C. § 4332(C)(i) (1988).

7. 115 CONG. REC. 19,010 (1969) (Excerpt from Committee on Interior and Insular Affairs Report on S.1075) ("It is the Committee's belief that S. 1075 will also provide a model and a demonstration to which State governments may look in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management.").

8. See *infra* notes 80-83 and accompanying text.

problems are caused by local actions—not federal projects.⁹ Although some states have taken a different approach,¹⁰ most have followed the federal method, requiring environmental impact statements for certain major projects.¹¹ Several states, however, have attempted to improve their policy acts by imposing additional procedural or substantive requirements on agency decision-making. Some states have used broad statements of purpose to emphasize environmental protection.¹² Others have attempted to encourage agencies to favor alternatives which will have a less substantial impact on the environment.¹³ Still others have tried to use judicial review to prevent agencies from making decisions that will have negative environmental ramifications.¹⁴ Despite these additional requirements, the state courts have been reluctant to limit agencies' discretion under the state environmental policy acts.

Like many other states, Indiana has enacted its own environmental policy act.¹⁵ For the most part, Indiana's statute is modeled after the federal act and other state environmental policy acts,¹⁶ but there are some significant differences. Unfortunately, these differences limit the scope of the Act and prevent it from reaching its goals.¹⁷ Indiana's statute, unlike its federal predecessor, has fostered no litigation.¹⁸ Indiana's chief environmental administrative law judge has stated that the Act has never been a factor in any

9. 115 CONG. REC. 19,010 (1969) (Excerpt from Committee on Interior and Insular Affairs Report on S.1075) ("[M]any of the most serious environmental problems the Nation faces are within the scope and, often, within the exclusive jurisdiction of State action and State responsibility.")

10. See *infra* note 85 and accompanying text.

11. For a list of states which require environmental impact statements, see *infra* note 84.

At their heart, state environmental policy acts attempt "to ensure that public agencies consider environmental impacts along with other factors when they act." DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 10.02[1], at 10-3 to -4 (1993). These acts "require that state or local government agencies prepare environmental impact statements . . . analyzing the environmental impacts of projects that the agencies propose to approve or carry out." *Id.* § 10.01, at 10-2. The required content of the environmental impact statement is determined by statutes, regulations, or a combination of both; however, environmental impact statements share a common purpose. As stated in Indiana's regulations:

The purpose of an environmental impact statement is to relate environmental considerations to the inception of the planning process, to examine alternative means of achieving the intended purpose of the proposed action, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision-making process in determining the environmental consequences of the proposed action.

IND. ADMIN. CODE tit. 326, r. 16-2-3(b)(1) (1992); see also *id.* tit. 327, r. 11-2-3(b)(1); *id.* tit. 329, r. 5-2-3(b)(1).

12. See, e.g., State Environmental Policy Act, WASH. REV. CODE ANN. § 43.21C.020(c) (West 1983).

13. See, e.g., State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 1984 & Supp. 1994).

14. See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1986).

15. Indiana Environmental Policy Act, IND. CODE §§ 13-1-10-1 to -8 (1993).

16. Compare 42 U.S.C. § 4331 with IND. CODE § 13-1-10-3.

17. See *infra* notes 208-24 and accompanying text.

18. There is not a single reported case which relies upon Indiana's Environmental Policy Act as a basis for its decision.

of his decisions.¹⁹ While some agencies do submit environmental impact statements,²⁰ the Act has not been as successful as its siblings in ensuring that agencies take environmental factors into account when making decisions.

This Note will focus on Indiana's Environmental Policy Act and ways of making it into a more powerful tool for protecting the state's environment. Part I will analyze the National Environmental Policy Act and three state environmental policy acts.²¹ The provisions of these statutes will be considered, as will the development of the statutes by the state courts. Part II focuses on the Indiana statute. Procedures under the Act will be explained, differences between the Indiana statute and other state statutes analyzed, and methods of challenging the agency before the court explored. Finally, Part III will consider how Indiana's Act may be strengthened by adding provisions similar to those found in other state statutes and by clarifying how an agency's decision may be challenged in the courts.

I. ENVIRONMENTAL REVIEW STATUTES

In adopting its environmental policy act, Indiana followed the approach chosen by the Federal Government and several other states.²² This Part will examine some of these other environmental policy acts. The first section will consider the National Environmental Policy Act, outline its operation, and show how judicial interpretation of the Act has limited its effectiveness as an environmental safeguard. The second section will explore the operation of environmental policy acts of California, Washington, and New York, discussing how—and why—these statutes differ from the federal act and from each other. The third section will summarize the states' statutes, noting their respective strengths and weaknesses. By considering the approaches of some of its sister states and then revising its own environmental policy act, Indiana can substantially advance its own goal of protecting the environment from imprudent governmental action.

19. Interview with Wayne E. Penrod, Chief Administrative Law Judge, Indiana's Environmental Boards, at the Indiana Department of Environmental Management, in Indianapolis, Ind. (Jan. 28, 1994) [hereinafter Penrod Interview].

"The Indiana agency charged with administering what are commonly thought of as the 'environmental laws' of the state is the Indiana Department of Environmental Management ("IDEM"). Created by the 1985 Indiana General Assembly, IDEM came into existence on April 1, 1986." Thomas R. Newby et al., *Indiana Environmental Law: An Examination of 1989 Legislation*, 23 IND. L. REV. 329, 331-32 (1990) (footnotes omitted). Indiana's environmental regulations are enforced by three boards: the Water Pollution Control Board, the Air Pollution Control Board, and the Soil and Hazardous Waste Management Board. *Id.* at 332. In addition, a financial management board oversees funding for IDEM.

20. Interview with Roy Francis, Environmental Impact Coordinator, Water Pollution Control Board, at the Indiana Department of Environmental Management, in Indianapolis, Ind. (Jan. 28, 1994).

21. The states whose environmental policy acts will be considered in this Note are California, Washington, and New York. These states were selected for two reasons. First, although each state adopted the environmental impact statement requirement, their legislatures imposed additional requirements to protect the environment. Second, these statutes have been the subject of extensive litigation, which has clarified their provisions and, in some cases, even strengthened the statutes.

22. See generally FRANK P. GRAD, 2 TREATISE ON ENVIRONMENTAL LAW § 9.08, at 9-292 to -315 (1994).

A. *The National Environmental Policy Act*

On January 1, 1970, President Richard Nixon signed the National Environmental Policy Act of 1969 ("NEPA") into law.²³ Heralded by many as "the Environmental Bill of Rights,"²⁴ NEPA requires federal agencies to conduct environmental review before proceeding with actions that significantly affect the environment. The Act has received mixed reviews over its twenty-five-year history. Supporters of NEPA contend that it has changed agency decision-making procedures and made administrators more accessible and accountable.²⁵ Yet others assert that NEPA does not go far enough to protect the environment, and at least one commentator has suggested that the courts' interpretation of NEPA has seriously limited its effectiveness.²⁶ The Act has been extremely influential, however, and its impact statement requirement has been imitated by states and foreign nations in statutes covering a broad range of issues.²⁷ Because NEPA served as the model for the state environmental policy acts which followed, an understanding of NEPA's form and history is essential in order to understand environmental impact review by state governments.

For analytical purposes, NEPA can be considered in three major sections. First, NEPA declares strong substantive goals for protecting the environment. Second, the Act imposes certain procedural obligations on all agencies of the Federal Government. Third, NEPA authorizes the creation of the Council on Environmental Quality, an agency responsible for overseeing NEPA's implementation. Taken together, these three components emphasize the importance of environmental factors in government decision-making.

23. In signing the Act, President Nixon commented that "[i]t is particularly fitting that my first official act in this new decade is to approve the National Environmental Policy Act. . . . We are determined that the decade of the seventies will be known as the time when this country regained a productive harmony between man and nature." 6 Wkly. Comp. Pres. Docs. 11 (Jan. 5, 1970).

24. Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 269 (1970). "In form, the National Environmental Policy Act is a statute; in spirit a constitution. . . ." *Id.* at 245; see also GRAD, *supra* note 22, § 9.01, at 9-6; Gary M. Emsdorff, Comment, *The Agency for International Development and NEPA: A Duty Unfulfilled*, 67 WASH. L. REV. 133, 137 (1992); Heather E. Ross, Student Article, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 356 (1994).

25. Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 453 (1990).

26. Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 229 (1992).

27. William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 488 (1990).

This influence may have been one of the primary purposes behind NEPA. As one commentator stated:

NEPA declared that the federal government would no longer be a leader in causing environmental degradation. Instead, like the early American colonists whose settlements were to be examples to the rest of the world, the federal government would become an example to other governments and other countries. NEPA committed the entire federal bureaucracy to maintain environmental quality and began a decade of unprecedented environmental legislation. Blumm, *supra* note 25, at 448-49 (footnotes omitted); see also *supra* note 7 and accompanying text.

However, the provisions of NEPA have usually been viewed in isolation from each other, and the Act has not been as successful as some had hoped.

The Act begins with bold declarations of the congressional policies and purposes behind the Act.²⁸ By enacting NEPA, Congress hoped to promote efforts to prevent or eliminate damage to the environment.²⁹ The substantive policies stated in Section 101 include Congress' goals to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations";³⁰ to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings";³¹ and to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."³²

The procedural mandates of the Act are found in section 102.³³ In this section, Congress demands that "all agencies of the federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action."³⁴ This environmental impact statement ("EIS") must include a discussion of the action's adverse environmental effects,³⁵ alternatives to the action,³⁶ and the resources which would be committed to the action if it were implemented.³⁷

To supervise NEPA's implementation, Congress created the Council on Environmental Quality ("CEQ") within the Executive Office of the President.³⁸ The Act directs the CEQ to "develop and recommend to the President national policies to foster and promote the improvement of environmental quality . . ."³⁹ Following this directive, the CEQ has enacted regulations to clarify NEPA's provisions.⁴⁰ These regulations define NEPA's terminology⁴¹ and explain how and when an EIS is to be prepared.⁴²

28. 42 U.S.C. §§ 4321, 4331 (1988).

29. *Id.* § 4321.

30. *Id.* § 4331(b)(1).

31. *Id.* § 4331(b)(2).

32. *Id.* § 4331(b)(5).

33. *Id.* § 4332 (1988).

34. *Id.* § 4332(C)(i).

35. *Id.* § 4332(C)(ii).

36. *Id.* § 4332(C)(iii).

37. *Id.* § 4332(C)(v).

38. *Id.* § 4342.

39. *Id.* § 4344(4) (1988).

40. 40 C.F.R. §§ 1500-1508.28 (1994).

41. *Id.* §§ 1508.1-1508.28 (1994).

42. *Id.* §§ 1500-1507.3 (1994). Under NEPA and the CEQ regulations, the process of environmental impact review is relatively straightforward. While an agency is still contemplating an action, it should determine whether an EIS is usually required for that type of action. *Id.* § 1501.4(a)(1). If the action ordinarily requires an EIS, then the statement must be prepared. If the action could have a significant impact on the environment, the agency may conduct an environmental assessment to determine whether to prepare an EIS. *Id.* § 1501.4(b). This assessment may lead the agency to conclude that no EIS is required or may lead to an EIS. Impact statements are required only for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

Significantly, NEPA remains silent on several issues which have been major concerns for the public and the courts. For example, is judicial review authorized under the Act? If so, what standard of review should be used? Finally, what is the relationship between the substantive policies of section 101 and the procedural obligations of section 102? Ultimately, NEPA's failure to address these questions may be its greatest failing, for the scope of the Act has been severely limited as the Supreme Court and other federal courts have drawn their own conclusions.⁴³

The first major case to address these questions was *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,⁴⁴ in which Judge Skelly Wright of the District of Columbia Circuit staked out a significant role for NEPA in the federal agencies. Judge Wright noted that the Act "makes environmental protection a part of the mandate of every federal agency and department."⁴⁵ *Calvert Cliffs'* also addressed the type of analysis agencies must employ under the Act. Wright stated that "all agencies must use a 'systematic, interdisciplinary approach' to environmental planning and evaluation 'in decisionmaking which may have an impact on man's environment.'"⁴⁶ While the court emphasized the importance of NEPA's procedures, it also recognized that "the general substantive policy of the Act is a flexible one."⁴⁷ As Wright stated:

We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. 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. But if the decision was reached procedurally without individualized consideration and

If an EIS is required, the agency begins by preparing a draft EIS. 40 C.F.R. § 1502.9(a). This draft is then circulated among the other agencies and the general public, who have the opportunity to comment upon the statement. *Id.* §§ 1503.1-3.4. After the notice and comment period, the agency prepares a final EIS, which should incorporate the comments of the public and the agencies. *Id.* §§ 1502.9, 1503.4. Preparing this statement and considering it in the decision-making process completes the agency's procedural obligations under NEPA.

43. *See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

44. 449 F.2d 1109 (D.C. Cir. 1971).

45. *Id.* at 1112. Previously, many agencies—including the Commission—had contended that they had no authority to take environmental factors into account when making decisions. "The Atomic Energy Commission . . . had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions." *Id.* This position was upheld in *New Hampshire v. Atomic Energy Comm'n*, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969). After *Calvert Cliffs'*, however, the Commission was not only permitted but required to consider the environmental impact of its decisions.

46. *Calvert Cliffs'*, 449 F.2d at 1113. Under this analysis, agencies must weigh environmental costs against economic and technical benefits to determine the proper course. "In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." *Id.*

47. *Id.* at 1112.

balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.⁴⁸

Although the court recognized that NEPA's emphasis is procedural, it also believed that Congress did not wish the Act to be treated as a "paper tiger."⁴⁹ Rather, Congress designed the procedural obligations to ensure that agencies would exercise their substantive authority under the Act.⁵⁰ Despite the fact that section 102 of NEPA requires nothing more than the preparation of an impact statement, Wright found that the Act demands that environmental factors receive a hard look.⁵¹ The Act requires that an EIS "accompany" proposals through the agency review process.⁵² The word "accompany" must be read "to indicate . . . that environmental factors, as compiled in the 'detailed statement,' be *considered* through agency review processes."⁵³ In short, although the court acknowledged that the primary focus of NEPA is procedural in nature, it also recognized that NEPA's broad substantive goals cannot be achieved if the agency does not seriously consider the environmental dangers explained in the EIS. Therefore, NEPA requires the agency

48. *Id.* at 1115. In holding that NEPA was reviewable by the courts, the D.C. Circuit relied heavily upon *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In that case, the Supreme Court applied the Administrative Procedure Act, which provides that the action of "each authority of the United States" is subject to judicial review unless the "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1988). The Court found "no indication that Congress sought to prohibit judicial review." *Overton Park*, 401 U.S. at 410. The Court also determined that the exception for decisions "committed to agency discretion" is very narrow. *Id.* This exception is only applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (quoting S. REP. NO. 752, 79th Cong., 1st Sess., 26 (1945)).

Overton Park is now known for creating the "hard look" standard, even though the words "hard look" do not appear in the opinion. The Court stated:

[The Administrative Procedure Act] requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416 (citations omitted).

49. The court stated: "Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Calvert Cliffs*, 449 F.2d at 1114.

50. *Id.* at 1112.

51. See *supra* note 48.

52. 42 U.S.C. § 4332(2)(C) (1988).

53. *Calvert Cliffs*, 449 F.2d at 1117-18 (emphasis in original). The court also stated:

What possible purpose could there be in the Section 102(2)(C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity—mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2)(C) must not be read so narrowly as to make the Act ludicrous.

Id. at 1117.

not only to prepare a "detailed statement" but also to take a hard look at the statement's content.

The Supreme Court, however, has taken a far less expansive view of NEPA. In its twelve cases construing the statute, the Court has consistently rejected invitations to interpret the statute broadly.⁵⁴ In fact, the Court has never decided a case—or even a single issue in a case—in favor of a NEPA plaintiff.⁵⁵ Most significantly, the Court has limited judicial review of agencies' compliance with NEPA. In a series of decisions, the Court has deferred to agency discretion and limited the federal courts to ensuring procedural compliance with the Act.

The process used by the Court to limit NEPA is, at best, unusual. The Court's first words on the Act's substantive role came in a footnote to *Kleppe v. Sierra Club*.⁵⁶ In language unrelated to the holding and only marginally related to the issues in the case, Justice Powell stated that NEPA and its legislative history do not suggest that a court should substitute its judgment for that of the agency.⁵⁷ Rather, a reviewing court's sole responsibility "is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"⁵⁸

The Court revisited NEPA's substantive role in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁵⁹ That case, like *Calvert Cliffs*,⁶⁰ focused on the environmental procedures of the Atomic Energy Commission. The Court held that, unless the Constitution or "compelling circumstances" demand otherwise, administrative agencies should be free to create their own procedures.⁶⁰ In dicta,⁶¹ then-Justice Rehnquist stated that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."⁶² He also noted

54. See, e.g., *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Weinberger v. Catholic Action*, 454 U.S. 139 (1981); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (consolidating two cases); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures ("SCRAP II")*, 422 U.S. 289 (1975); *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP I")*, 412 U.S. 669 (1973).

55. David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 553 (1990).

56. 427 U.S. 390 (1976).

57. *Id.* at 410 n.21.

58. *Id.* (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

59. 435 U.S. 519 (1978).

60. *Id.* at 543.

61. Justice Rehnquist prefaced the Court's comments on NEPA by stating, "All this leads us to make one further observation of some relevance to this case." *Id.* at 557. The tone of this language, together with its placement at the end of the opinion, indicates that the comments were not essential to the Court's holding.

62. *Id.* at 558.

that the Act's purpose is to "insure a fully informed and well-considered decision"—not to compel any particular substantive result.⁶³ It should be emphasized that this language, like the footnote in *Kleppe*, was not essential to the Court's holding.

The Supreme Court completely shut the door to substantive review of NEPA in *Strycker's Bay Neighborhood Council v. Karlen*.⁶⁴ In a nine-paragraph per curiam opinion, the Court held that substantive review of agency action is not available under NEPA.⁶⁵ The Court emphasized that the Act imposes "essentially procedural" duties on federal agencies.⁶⁶ It found that *Vermont Yankee* "cuts sharply against the Court of Appeals' conclusion that an agency . . . must elevate environmental concerns over other appropriate considerations."⁶⁷ Rather, after the agency "has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences."⁶⁸

Dissenting from the Court's opinion, Justice Marshall disagreed with the suggestion that "*Vermont Yankee* limits the reviewing court to the essentially mindless task of determining whether an agency 'considered' environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion."⁶⁹ Instead, Justice Marshall believed that the agency's decision may still be reversed by the courts if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁷⁰ If the agency fails to take a hard look at environmental consequences, its decision may be reversed by the court.⁷¹

Various explanations have been advanced for the Supreme Court's less than generous approach to NEPA. One commentator has suggested that the Court has merely attempted to control the expansion of NEPA by the lower federal courts.⁷² Another has posited that the opinions are motivated by the Court's fear of judicial intervention in administrative decisions.⁷³ A third has proposed that the Court's positions are not motivated by any opinion about the statute itself but are instead the result of the Solicitor General's control over the Court's docket.⁷⁴

63. *Id.*

64. 444 U.S. 223 (1980) (per curiam).

65. *Id.* at 227-28.

66. *Id.* at 227 (quoting *Vermont Yankee*, 435 U.S. at 558).

67. *Id.*

68. *Id.*

69. *Id.* at 231 (Marshall, J., dissenting). Marshall also pointed out that "*Vermont Yankee* does not stand for the broad proposition that the majority advances today. The relevant passage in that opinion was meant to be only a 'further observation of some relevance to this case.'" *Id.* at 229 (quoting *Vermont Yankee*, 435 U.S. at 557).

70. *Id.* at 229 (quoting 5 U.S.C. § 706(2)(A)).

71. *Id.*

72. Rodgers, *supra* note 27, at 497.

73. Ferester, *supra* note 26, at 217.

74. Shilton, *supra* note 55, at 555-56.

Regardless of the reason, however, the substantive erosion of NEPA has begun to affect the statute's procedural effectiveness.⁷⁵ This effect manifests itself in three ways. First, there has been a dramatic decline in the number of impact statements prepared by the federal agencies.⁷⁶ Second, fewer NEPA lawsuits are being filed.⁷⁷ Third, fewer petitions for review of NEPA decisions are being filed with the Supreme Court.⁷⁸ Any one of these factors in isolation might not be cause for concern; but together they show that environmental plaintiffs are not using NEPA as frequently as they had in the past. Since *Strycker's Bay*, the best remedy a plaintiff can hope to achieve is to delay the agency's action. Because NEPA depends upon environmental plaintiffs to bring actions, its substantive decay has affected its procedural mandates.

In sum, NEPA blends strong substantive goals with stringent procedural requirements. Initially, the Act was interpreted broadly by the federal courts. Agencies not only had to prepare impact statements but were also required to consider seriously the potential environmental impacts those statements revealed. The Supreme Court, however, has eliminated substantive review of NEPA. If the agency meets its procedural obligations, then the court should not intervene. This substantive trimming has adversely affected NEPA as a procedural statute. Commentators have also noted that "some courts now seem to be reviewing agency action under NEPA far less closely than they review other types of agency action."⁷⁹ For NEPA to be more effective, Congress should amend the Act and make its substantive role clearer.

B. Environmental Review in the Several States

In the wake of NEPA, many states began to reconsider their own environmental policies. Eighteen states, the District of Columbia, and Puerto Rico have enacted "Little NEPA's," statutes mandating some form of environmental review.⁸⁰ One of these states, New Mexico, passed but later repealed its

75. For a valuable discussion of the effects of ignoring NEPA's substantive provisions (including charts illustrating the decline in impact statements, NEPA suits, and Supreme Court petitions), see Ferester, *supra* note 26, at 223-30.

76. *Id.* at 224-26.

77. *Id.* at 226-28.

78. *Id.* at 228-29.

79. Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 6 (1983).

As another commentator noted:

Thus, we have—after two decades—a National Environmental Policy Act that has changed agency decision making processes and made administrators more accessible and accountable to the public, but which requires nothing specific in terms of environmental quality. NEPA students are always surprised (and disappointed) to learn that the nation's environmental policy consists of one part information disclosure, one part public participation, and eight parts administrative discretion.

Blumm, *supra* note 25, at 453.

80. The following states and territories have enacted environmental policy acts: California, California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1994); Connecticut, Connecticut Environmental Protection Act of 1971, CONN. GEN. STAT. §§ 22a-14

environmental review statute.⁸¹ In addition, several states have executive orders which establish procedures similar to NEPA.⁸² Many other states require environmental review only under specific circumstances.⁸³

In enacting their environmental policy acts, many states have attempted to incorporate the substantive element lacking in NEPA.⁸⁴ Most states, including Indiana, have modeled their acts more closely after NEPA.⁸⁵ Though the various state approaches differ somewhat, these statutes share a common purpose: "to ensure that public agencies consider environmental impacts along with other factors when they act."⁸⁶ Therefore, each state act requires some level of environmental impact analysis before major government actions may proceed.

Like NEPA,⁸⁷ many of the state environmental policy acts contain broad statements of purpose and policy.⁸⁸ Most of these acts have language which closely tracks—or even duplicates—NEPA's purpose and policy statements, but some states have set forth more ambitious objectives. Washington's

to -20 (1985 & Supp. 1994); District of Columbia, D.C. CODE ANN. §§ 6-981 to -990 (Supp. 1994); Florida, Environmental Protection Act of 1971, FLA. STAT. ANN. § 403.412 (West 1993); Georgia, Environmental Policy Act, GA. CODE ANN. §§ 12-16-1 to -8 (1992 & Supp. 1994); Hawaii, HAW. REV. STAT. §§ 343-1 to -8 (1985 & Supp. 1992); Indiana, IND. CODE §§ 13-1-10-1 to -8 (1993); Maryland, Maryland Environmental Policy Act, MD. CODE ANN., NAT. RES. §§ 1-301 to -305 (1989); Massachusetts, Massachusetts Environmental Policy Act, MASS. GEN. L. ch. 30, §§ 61-62H (1983 & Supp. 1994); Michigan, Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-1207 (West 1987 & Supp. 1994); Minnesota, Minnesota Environmental Policy Act of 1973, MINN. STAT. ANN. §§ 116D.01-07 (West 1987 & Supp. 1994); Montana, MONT. CODE ANN. §§ 75-1-101 to -3-324 (1993); New York, State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1994); North Carolina, North Carolina Environmental Policy Act of 1971, N.C. GEN. STAT. §§ 113A-1 to 113A-10 (1993); Puerto Rico, Public Policy Environmental Act, P.R. LAWS ANN. tit. 12, §§ 1121-1142 (1977 & Supp. 1991); South Dakota, South Dakota Environmental Policy Act, S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to -13 (1992 & Supp. 1994); Virginia, VA. CODE ANN. §§ 10.1-1182 to -1192 (Michie 1993); Washington, State Environmental Policy Act of 1971, WASH. REV. CODE ANN. §§ 43.21C.010-014 (West 1983 & Supp. 1994); Wisconsin, Wisconsin Environmental Policy Act, WIS. STAT. ANN. § 1.11 (West 1986 & Supp. 1993).

See also Nicholas A. Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155, 1157-58 (1982).

81. N.M. STAT. ANN. §§ 12-20-1 to -7 (Supp. 1973), *repealed by* 1974 N.M. Laws ch. 46, § 1.

82. E.g., Michigan, Exec. Order 1991-31 (1991); New Jersey, Exec. Order No. 215 (1989); see also Robinson, *supra* note 80, at 1158.

83. States with limited environmental impact review requirements include the following: Delaware, Coastal Zone Act, DEL. CODE ANN. tit. 7, §§ 7001-7004 (1991 & Supp. 1992); Kentucky, KY. REV. STAT. ANN. § 278.025 (Michie/Bobbs-Merrill 1989 & Supp. 1994); Louisiana, LA. REV. STAT. ANN. § 30:2021 (West 1989); Mississippi, Coastal Wetlands Protection Act, MISS. CODE ANN. § 49-27-27 (1972 & Supp. 1994); Nebraska, Environmental Protection Act §§ 81-1501 to -1532 (1987 & Supp. 1993); Nevada, NEV. REV. STAT. §§ 321.640-770 (1994); New Jersey, Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -27 (West 1991 & Supp. 1994); Oregon, OR. REV. STAT. § 519.979 (1993); Pennsylvania, PA. CONS. STAT. ANN. tit. 53, § 1611 (1975); Rhode Island, Rhode Island Environmental Rights Act, R.I. GEN. LAWS § 10-20-8(b) (1985); see also Robinson, *supra* note 80, at 1158.

84. See, e.g., MICH. COMP. LAWS ANN. §§ 691.1201-1207; MINN. STAT. ANN. §§ 116D.01-07.

85. Ferester, *supra* note 26, at 209.

86. SELMI & MANASTER, *supra* note 11, § 10.02[1], at 10-3 to -4.

87. See *supra* notes 28-32 and accompanying text.

88. See, e.g., CAL. PUB. RES. CODE §§ 21000, 21001 (West 1986); N.Y. ENVTL. CONSERV. LAW §§ 8-0101, -0103 (McKinney 1984); WASH. REV. CODE ANN. §§ 43.21C.010, .020 (West 1983).

statute, for example, provides that "[t]he legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation . . . of the environment."⁸⁹ Courts occasionally cite to these sections of the statutes and interpret the acts broadly, basing their decisions upon the legislature's intent.⁹⁰ However, courts usually do not view these sections as central components of the acts and often ignore the provisions when construing the statute's scope.⁹¹

The procedural requirements of these state environmental policy acts also mirror the procedures under NEPA.⁹² If an agency's project will not have a significant impact on the environment, then the agency will not have to conduct an environmental review. If the agency is uncertain of its proposed action's potential effects, it will have to conduct an initial study. Again, if there is no significant impact on the environment, no environmental review is required. If there may be significant impact, then the agency must prepare an impact statement. As with NEPA, the agency begins by circulating a draft statement and receiving comments from other agencies and the public. The final impact statement incorporates the comments received by the agency. Though specific requirements vary by state, the agencies usually must discuss the significant impacts of the project, mitigation measures to minimize those impacts, and alternatives which may be more environmentally favorable.

Among these state statutes, the most significant are those of California, Washington, and New York. These three populous states have modified NEPA's EIS requirement with certain substantive and procedural changes. Indiana can benefit from the experiences of these three states in reforming its own environmental policy act.

1. The California Environmental Quality Act

Among the states, California was the first to follow the Federal Government's lead and enact an environmental policy act. The California Environmental Quality Act⁹³ ("CEQA"), enacted just eight months after NEPA,⁹⁴ requires the preparation of an environmental impact report ("EIR") before the government can proceed with a proposal that may affect the environment. The kinship with NEPA is important, for the California courts have relied upon

89. WASH. REV. CODE ANN. § 43.21C.020(c). This language has no counterpart in NEPA. Although the Senate included a similar provision in its original version of NEPA, the conference committee removed this language. 115 CONG. REC. 19,008 (1969); *see also* Ferester, *supra* note 26, at 223 & n. 91.

90. *See infra* notes 110-12 and accompanying text.

91. *See infra* notes 113-16 (discussing Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988)), 169-77 (discussing Jackson v. New York Urban Dev. Corp., 494 N.E.2d 429 (N.Y. 1986)) and accompanying text.

92. *See supra* note 42.

93. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21178.1.

94. Ferester, *supra* note 26, at 231.

NEPA in interpreting CEQA.⁹⁵ This relationship actually cuts both ways; the Council on Environmental Quality ("Council") drew upon CEQA when enacting its regulations to implement NEPA.⁹⁶

The California Act differs from NEPA in four significant respects. First, the threshold for requiring the "detailed statement" is lower under CEQA than it is under NEPA. Under NEPA, an EIS is required for "major Federal actions significantly affecting the quality of the human environment."⁹⁷ Under CEQA, an EIR is required for any action that the agencies "propose to carry out or approve which *may* have a significant effect on the environment."⁹⁸ Under NEPA, an agency might not have to prepare an EIR for actions which could have some environmental impact. Under CEQA, a project which might have an environmental impact *must* be accompanied by an EIS. By requiring an EIR for projects which may significantly affect the environment, the California Legislature advances its goal of forcing agencies to consider the environmental effects of their actions.

Second, CEQA defines several of its essential terms.⁹⁹ By contrast, NEPA contains no definitions but relies on the Council's regulations to define its essential terms. Although the federal courts defer to the Council regulations, there are certain advantages to enacting statutory definitions. Defining its terms gives the California Legislature more control over the scope of CEQA.¹⁰⁰ Establishing statutory definitions also encourages consistent interpretations of the statute. For example, the term "environment" may be interpreted broadly or narrowly. Without some form of guidance, the courts would spend years developing a common law test for when an action "may have a significant effect on the environment." Instead, CEQA provides that environment "means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance."¹⁰¹ This definition clarifies the scope of the Act and leads to more consistent application.

Third, and perhaps most importantly, CEQA requires agencies to mitigate whenever feasible. Although NEPA requires that agencies discuss mitigation

95. See, e.g., *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66 (Cal. 1975); *Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049 (Cal. 1972).

96. Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 198 (1984).

97. 42 U.S.C. § 4332(2)(C).

98. CAL. PUB. RES. CODE § 21100 (West 1986) (emphasis added).

99. *Id.* §§ 21060-21069 (West 1986 & Supp. 1994).

100. If, for example, California entrusted an agency with defining CEQA's terms, that agency would have a great deal of influence over when the statute would apply. The legislature defines "project" to include activities directly undertaken by the agency, activities supported by the agency, and activities permitted or authorized by the agency. *Id.* § 21065 (West 1986). If the legislature were to leave construction of the term to an agency, the agency might decide that "project" refers only to actions undertaken by an agency. Although this interpretation is not inconsistent with the statute's goals, it would severely limit the statute's application. Thus, the legislature maintains a higher degree of control by defining the statutory terms itself.

101. *Id.* § 21060.5 (West 1986).

measures and alternatives in the impact statement, those measures do not have to be implemented. By contrast, CEQA provides that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects it approves or carries out whenever it is feasible to do so."¹⁰² This substantive requirement mandates that agencies take action to offset the adverse environmental effects of their projects whenever feasible, but it does not absolutely prohibit the agency from approving projects with adverse environmental effects. If "economic, social, or other conditions" make alternatives or mitigation measures "infeasible," then a project may be approved despite its environmental impacts.¹⁰³ Nevertheless, by encouraging adoption of alternatives and mitigation measures and by requiring agencies to make findings that other options are not feasible, the legislature advances CEQA's substantive goals.

Finally, CEQA distinguishes itself from NEPA by authorizing two standards of judicial review. If the agency's decision was the subject of a formal hearing, then the reviewing court must consider whether the agency acted beyond the scope of its authority, whether there was a fair trial, and whether there was prejudicial abuse of discretion.¹⁰⁴ In all other cases, the review is limited to whether there was a prejudicial abuse of discretion by the agency.¹⁰⁵ Ultimately, these two standards of review are not widely divergent. Each allows the agency's determination to be overruled "only if it does not comply with the procedure required by law or is not supported by substantial evidence."¹⁰⁶ What is most significant is not the level of review authorized but the mere discussion of judicial review in the statute. By including these provisions, the legislature ensured that administrative decisions would receive a certain amount of judicial scrutiny.

Judicial development of CEQA has been very similar to that under NEPA. The first California Supreme Court case construing CEQA, *Friends of Mammoth v. Board of Supervisors*,¹⁰⁷ takes an expansive reading very similar to *Calvert Cliffs*'.¹⁰⁸ In *Friends of Mammoth*, the issue was whether CEQA applied to private activities requiring a permit or some other

102. *Id.* § 21002.1(b) (West 1986).

103. *Id.* § 21002 (West 1986).

104. The statute provides that a challenge "on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure." *Id.* § 21168. Section 1094.5 of the Code of Civil Procedure states:

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

CAL. CIV. PROC. CODE § 1094.5(b) (1980 & Supp. 1994).

105. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." CAL. PUB. RES. CODE § 21168.5.

106. Selmi, *supra* note 96, at 222.

107. 502 P.2d 1049 (Cal. 1972).

108. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *see also supra* notes 44-53 and accompanying text.

government approval.¹⁰⁹ Since the statute did not define which actions were subject to the permit process, the court looked to the purposes and policies behind the statute,¹¹⁰ and found that the legislature intended CEQA to apply broadly. The court concluded that “the Legislature intended the [Act] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”¹¹¹ Therefore, the court held that the Act should apply to private activities requiring government permission.¹¹²

In recent years, however, the California Supreme Court has narrowed its approach to CEQA. The modern interpretation is well illustrated by *Laurel Heights Improvement Ass'n v. Regents of the University of California*.¹¹³ The court noted that “[a]n EIR is an ‘environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹¹⁴ The courts, however, are to consider the sufficiency of the EIR as an informative document—not the correctness of the conclusions reached.¹¹⁵ The reviewing court “may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.”¹¹⁶ Like the federal courts evaluating NEPA, the California Supreme Court has shifted its focus to CEQA’s procedural elements. Nevertheless, the substantive

109. *Friends of Mammoth*, 502 P.2d at 1052. At that time, since CEQA did not include a definition of “project,” the court could not rely upon the statute or the regulations. Rather, this case illustrates the significant role California’s courts have played in developing CEQA. The interpretation adopted by the court was later enacted into law as part of CEQA. See CAL. PUB. RES. CODE § 21065(g) (West 1986).

110. *Friends of Mammoth*, 502 P.2d at 1054.

111. *Id.* at 1056.

112. The court stated: “We . . . conclude that to achieve that maximum protection the Legislature necessarily intended to include within the operation of the act, private activities for which a government permit or other entitlement for use is necessary.” *Id.*

California’s supreme court also interpreted CEQA broadly in *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66 (Cal. 1975). Faced with the question of whether an EIR was required, the court followed the broad interpretation of *Friends of Mammoth* in concluding that CEQA imposes a low threshold requirement for the preparation of an EIR. *Id.* at 76. Therefore, an EIR should be prepared whenever the agency perceives some substantial evidence that the project may have significant environmental effects or whenever the action arguably may have adverse environmental impacts. *Id.* at 77. In fact, “the existence of serious public controversy concerning the environmental effect of a project in itself indicates that preparation of an EIR is desirable.” *Id.* at 78. Essentially, the court held that an EIR should be prepared whenever the agency is in doubt about its project’s potential impacts. *Id.*

113. 764 P.2d 278 (Cal. 1988).

114. *Id.* at 282 (quoting *County of Inyo v. Yorty*, 108 Cal. Rptr. 377, 388 (Cal. Ct. App. 1973)).

115. *Id.* at 283. As the court stated:

A court’s task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that “The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.”

Id. (quoting *Bozung v. Local Agency Formation Comm’n*, 529 P.2d 1017, 1030 (Cal. 1975)).

116. *Id.*

elements of CEQA will ensure that the statute continues to play a significant role for years to come.

2. Washington's State Environmental Policy Act

Two years after the Federal Government and California adopted their environmental policy acts, the State of Washington followed suit and enacted the State Environmental Policy Act of 1971 ("SEPA").¹¹⁷ Like California, Washington drew heavily on NEPA's provisions in creating this Act. In fact, SEPA is much more closely related to NEPA than its California counterpart.¹¹⁸ Yet Washington took a far bolder approach than either of those acts by recognizing that "each person has a fundamental and inalienable right to a healthful environment."¹¹⁹ Washington's courts have invoked this provision in interpreting the statute broadly. Washington's supreme court has stated that this language "indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state."¹²⁰

Like CEQA, SEPA differs from NEPA in several significant respects. First, Washington's courts have set a lower threshold for determining whether review under SEPA is required. Washington's supreme court has stated that "the procedural requirements of SEPA . . . should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."¹²¹

Second, SEPA allows for some actions to be "categorically exempt" from its requirements. Such actions do not require preparation of an impact statement.¹²² The legislature did not set out what these actions are, however. Instead, it left the task of determining which actions should be categorically exempt to the Department of Ecology. The Department was required to adopt rules specifying the types of government action "which are not to be considered . . . major actions significantly affecting the quality of the environment."¹²³ The term "categorical exemption" is something of a misnomer,¹²⁴ however, for the Act states that exemptions "shall be limited to those types which are not major actions significantly affecting the quality of the environment."¹²⁵ Rather, the rules establish which actions fall below

117. 1971 Wash. Laws ch. 109 (codified as amended at WASH. REV. CODE ANN. §§ 43.21C.010-.914).

118. For a table showing the provisions of SEPA and their sources in NEPA, see *Eastlake Community Council v. Roanoke Assocs.*, 513 P.2d 36, 45 n.5 (Wash. 1973).

119. WASH. REV. CODE ANN. § 43.21C.020(3) (West 1983); see also *supra* note 89 and accompanying text.

120. *Leshi Improvement Council v. Washington State Highway Comm'n*, 525 P.2d 774, 781 (Wash. 1974); see also *Ferester, supra* note 26, at 242.

121. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 552 P.2d 674, 680 (Wash. 1976) (en banc).

122. WASH. REV. CODE ANN. § 43.21C.031 (West Supp. 1994).

123. *Id.* § 43.21C.110(1)(a) (West Supp. 1994).

124. *William H. Rodgers, Jr., The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 45 (1984).

125. WASH. REV. CODE ANN. § 43.21C.110(1)(a).

the threshold of requiring review. By making this determination in advance, the Washington Legislature clarified the scope of SEPA and eased the burden on the state courts.¹²⁶

Third, SEPA gives agencies the substantive authority to deny permits based on environmental factors. The Act provides that “[a]ny government action may be conditioned or denied pursuant to this chapter.”¹²⁷ This grant of authority is SEPA’s strongest substantive sword.¹²⁸ Before environmental policy statutes were enacted, many agencies did not feel that they had the authority to consider environmental factors when making decisions. Although NEPA and the state policy acts do allow the agencies to consider the impact on the environment, agencies may still be reluctant to base their decisions on environmental factors. By including this provision, SEPA encourages the agencies to seriously consider the information in the EIS. Washington’s agencies have been willing to refuse permits based on this provision, and the courts generally have been willing to uphold these refusals.¹²⁹

Fourth, like CEQA, SEPA establishes a standard for judicial review. Plaintiffs may challenge agency actions which fail to comply with SEPA’s substantive or procedural provisions.¹³⁰ Generally, however, the state’s

126. In the absence of a rule, the courts would have to determine whether an action significantly affects the environment. This determination would be made on a case-by-case basis, which would result in a surge of litigation as plaintiffs and defendants learned which actions require review before approval. Eventually, the courts would establish standards to narrow the scope of SEPA, but the legislature spared them this process by allowing rules to be promulgated to answer these threshold questions.

127. This section of SEPA provides as follows:

Any governmental action may be conditioned or denied pursuant to this chapter: *Provided*, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. . . . Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact

WASH. REV. CODE ANN. § 43.21C.060 (West Supp. 1994) (italics in original).

128. This statutory provision was not part of the original SEPA. In fact, it was created by Washington’s supreme court in *Polygon Corp. v. City of Seattle*, 578 P.2d 1309 (Wash. 1978). In that case, the plaintiff corporation contended that SEPA was intended only to serve an informational purpose and that it did not grant the agency the authority to refuse a building permit. The court concluded that SEPA’s broad mandate “would be meaningless under the facts of this matter if the superintendent was powerless to decide in the manner that ‘full consideration of environmental impacts’ impelled.” *Id.* at 1312. Therefore, the court held that SEPA confers substantive authority on agencies to deny permits on the basis of adverse environmental impacts. *Id.* at 1313.

Later, the Washington Legislature enacted § 43.21C.060, which codified this holding. *Polygon* is a valuable illustration of how the court can play a vital role in expanding a state’s environmental policy act.

129. *See, e.g., Victoria Tower Partnership v. City of Seattle*, 800 P.2d 380 (Wash. Ct. App. 1990), *review denied*, 807 P.2d 884 (Wash. 1991); *State v. Lake Lawrence Pub. Land Protection Ass’n*, 601 P.2d 494 (Wash. 1979), *cert. denied*, 449 U.S. 830 (1980).

130. “The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter.” WASH. REV. CODE ANN. § 43.21C.075(1) (West Supp. 1994).

courts defer to the agency's decision. The statute itself provides that a government agency's decisions should be given "substantial weight."¹³¹

Like other courts construing environmental policy acts, Washington's courts have held that SEPA's mandate is procedural, not substantive. In 1973, Washington's supreme court found that SEPA does not demand any particular substantive result since the statute itself provides that environmental factors should be examined along with economic and technical considerations.¹³² Rather, SEPA requires that the government give "appropriate consideration" to the environment in its decision-making process.¹³³ The statute is the state's attempt to shape the environment's future by deliberation, not default, and requires that environmental factors be considered to the fullest.¹³⁴

The court took a more active approach to SEPA in *Norway Hill Preservation & Protection Ass'n v. King County Council*.¹³⁵ In *Norway Hill*, the dispute centered upon the appropriate level of review for an agency's determination that an action would have no significant environmental impact.¹³⁶ The court observed that reviewing such decisions under the "arbitrary and capricious standard" would allow agencies to avoid SEPA's requirements since their decisions rarely could be reversed.¹³⁷ Therefore, the court decided that the appropriate standard for review would be the "clearly erroneous standard."¹³⁸ Under this standard, an agency's decision can be reversed, despite supporting evidence in the record, if the reviewing court "is left with the definite and firm conviction that a mistake has been committed."¹³⁹ The court stated that "[t]he 'clearly erroneous' standard provides a broader review than the 'arbitrary or capricious' standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision."¹⁴⁰ Therefore, the court concluded that the "clearly erroneous" standard should be applied since that standard "will allow a reviewing court to give substantial weight to the agency determination as required by [SEPA], yet at the same time it will allow a reviewing court to consider properly 'the

131. "In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a 'detailed statement,' the decision of the governmental agency shall be accorded substantial weight." *Id.* § 43.21C.090 (West 1983).

132. *Stempel v. Department of Water Resources*, 508 P.2d 166, 172 (Wash. 1973).

133. *Id.*

134. *Id.* at 171-72.

135. 552 P.2d 674 (Wash. 1976) (en banc).

136. *Id.* at 677.

137. *Id.* at 678. "[W]ithout a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard." *Id.* (quoting Frederick R. Anderson, Jr., *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238, 361 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974)).

138. *Id.* at 679.

139. *Id.* at 678 (quoting *Ancheta v. Daly*, 461 P.2d 531, 534 (Wash. 1969) (citation omitted)).

140. *Id.* In a footnote, the court noted that "[i]n an appropriate case an administrative decision could be 'arbitrary and capricious,' e.g., where there is no evidence in the record to support it, and yet not be 'clearly erroneous.'" *Id.* at 678 n.5 (italics in original) (citing *Stempel v. Department of Water Resources*, 508 P.2d 166 (Wash. 1973)).

public policy contained in the act of the legislature authorizing the decision or order."¹⁴¹

It is now well established that SEPA, like CEQA and NEPA, is essentially a procedural statute which does not mandate any particular substantive result.¹⁴² Nevertheless, SEPA still has a significant substantive role in preserving Washington's environment. Most significantly, SEPA allows government agencies to refuse permits on environmental grounds or to impose environmental conditions before the permit is granted. This provision, along with SEPA's other substantive provisions, allows the agency to seriously pursue the statute's broad mandate.

3. New York's State Environmental Quality Review Act

Unlike California and Washington, the State of New York did not respond immediately to NEPA. Instead, it waited several years before adopting an environmental policy act. New York enacted its State Environmental Quality Review Act ("SEQRA")¹⁴³ in 1975, six years after the passage of NEPA and CEQA. By waiting, New York was able to draw upon the experience of other state acts¹⁴⁴ and to adopt the provisions it felt would best advance its own environmental goals. Therefore, SEQRA differs from NEPA in several significant respects.

First, like CEQA, SEQRA contains definitions of some of its essential terms.¹⁴⁵ Many of these definitions suggest SEQRA should be applied broadly. The definition of environment, for example, includes all the elements of CEQA's definition but adds patterns of population concentration or growth and community character.¹⁴⁶ Thus, environmental review includes socio-economic factors which might not have to be reviewed in other states. In addition, SEQRA applies to all agency actions, and "agency" is defined to include state and local agencies.¹⁴⁷ "Action" is also interpreted broadly and includes four separate types of action: projects undertaken by agencies; projects sponsored or supported by agencies; projects permitted by agencies; and policy, regulations, and procedure making.¹⁴⁸ This definition includes

141. *Id.* at 679 (quoting *Ancheta*, 461 P.2d at 534-35).

142. *Save Our Rural Env't v. Snohomish County*, 662 P.2d 816, 820 (Wash. 1983).

143. State Environmental Quality Review Act, 1975 N.Y. Laws ch. 612 (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117).

144. In composing SEQRA's provisions, New York's legislators worked extensively with the drafters of CEQA. Robinson, *supra* note 80, at 1160.

145. N.Y. ENVTL. CONSERV. LAW § 8-0105 (McKinney 1984).

146. *Id.* § 8-0105(3). "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." *Id.* § 8-0105(6).

147. *Id.* § 8-0105(3).

148. *Id.* § 8-0105(4). The Act provides as follows:

"Actions" include: (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; [and] (ii) policy, regulations, and procedure making.

more activities than does CEQA, which mentions only the first three types of actions.

Actions subject to review under SEQRA receive further definition through the state's regulations. Section 8-0113 of the Act requires the Commissioner to adopt rules and regulations to implement SEQRA's provisions.¹⁴⁹ Among these rules and regulations, the Commissioner must establish criteria to determine what actions may have significant impact on the environment; specifically, the Commissioner must identify those actions or classes of actions which are likely to require impact statements, as well as actions or classes of actions which are not likely to require impact statements.¹⁵⁰ Such regulations have been enacted,¹⁵¹ and they divide actions into two distinct groups. Type I actions are those which usually will require an EIS,¹⁵² including adoption of a land use plan, large sales of land, and zoning changes.¹⁵³ By contrast, Type II actions are those actions which usually will not require an EIS,¹⁵⁴ including replacement of a facility with the same kind of facility, repaving an existing highway, and agricultural farm management practices.¹⁵⁵ Though not exhaustive lists, these regulations provide valuable guidance for agencies planning their activities.¹⁵⁶

Second, SEQRA's procedural provisions extend further than NEPA's. Under NEPA, an agency must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."¹⁵⁷ By contrast, SEQRA requires agencies to prepare an EIS for any actions "they propose or approve which may have a significant effect on the environment."¹⁵⁸ Like Washington, New York has extended the scope of its statute by requiring an EIS for

Id. The Act also provides that actions do not include enforcement proceedings, "official acts of a ministerial nature, involving no exercise of discretion," or maintenance or repair. *Id.* § 8-0105(5).

149. *Id.* § 8-0113 (McKinney 1984 & Supp. 1994).

150. *Id.* §§ 8-0113(2)(b)-(c)(ii) (McKinney 1984).

151. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.12-.13 (1992).

152. *Id.* § 617.12.

153. *Id.* § 617.12(b).

154. *Id.* § 617.13.

155. *Id.* § 617.13(b).

156. In *H.O.M.E.S. v. New York State Urban Dev. Corp.*, the project in question was a new athletic facility being built by Syracuse University with help from the state. 418 N.Y.S.2d 827 (App. Div. 1979). The defendants claimed that no impact statement was required since a domed stadium was not listed as a Type I project. The court rejected this position and required environmental review, stating: "Like the proverbial ostrich, respondents have incredibly put out of sight and mind a clear environmental problem. By any assessment, the stadium is a major project . . ." *Id.* at 831. This case shows that an action may require an EIS even though it is not listed as a Type I action.

Despite the fact that the regulations do not list all Type I actions, they remain useful for agencies attempting to allocate their resources. For example, an agency may not have sufficient time or budgetary resources to prepare an EIS for the particular Type I project it is contemplating. Rather than begin the project and risk an injunction several months down the road, the agency could scale back the project so as to avoid having to conduct the environmental review in the first place. The regulations also assist the courts in determining whether an agency should have prepared an EIS. Listing those projects which do and do not require impact analysis helps to standardize the application of SEQRA and furthers New York's goal of forcing agencies to consider the environmental effects of major actions.

157. 42 U.S.C. § 4332(C).

158. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKiune 1984).

actions which *may* affect the environment as opposed to those which *will* affect the environment.¹⁵⁹

Third, New York's statute also imposes additional substantive requirements. Agencies must use all practicable means to further the policies and goals of the Act and must mitigate or avoid adverse effects "to the maximum extent practicable."¹⁶⁰ This requirement brings a substantive element to environmental review. An agency must not only conduct a thorough, probing review of the potential impacts of its decision, it must also act on the information that this review yields. This substantive requirement is far bolder than the requirements of NEPA, CEQA, and SEPA, yet it falls short of ensuring that environmental factors are assigned a value equal to economic factors. The Act mandates only that agencies act "to the maximum extent practicable" to minimize or avoid adverse environmental impacts; it does not elevate environmental factors over other considerations.¹⁶¹

Fourth, the Act imposes an additional procedural hurdle upon agencies before allowing them to approve environmentally harmful actions. Before an agency may approve an action that has been the subject of an environmental impact statement, it must make an explicit finding that environmental impacts will be minimized or avoided to the maximum extent practicable.¹⁶² Where the agency believes an action's economic benefits outweigh its environmental costs, SEQRA requires the agency to take steps to mitigate or avoid environmental impact to the maximum extent practicable; if supported by findings that such steps have been taken, approval of the action very likely will not be reversed by the courts. Although SEQRA places high emphasis on mitigating or avoiding environmental damage by government agencies, it does not eliminate the possibility that such damage will occur.

Unlike CEQA and SEPA, SEQRA does not include any provisions specifically addressing judicial review. New York's courts have responded by developing standards for reviewing SEQRA decisions. These standards, however, do not seem consistent with the broad goals of the statute. Although the courts have acknowledged that SEQRA has a stronger substantive element than NEPA, they have consistently held that SEQRA does not mandate any particular result.

The leading case interpreting SEQRA's substantive role is *Jackson v. New York State Urban Development Corp.*¹⁶³ In *Jackson*, the court began by observing that "SEQRA makes environmental protection a concern of every

159. See *supra* note 121 and accompanying text.

160. The Act provides as follows:

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1984).

161. *Id.*

162. *Id.* § 8-0109(8) (McKinney 1984).

163. 494 N.E.2d 429 (N.Y. 1986).

agency"¹⁶⁴ and acknowledging that the Act is far more substantive than NEPA.¹⁶⁵ The court also noted SEQRA's requirement that agencies must act in a manner which avoids or minimizes environmental impact to the maximum extent practicable.¹⁶⁶ The court declined, however, to take a broad approach to SEQRA and found that an agency's substantive obligations under the Act must be viewed in light of a rule of reason.¹⁶⁷ Moreover, SEQRA left the agencies with broad discretion to evaluate environmental impacts and choose among alternatives.¹⁶⁸

The court ultimately concluded that the role of the courts is to ensure procedural and substantive compliance with SEQRA—not "to weigh the desirability of any action or choose among alternatives."¹⁶⁹ Therefore, the court approved a two-part standard for judicial review of SEQRA decisions by agencies. First, the reviewing court must examine the agency's actions and ensure that those actions complied with SEQRA's procedural requirement. Second, the court must review the record and determine whether the agency "identified the relevant areas of environmental concerns, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."¹⁷⁰ If the agency's decision meets this test, then its decision should be upheld.

Ultimately, the *Jackson* test seems to fall short of SEQRA's requirements. By permitting the agencies to determine what is and is not practicable, the court diluted SEQRA's mandate that the agency make explicit findings that the effects have been avoided or minimized "to the maximum extent practicable" before approving an action with potentially significant effects.¹⁷¹ The New York courts, however, are unlikely to abandon the *Jackson* test for reviewing SEQRA decisions. In 1990, the court of appeals again used this two-part test to validate an agency's decision.¹⁷² Nevertheless, the opinion emphasized that a reviewing court must ensure that the agency has taken a

164. *Id.* at 434.

165. *Id.* As the court stated, "SEQRA is not merely a disclosure statute; it 'imposes far more "action forcing" or "substantive" requirements on state and local decisionmakers than NEPA imposes on their federal counterparts.'" *Id.* (quoting Phillip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

166. *Id.*

167. *Id.* at 436. "[A]n agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. 'Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before [an impact statement] will satisfy the substantive requirements of SEQRA.'" *Id.* (quoting *Aldrich v. Pattison*, 486 N.Y.S.2d 23, 29 (App. Div. 1985)).

168. *Id.* The court stated that "[n]othing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." *Id.* (citations omitted).

169. *Id.*

170. *Id.*

171. *See supra* note 160. A better standard might entail allowing the court to review alternatives or mitigation measures appearing in the record and to determine the practicability of the options rejected by the agency. This would force agencies to evaluate other options more seriously and to bolster their findings with deeply considered and strongly supported facts.

172. *See Akpan v. Koch*, 554 N.E.2d 53 (N.Y. 1990).

hard look at the environmental issues.¹⁷³ The tone of the opinion suggests that if the environmental effects of an approved action are serious enough, the court might be willing to find that the agency did not take a hard look at its decision. This issue will certainly see additional litigation in the future, but if the judicial development of CEQA and SEPA is any indication, it is unlikely that the substantive provisions of SEQRA will receive a broad application.

C. Summary of State Approaches

Though originally implemented to force federal agencies to consider the environmental effects of their actions, NEPA's influence has spread far beyond the national government. Perhaps its most significant contribution to the environmental movement is its role as the model for the "Little NEPA" statutes enacted by several states. These statutes have adopted NEPA's procedures in an attempt to require their own state and local agencies to consider environmental factors, and to value environmental protection as an important role in their mandate.

California, Washington, and New York have enacted environmental protection acts which combine NEPA's procedures with certain substantive elements. These additional requirements may be considered in three groups. First, the acts have a lower threshold for when environmental review is required. California and New York require review whenever an action *may* have significant environmental impact;¹⁷⁴ Washington requires review whenever a more-than-moderate environmental effect may occur.¹⁷⁵ The courts recognize that the statutes' far-reaching policy statements require broad application of the acts' substantive provisions. When the threshold for environmental review is low, more state actions will receive environmental consideration. After analyzing their actions and the effect those actions may have, agencies become more likely to decide upon less damaging alternatives.

Second, the states have enacted provisions to clarify what actions are covered by their statutes. The California and New York acts include definitions of certain essential terms, such as "action," "project," and "environment."¹⁷⁶ Washington, on the other hand, has recognized certain

173. *Id.* at 58. The court stated:

Nevertheless, an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors. This determination is best made on a case-by-case basis and we need not and do not delineate the precise parameters of the hard look doctrine beyond our holding here.

Id. (citation omitted).

174. See *supra* notes 98, 158-59 and accompanying text.

175. See *supra* note 121 and accompanying text.

176. See *supra* notes 99-101, 145-49 and accompanying text.

categorical exemptions which do not require environmental review.¹⁷⁷ New York has also grouped its actions by type, establishing that certain actions will require environmental review while others will not.¹⁷⁸ Ultimately, these provisions give the legislature closer control over the statute's application. These provisions also give the courts concrete terminology to use in interpreting the statute. This encourages a consistent application of the statute to actions within the legislature's intent.

Third, CEQA, SEPA, and SEQRA all impose additional substantive constraints on the agency's decision. California requires agencies to mitigate whenever feasible;¹⁷⁹ Washington gives agencies the substantive authority to deny permits based on environmental considerations.¹⁸⁰ New York has enacted several action-forcing provisions, one of which forbids agency approval of an action unless the agency makes an express finding that environmental impacts will be avoided to the maximum extent practicable.¹⁸¹ These provisions contain language that has no companion in NEPA. By limiting agency discretion, the states intended for their statutes to be more effective tools for environmental preservation.

State courts, however, have been unwilling to apply these statutes broadly. Far-reaching initial interpretations are rescinded gradually as the courts try to limit the scope of the statutes and their own roles in enforcing those directives. The courts will nearly always defer to an agency's decision so long as the agency has complied with the necessary procedures. This seems to conflict with the strong mandates the state legislatures have used in their policy acts, yet the trends are the same in California, Washington, and New York. Environmental policy acts are perceived as procedural, and strong statutory language would be required to convince courts otherwise. The courts essentially assume that the agencies are capable of fulfilling the statutes' mandates without judicial intervention.

If the trend under NEPA is any indication, then the effectiveness of "Little NEPA's" may be threatened by lax judicial enforcement. Studies show that fewer EIS's are prepared under NEPA today than were prepared ten years ago, and fewer NEPA actions are filed in the courts. If this trend continues, NEPA's procedural mandates will eventually be forgotten. If the state courts continue in their present application of the state acts, CEQA, SEPA, and SEQRA may not be far behind.

It is possible, however, to draft an environmental policy act which encourages an active judicial role and fosters an environmental ethic in the agencies. The following Part will examine Indiana's Environmental Policy Act and consider why the statute has gone unenforced by the courts. The final Part will consider how the Indiana statute may be strengthened through amendments taken from CEQA, SEPA, and SEQRA.

177. See *supra* notes 122-26 and accompanying text.

178. See *supra* notes 149-56 and accompanying text.

179. See *supra* notes 102-03 and accompanying text.

180. See *supra* notes 127-29 and accompanying text.

181. See *supra* note 162 and accompanying text.

II. THE INDIANA ENVIRONMENTAL POLICY ACT

Like California, Washington, and New York, Indiana has enacted its own "Little NEPA" to apply to state projects.¹⁸² This Part will discuss this statute and evaluate its overall effectiveness. The first section will examine the statutory language, noting how Indiana's Act differs from NEPA and the other state environmental policy acts. The second section will consider whether environmental citizen suits would be an effective means of ensuring that agencies comply with the mandates of the Act. The third section will consider whether an agency's failure to follow the Act could be challenged under Indiana's Administrative Orders and Procedures Act. Ultimately, the weak language of Indiana's Environmental Policy Act does little to protect the state's environment from imprudent government decisions; only by substantially revising the statute may the General Assembly ensure that Indiana's agencies will consider the environmental effects of their actions before those actions are approved.

A. The Language of the Statute

Passed by the Indiana General Assembly in 1972,¹⁸³ the Indiana Environmental Policy Act ("IEPA" or "the Act") requires environmental impact statements for actions significantly affecting the environment.¹⁸⁴ Aside from a few notable exceptions, IEPA employs the language of NEPA verbatim. Like NEPA, IEPA contains no substantive element. Indiana's Act has also generated far less litigation than its federal counterpart; in fact, there are no reported decisions involving a challenge to an agency action for failure to comply with IEPA.

Like NEPA, Indiana's statute begins with bold statements of purpose and policy.¹⁸⁵ The Act states that its purposes include encouraging harmony between people and the environment and eliminating damage to the environment and biosphere.¹⁸⁶ This language restates NEPA's purpose verbatim.¹⁸⁷ The policies behind IEPA are also copied directly from NEPA.¹⁸⁸ These policies include assuring a safe and healthful environment for the citizens of the state, attaining beneficial use of the environment without degradation, and achieving a balance between population and resource use.¹⁸⁹

182. 1972 Ind. Acts 98 (codified as amended at IND. CODE §§ 13-1-10-1 to -8).

183. *Id.*

184. *Id.* § 13-1-10-3. Unlike NEPA, CEQA, and the environmental policy acts of other states, Indiana's Environmental Policy Act has never been interpreted or applied by the courts. The abbreviation "IEPA" has been used in this Note as a shorthand consistent with scholarly writings about these other statutes.

185. *Id.* §§ 13-1-10-1 to -2; see also *supra* notes 28-32 and accompanying text.

186. *Id.* § 13-1-10-1.

187. Compare IND. CODE § 13-1-10-1 with 42 U.S.C. § 4321.

188. Compare IND. CODE § 13-1-10-2 with 42 U.S.C. § 4331.

189. IND. CODE § 13-1-10-2.

The motives of Indiana's General Assembly in enacting the environmental policy act are not entirely clear. Unlike many states, Indiana does not publish its legislative history; therefore, Indiana's courts are not able to rely upon legislative intent in construing state law. Nevertheless, NEPA's history provides valuable insight into the General Assembly's probable motives. Although it should not be assumed that the legislatures' motives were identical, the extreme similarity between the two statutes does suggest that Indiana's General Assembly was concerned with the same issues and felt that a state statute modeled after NEPA would be an effective means of addressing those concerns. In this limited context, the remarks of the Senate in passing NEPA are particularly useful for purposes of analyzing the General Assembly's probable motives as it enacted IEPA.

First, the Senate was concerned that environmental damage was accelerating, in large part due to governmental actions.¹⁹⁰ To offset this process, NEPA stated the nation's goals for protecting its environment.¹⁹¹ Action-forcing measures were also included to ensure that the goals and principles of the Act would not be ignored by the agencies. Second, the Senate also noted the rising public concern over environmental matters.¹⁹² Thus, as NEPA's statement of purpose stated: "A primary purpose of the bill is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment."¹⁹³

Although NEPA did set forth certain policy statements, the Senate also explained that certain other concerns motivated the Congress to action. Indiana's statute includes the same policy statements as NEPA. Thus, the same policy considerations probably motivated the General Assembly.¹⁹⁴ It is fair to assume that Indiana's legislature enacted IEPA to encourage government agencies to make environmentally responsible decisions and to increase

190. 115 CONG. REC. 19,010 (1969) (statement of Sen. Mansfield).

191. *Id.* at 19,009 (statement of Sen. Jackson) (The proposed act includes a "considered congressional statement of national goals and purposes for the management and preservation of the quality of America's future environment. The bill directs that all Federal agencies conduct their activities in accordance with these goals, and provides 'action forcing' procedures to insure that these goals and principles are observed.").

192. *Id.* at 19,010. ("Recent years have witnessed a growing public concern for the quality of the environment and the manner in which it is managed.").

193. *Id.* The Senate Committee on Interior and Insular Affairs added:

It is the Committee's belief that [NEPA] will also provide a model and a demonstration to which State governments may look in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management. This objective is of great importance because many of the most serious environmental problems the Nation faces are within the scope and, often, within the exclusive jurisdiction of State action and State responsibility.

Id. (Excerpt from the Committee on Interior and Insular Affairs Report on S. 1075)

194. It should be noted that at the time the General Assembly enacted IEPA, the United States Supreme Court had not yet begun to limit NEPA's substantive application. Rather, the leading case on NEPA's role in decision-making was *Calvert Cliffs*, which held agencies to the "hard look" standard. See *supra* notes 44-53 and accompanying text. Under the law as it stood when IEPA was enacted, NEPA—or a statute modeled after NEPA—seemed to require agencies to seriously scrutinize the impact of their decisions and to make environmentally responsible decisions.

public awareness of, and involvement in, these decisions.¹⁹⁵ It is equally fair to judge the effectiveness of Indiana's statute by considering how effectively it reaches these two broad goals.

As with the policy and purpose statements, Indiana's Act mirrors NEPA's procedural requirements.¹⁹⁶ Section 13-1-10-3 provides that all agencies of the state must "include in every recommendation or report on proposals for legislation and other major state actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action."¹⁹⁷ The process under IEPA is also very similar to NEPA.¹⁹⁸ First, the agency must determine whether IEPA applies to the action it plans to take.¹⁹⁹ Some actions are specifically exempted by rules passed by the Water Pollution Control Board, the Air Pollution Control Board, and the Solid Waste Management Board;²⁰⁰ minor actions and emergency actions are also categorically exempt.²⁰¹ If the action is not exempt, the second step under IEPA is to determine whether the action will significantly affect the quality of the human environment. The impact of some actions may be obvious; where significance is less certain, the agency should prepare an environmental assessment form to assist in making the determination.²⁰² If this form leads the agency to conclude that no significant environmental effects will result from the action, then the agency

195. Although not enacted by the legislature, the rules promulgated by the state's water and air pollution control boards do address the purpose of environmental impact statements and support the conclusion that the General Assembly acted to promote responsible decisions and public awareness. These rules provide:

The purpose of an environmental impact statement is to relate environmental considerations to the inception of the planning process, to examine alternative means of achieving the intended purpose of the proposed action, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision-making process in determining the environmental consequences of the proposed action.

IND. ADMIN. CODE tit. 326, r. 16-2-3(b)(1) (1992); *see also id.* tit. 327, r. 11-2-3(b)(1).

196. Compare IND. CODE § 13-1-10-3 with 42 U.S.C. § 4332.

197. IND. CODE § 13-1-10-3(2)(C)(i).

198. *See supra* note 42.

199. The Act required the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board to define, by rule, "which actions constitute a major state action significantly affecting the quality of the human environment." IND. CODE § 13-1-10-3(2)(C). Under this statutory authority, these three boards have enacted rules governing IEPA's application. *See* IND. ADMIN. CODE tit. 326, r. 16-1-1 to -2-3 (1992) (Air Pollution Control Board); *id.* tit. 327, r. 11-1-1 to -2-3 (Water Pollution Control Board); *id.* tit. 329, r. 5-1-1 to -2-3 (Solid Waste Management Board). However, these rules provide little guidance for determining whether an action is significant. In fact, the applicable rule of each board states that "[i]t is not within the scope of this rule to identify before the fact which major state agency actions significantly affect the quality of the human environment." *Id.* tit. 326, r. 16-1-4(a) (1992); *id.* tit. 327, r. 11-1-4(a); *id.* tit. 329, r. 5-1-4(a). The rules do identify that actions include (but are not limited to) legislative proposals by agencies, new or continuing projects undertaken or supported by the agencies, and the making of rules. *Id.* tit. 326, r. 16-1-3(d); *id.* tit. 327, r. 11-1-3(d); *id.* tit. 329, r. 5-1-3(d). Nonetheless, the rules leave significance to be determined on a case-by-case basis.

200. IND. ADMIN. CODE tit. 326, r. 16-1-3(e) (1992); *id.* tit. 327, r. 11-1-3(e); *id.* tit. 329, r. 5-1-3(e).

201. *Id.* tit. 326, r. 16-1-3(f) (1992); *id.* tit. 327, r. 11-1-3(f); *id.* tit. 329, r. 5-1-3(f).

202. *Id.* tit. 326, r. 16-1-5 (1992); *id.* tit. 327, r. 11-1-5; *id.* tit. 329, r. 5-1-5.

may issue a statement to that effect;²⁰³ otherwise, the agency should prepare an environmental impact statement. This statement's content is established by the statute²⁰⁴ and the accompanying rules.²⁰⁵ As with NEPA, however, once the agency has prepared its decision, its requirements under IEPA are met. The Act does not mandate any substantive result, nor does it require mitigation or adoption of a less environmentally damaging alternative.

In the procedures it mandates, IEPA is very similar to the statutes of California, New York, and Washington.²⁰⁶ However, Indiana drafted its statute far more narrowly than these other states. This narrow construction has severely limited IEPA's effectiveness and probably explains why plaintiffs have not challenged agencies for failing to comply with IEPA's procedures.

First, and perhaps most importantly, IEPA applies only to a limited range of actions. The Act itself provides that "[n]othing in this chapter shall be construed to require an environmental impact statement for the issuance of a license or permit by any agency of the state."²⁰⁷ This provision drastically limits IEPA's scope, for the Act applies only to actions directly undertaken by government agencies. Neither NEPA nor any of its other progeny were drafted so narrowly. In fact, where state legislatures failed to include any mention of permits or licenses, state courts have still required environmental impact statements from the permitting agencies, holding that to require otherwise would contravene the purposes and policies behind the acts.²⁰⁸ Washington, for example, not only requires environmental review of actions permitted by agencies but also grants the agency the substantive authority to deny the permit based on the findings of that review.²⁰⁹ As California's supreme court has noted, the broad purposes of environmental policy acts suggest that the Act should be applied to permits and licenses.²¹⁰ Thus, by providing that IEPA would not apply to permits and licenses, the General Assembly severely limited the scope and effectiveness of the Act.

Indiana limits IEPA's scope in another significant manner. Environmental impact review is required only for the actions of state agencies.²¹¹ The regulations enacted by the water and air pollution control boards define state agencies to include bodies created and funded by the state.²¹² These regulations explicitly provide that "[l]ocal government units at the town, city,

203. *Id.* tit. 326, r. 16-1-5 (1992); *id.* tit. 327, r. 11-1-5; *id.* tit. 329, r. 5-1-5.

204. IND. CODE § 13-1-10-3(C).

205. IND. ADMIN. CODE tit. 326, r. 16-2-3(b)(2) (1992); *id.* tit. 327, r. 11-2-3(b)(2); *id.* tit. 329, r. 5-2-3(b)(2).

206. *See supra* text following note 92.

207. IND. CODE § 13-1-10-6.

208. *See, e.g.,* *Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049 (Cal. 1972); *Polygon Corp. v. City of Seattle*, 578 P.2d 1309 (Wash. 1978).

209. *See supra* notes 127-29 and accompanying text.

210. *Friends of Mammoth*, 502 P.2d at 1056.

211. *See* IND. CODE § 13-1-10-3(2) ("[A]ll agencies of the state shall . . .").

212. The regulations define state agencies, departments, or institutions to include "any department, board, commission, bureau, or council created by the legislature having statewide jurisdiction, the operation of which is financed from appropriations of the general assembly." IND. ADMIN. CODE tit. 326, r. 16-2-2 (1992); *id.* tit. 327, r. 11-2-2; *id.* tit. 329, r. 5-2-2.

township, or county level are not included."²¹³ With this simple provision, the rules exclude a wide range of actions, including city construction projects, construction and maintenance of local roads, and all zoning decisions.²¹⁴ In enacting NEPA, the U.S. Senate recognized the significance of local actions. The Act was intended not only to affect the decisions of federal agencies but also to give "a model and a demonstration to which State governments may look in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management."²¹⁵ California, New York, and Washington all explicitly provide that their acts apply to local agencies.²¹⁶ By excluding local actions, the Indiana General Assembly ignored a large range of actions and seriously limited IEPA's mandate.

A second way in which IEPA differs from the other state acts is that Indiana's Act does not include a substantive element. California and New York express a preference for environmentally responsible decisions. Agencies are required to mitigate or adopt less damaging alternatives—or at least to issue explicit findings of the reasons for choosing not to do so.²¹⁷ Like NEPA, IEPA requires only the preparation of an environmental impact statement. Once a statement is prepared to accompany the proposal, the agency has met its IEPA obligations. The Supreme Court's gradual limitation of NEPA's substantive element has had an adverse effect on NEPA's procedural role.²¹⁸ Without a substantive element, IEPA cannot be expected to fare any better.

A third difference between IEPA and the other state statutes is that IEPA does not provide a standard for judicial review. This is not particularly surprising since IEPA was modeled after NEPA, which also contains no mention of judicial review. However, since Congress failed to include a standard for the courts to use when reviewing agency actions under NEPA, the courts were left to determine how those actions should be examined. The Supreme Court has mandated an extremely deferential approach to NEPA.²¹⁹ Under the Court's recent NEPA holdings, a reviewing court should consider whether the agency has met NEPA's procedural requirements; if these requirements are met, then the court should defer to the agency's judgment.²²⁰

213. *Id.* tit. 326, r. 16-2-2 (1992); *id.* tit. 327, r. 11-2-2; *id.* tit. 329, r. 5-2-2.

214. When a state's environmental policy act applies to local actions, it "will apply to land use decisions such as rezonings, general plans, planned unit developments, and approvals of subdivision maps. Disputes over these types of decisions have resulted in a large portion of the [state environmental policy act] case law." SELMI & MANASTER, *supra* note 11, at 10-5.

215. 115 CONG. REC. 19,010 (1969) (Excerpt from Committee on Interior and Insular Affairs Report on S.1075).

216. CAL. PUB. RES. CODE § 21151; N.Y. ENVTL. CONSERV. LAW § 8-0105(3); WASH. REV. CODE ANN. § 43.21C.030. *But see* MONT. CODE ANN. § 75-1-201(2) (1993) (exempting the Department of Public Services Regulation in certain circumstances).

217. CAL. PUB. RES. CODE § 21002.1(b); N.Y. ENVTL. CONSERV. LAW § 8-0109(1).

218. *See supra* notes 75-78 and accompanying text.

219. *See supra* notes 54-68 and accompanying text.

220. *See, e.g.,* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

By contrast, Washington and California explicitly provided for judicial review in their statutes. Yet both of these states employ standards which are also deferential to the agency's decision. California differentiates between actions based upon whether a hearing was held; however, both types of action receive essentially the same level of review. If there is substantial evidence to support the decision, it will be upheld by California's courts.²²¹ Washington's courts also grant substantial weight to agency decisions and defer to those decisions.²²²

For judicial review to be valuable under an environmental policy act, it must be meaningful review. Judges should not be relegated to "the essentially mindless task" of determining whether an impact statement accompanied the proposal—especially if the agency may ignore the statement's findings in reaching its decision.²²³ Instead, a standard of judicial review should help the courts to implement the act's policy. The goals of the statute should be carefully considered in deciding how closely an agency's decision should be scrutinized.

Specifying the standard of review will have no effect unless plaintiffs challenging the agency's decision have recourse to the courts. If the court cannot hear the case, no level of judicial scrutiny will make a difference. Therefore, the remainder of this Part considers whether Indiana plaintiffs can bring environmental matters to the court's attention through the Indiana Environmental Protection Act or the Administrative Orders and Procedures Act. As we shall see, these statutes fail to ensure judicial redress of a claim that an agency violated IEPA.

B. Using Environmental Citizen Suits to Enforce IEPA

Since IEPA offers no methods for challenging an agency's decision, other avenues for challenging the agency's decision must be explored. One option may be the Indiana Environmental Protection Act ("Protection Act").²²⁴ Under the Protection Act, any individual or legal entity may sue an alleged polluter, regardless of whether the plaintiff is harmed by the polluter's activity.²²⁵ This provision may be applicable to IEPA violations. If, for

221. See *supra* notes 104-06 and accompanying text.

222. See *supra* notes 130-31 and accompanying text.

223. *Strycker's Bay*, 444 U.S. at 231 (Marshall, J., dissenting); see also *supra* text accompanying note 69.

224. IND. CODE §§ 13-6-1-1 to -6 (1993).

225. The Protection Act provides that the attorney general, a government entity, a citizen of Indiana, or a business maintaining an office in Indiana:

may bring an action for declaratory and equitable relief in the name of the state against an individual, a partnership, a copartnership, a firm, a company, a corporation, a limited liability company, an association, a joint stock company, a trust, an estate, a state agency, or an officer, a city, a town, a county, or a local governmental unit, an agency, or an official, or any other legal entity or their legal representative, agent, or assigns, for the protection of the environment of Indiana from significant pollution, impairment, or destruction. A citizen, a partnership, a corporation, a limited liability company, an association, or a public officer or agency, as a condition precedent to maintaining an action, must give notice in writing by registered or

example, an agency failed to prepare an impact statement for a project which would pollute an area, a plaintiff would be able to sue that agency to have the action enjoined until an impact statement is filed.

There are numerous problems with using the Protection Act to enforce IEPA. First, the Protection Act does not define its terms. There is no indication of how broadly the term "environment" should be defined, for example, nor does the Act clarify what level of pollution is "significant" enough to warrant protection. In the few cases where the Protection Act has been invoked,²²⁶ it has been construed narrowly.²²⁷ In the one case discussing the statute's language, the court determined that although the Act "accords standing to bring an action, it does so under limited circumstances. The general tenor of its provisions is restrictive and an action thereunder is not permitted unless an agency fails to hold a hearing . . ."²²⁸ The court's conclusion that the Act applies only under limited circumstances "can only be interpreted as an effort to deter use of the statute, contrary to what the legislature must have intended when enacting [the Protection Act]."²²⁹ Consequently, a court would be unlikely to approve the statute's use in new and innovative ways—such as bringing a claim under IEPA. By narrowly construing the statute's vague terms (such as "environment" and "significantly"), the court could continue to constrict the Protection Act's scope and would preclude its use in enforcing IEPA.

The greatest drawbacks to using the Protection Act to challenge agency actions under the IEPA are not the provisions excluded by the Act but the limitations included in the Act. For example, before getting a day in court, a plaintiff invoking the Protection Act must exhaust all available administrative remedies.²³⁰ The Act gives the agency ninety days from the time it receives

certified mail to the department of natural resources, the department of environmental management, and the attorney general, who shall promptly notify all state administrative agencies having jurisdiction over or control of the pollution, impairment, destruction, or protection of the environment for which relief is sought.

Id. § 13-6-1-1(a).

226. Few Indiana cases have cited the Protection Act. Those which have cited the Act include: *Indiana ex rel. Prosser v. Indiana Waste Systems, Inc.*, 603 N.E.2d 181 (Ind. Ct. App. 1992); *Sekerez v. United States Reduction Co.*, 344 N.E.2d 102 (Ind. Ct. App. 1976); *Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521 (Ind. Ct. App. 1975); and *Sekerez v. United States Steel Corp.*, 316 N.E.2d 413 (Ind. Ct. App. 1974).

227. *See Youngstown Sheet & Tube*, 337 N.E.2d 521.

228. *Id.* at 525.

229. Mary J. Rhoades, Note, *The Indiana Environmental Protection Act: An Environmentalist's Weapon in Need of Repair*, 22 VAL. U. L. REV. 149, 167-68 (1987) ("Consequently, the [Protection Act's] objective of improving the environment through the citizenry is violated and legislative will is frustrated.") *Id.* at 168.

230. "In Indiana, environmental litigation is restricted to a limited set of circumstances—potential plaintiffs are precluded from the courts unless they fully exhaust administrative remedies." *Id.* at 163 n.67 (citing Joseph F. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 412).

By contrast, a plaintiff under the Michigan Environmental Protection Act has direct standing before the court and need not exhaust administrative remedies before bringing suit. *See MICH. COMP. LAWS ANN.* § 691.1204(1) (West 1987).

notice to take action to eliminate the pollution.²³¹ If during this time the agency initiates a hearing or criminal proceeding, then the plaintiff's cause of action cannot be maintained.²³² Plaintiffs' reluctance to file claims under the Protection Act may be caused in part by this provision.²³³ Imposing a mandatory waiting period takes control over the action away from the plaintiff, which discourages individuals and groups from filing claims under the Protection Act.

The statute's effectiveness is also limited by the low burden of proof the defendant must sustain. If the plaintiff establishes a prima facie showing that the defendant's conduct has impaired or polluted the environment of the State (or is likely to do so), the defendant has two ways to rebut the prima facie case.²³⁴ The defendant may show compliance with the applicable state standards,²³⁵ or, if there is no applicable rule, the defendant may show that there is no feasible or prudent alternative and that the action is consistent with the State's concern for the environment.²³⁶ This provision is troubling in light of the court's narrow application of the Protection Act. In *Youngstown Sheet & Tube*, the court took the position that the Protection Act was to be used only under limited circumstances; therefore, it interpreted the statute's language narrowly.²³⁷ Consistent with that approach, a court could interpret the terms "feasible and prudent" narrowly and allow more defendants to defeat these troublesome citizen suits.

Based upon the Protection Act's narrow interpretation, procedural requirements, and strict timing provisions, the Act would not be a powerful weapon for challenging an agency's actions as violative of the IEPA. Even if the action which was the subject of the impact statement polluted the environment, the ease with which the agency could escape liability turns the Protection Act into a paper tiger. For IEPA to receive meaningful consideration from the courts, an alternative method for challenging the agency's determination must be developed.

231. IND. CODE § 13-6-1-1(b)(1).

232. *Id.* § 13-6-1-1(b).

233. As one commentator has stated:

The legislature unnecessarily restricted the statute by requiring a plaintiff to exhaust all administrative remedies before gaining access to the courts. This inconvenience alone has been cited as one reason Indiana citizens do not use [the Protection Act]. . . . [T]his procedure effectively precludes citizens from playing an active role in the environmental decision-making process. . . . While an agency is considering the case, the concerned citizen is merely a passive amicus.

Rhoades, *supra* note 229, at 166 (footnotes omitted).

234. IND. CODE § 13-6-1-2(a).

235. *Id.* § 13-6-1-2(a)(1).

236. *Id.* § 13-6-1-2(a)(2).

237. *See supra* notes 226-29 and accompanying text.

C. The Administrative Orders and Procedures Act

The Indiana Administrative Orders and Procedures Act²³⁸ ("IAOPA") offers another method of challenging an agency's procedures in court under IEPA. IAOPA establishes the conditions under which judicial review will be allowed and the degree of scrutiny which the action will receive. Although this statute would allow the courts to consider whether an agency had met its obligations under IEPA, the procedures specified in IAOPA are too stringent for the Act to be a viable means of enforcing IEPA.

Indiana courts have recognized that the right to judicial review is guaranteed by the Constitution. Due process and the separation of powers doctrine demand that an agency's decisions be subject to scrutiny by the courts.²³⁹ Nevertheless, this right has definite limits. For example, the court must first determine whether the agency acted within its jurisdiction.²⁴⁰ The court may also consider whether the agency's determination accords with the law and is supported by substantial evidence.²⁴¹ The right to judicial review is not revoked simply because the legislature failed to provide for judicial review in a statute;²⁴² however, there may be additional procedural requirements imposed before an agency's decision may be challenged before the court.

In Indiana, the procedures a plaintiff must follow in order to challenge the agency's decisions are established in IAOPA.²⁴³ To obtain review of a final agency action, the plaintiff must show standing, exhaust all administrative remedies, and meet certain timing requirements.²⁴⁴ Thus, IAOPA achieves its twin purposes: it provides for judicial review, yet also narrows the right to more limited sets of circumstances.²⁴⁵

The standing requirement is relatively easy to satisfy. Under IAOPA, a person has standing to obtain judicial review of an agency action if the action is specifically addressed against him, if he was a party to the agency proceedings leading up to the action, or if he was "otherwise aggrieved or

238. IND. CODE §§ 4-21.5-5-1 to -16 (1993). This Act is also occasionally referred to as the "Administrative Adjudication Act."

239. *Mathis v. Cooperative Vendors, Inc.*, 354 N.E.2d 269, 274 (Ind. Ct. App. 1976).

240. *City of Indianapolis v. Nickel*, 331 N.E.2d 760, 767 (Ind. Ct. App. 1975).

241. *Id.*

242. *City of Plymouth v. Stream Pollution Control Bd.*, 151 N.E.2d 626, 628 n.3 (Ind. 1958).

243. IND. CODE § 4-21.5-5-2.

244. The Act provides that:

(b) Only a person who qualifies under:

- (1) section 3 of this chapter concerning standing;
- (2) section 4 of this chapter concerning exhaustion of administrative remedies;
- (3) section 5 of this chapter concerning the time for filing a petition for review;
- (4) section 13 of this chapter concerning the time for filing the agency record for review;

and

- (5) any other statute that sets conditions for the availability of judicial review; is entitled to review of a final agency action.

Id. § 4-21.5-5-2(b).

245. "The purpose of the Administrative Adjudication Act . . . is to provide for a scope of review of administrative actions; thus, at the same time limiting judicial review of such action." *Indiana Alcoholic Beverage Comm'n v. Lamb*, 267 N.E.2d 161, 163 (Ind. 1971).

adversely affected by the agency action."²⁴⁶ These provisions basically require the plaintiff to show that he "has sustained or is in immediate danger of sustaining a direct injury" as a result of the agency action.²⁴⁷ It is not enough for the plaintiff to show an injury "common to all members of the public."²⁴⁸ As the Seventh Circuit Court of Appeals has noted, however, an organization whose members were injured by an administrative action has standing to represent those members before the court and to challenge the agency's decision.²⁴⁹ Given that a significant amount of environmental litigation is initiated by private organizations, the standing of those groups to challenge the agency in court is particularly important in the context of IEPA.

Before a judicial challenge to an agency action may be raised, all administrative remedies generally must be exhausted.²⁵⁰ If the plaintiff fails to exhaust the available administrative remedies, then the court must dismiss the complaint.²⁵¹ The Indiana Supreme Court has suggested, however, that this rule should not be applied "mechanistically."²⁵² Instead, various equitable factors should be considered in determining whether to allow the plaintiff to bypass administrative channels. These factors include the character of the question presented, the nature of the question (whether one of law or fact), the adequacy of the administrative channels for addressing the question, the harm to the plaintiff of going through those channels, and the disruptive effect of judicial intervention.²⁵³

Under IEPA, if an action were challenged by an individual, administrative remedies would be available and would have to be exhausted before a court could hear the controversy.²⁵⁴ The plaintiff and the agency would present their arguments before an administrative law judge, who would hear the evidence and issue a ruling.²⁵⁵ At this hearing, the agency would present its EIS (or its data supporting a determination that an EIS was not necessary), and this information, along with any other evidence submitted by the agency

246. The Act provides:

- (a) The following persons have standing to obtain judicial review of an agency action:
- (1) A person to whom the agency action is specifically directed.
 - (2) A person who was a party to the agency proceedings that led to the agency action.
 - (3) A person eligible for standing under a law applicable to the agency action.
 - (4) A person otherwise aggrieved or adversely affected by the agency action.

IND. CODE § 4-21.5-5-3(a).

247. *Terre Haute Gas Corp. v. Johnson*, 45 N.E.2d 484, 486 (Ind. 1942).

248. *Id.*

249. *United States v. Board of Sch. Comm'rs*, 466 F.2d 573 (7th Cir. 1972) ("It is noteworthy, however, that for purposes of standing '... an organization whose members are injured may represent those members in a proceeding for judicial review.' . . . This is especially true when representation of the interests involved is the primary reason for the organization's existence.") (omissions in original) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

250. "A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review." IND. CODE § 4-21.5-5-4(a).

251. *Rambo v. Cohen*, 587 N.E.2d 140, 144 (Ind. Ct. App. 1992).

252. *Wilson v. Board of Indiana Employment Sec. Div.*, 385 N.E.2d 438, 441 (Ind. 1979).

253. *Id.*

254. *Penrod Interview*, *supra* note 19.

255. *Id.*

or the defendant, will make up the record which would later be reviewed by a court. Once the final order is entered by the administrative law judge, the aggrieved party has a limited right to judicial review.²⁵⁶ Only evidence from the record may be reviewed,²⁵⁷ however, and a party must be part of the administrative adjudication in order to have any right to judicial review later.²⁵⁸

To meet IAOPA's requirement that administrative remedies be exhausted, a plaintiff challenging an agency's decision under IEPA would need to initiate these administrative procedures. Considering the narrow interpretation the Indiana courts have given to the Protection Act,²⁵⁹ it is unlikely that those same courts would ignore IAOPA's requirements and allow IEPA plaintiffs to proceed to court without first requiring them to pursue administrative relief.

Once standing has been demonstrated, administrative remedies exhausted, and all notice requirements met, the plaintiffs may present their arguments to the court for review. The standards of judicial review, as established by IAOPA, are extremely limited.²⁶⁰ A court may not conduct de novo review or "substitute its judgment for that of the agency."²⁶¹ Rather, a reviewing court may consider only whether the agency's action is arbitrary, capricious, or not in accordance with law; contrary to the Constitution, a statute, or required procedures; or unsupported by substantial evidence.²⁶² Judicial review has been limited to these narrow circumstances because "Indiana, like other jurisdictions, recognizes the need for unfettered action by administrative agencies operating within the sphere of their authority."²⁶³

Ultimately, the scope of judicial review of administrative decisions is limited to consideration of whether there was substantial evidence to support the decision or whether the action was arbitrary and capricious.²⁶⁴ To be arbitrary and capricious, a decision must be "willful and unreasonable, without

256. *Id.*

257. IND. CODE § 4-21.5-5-11.

258. *Id.*

259. *See supra* notes 226-29 and accompanying text.

260. *See City of Indianapolis v. Ingram*, 377 N.E.2d 877, 883 (Ind. Ct. App. 1978).

261. IND. CODE § 4-21.5-5-11.

262. The Act provides as follows:

- (a) The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.
- (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.
- (c) The court shall make findings of fact on each material issue on which the court's decision is based.
- (d) The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:
 - (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (2) contrary to constitutional right, power, privilege, or immunity;
 - (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;
 - (4) without observance of procedure required by law; or
 - (5) unsupported by substantial evidence.

Id. § 4-21.5-5-14.

263. *Indiana Alcoholic Beverage Comm'n v. McShane*, 354 N.E.2d 259, 268 (Ind. Ct. App. 1976).

264. *Ingram*, 377 N.E.2d at 883.

consideration and in disregard of the facts or circumstances in the case."²⁶⁵ The court will reverse an agency action as arbitrary and capricious only "if the evidence, when viewed as a whole, establishes that the agency's conclusions are clearly erroneous."²⁶⁶ The substantial evidence standard has been described in very similar language: "Under the substantial evidence standard, the reviewing court must consider the record as a whole A court may vacate a . . . decision only if the evidence, when viewed as a whole, demonstrates that the conclusions reached . . . are clearly erroneous."²⁶⁷ Substantial evidence exists where a reasonable person would believe the evidence is sufficient to support the agency's decision.²⁶⁸ The Indiana Supreme Court has acknowledged the overlap between these two tests: "Recognizing the absence of significant differences between the 'arbitrary and capricious' test and the 'unsupported by substantial evidence' standard, this Court recently declared that the 'substantial evidence' standard should be applied when reviewing the evidentiary support for an administrative decision."²⁶⁹

In some cases, review under the substantial evidence standard might meet IEPA's objectives. The General Assembly's motives for enacting IEPA were to encourage environmentally conscious decision-making and to allow public involvement in these decisions. If the agency holds a hearing, the public will be allowed to express its concerns about the action. This process would also inform the agency of any additional environmental issues surrounding the project. By responding to these issues in the record, the agency would have considered and rejected the environmental arguments, but the decision would have been environmentally conscious. If the court took the whole record into account in determining whether the decision was supported by substantial evidence, then the statute's goals would be met.

In sum, although an agency's decisions under the state environmental policy act could potentially be challenged through IAOPA, certain conditions must

265. *State Bd. of Tax Comm'rs v. Philco-Ford Corp.*, 356 N.E.2d 1379, 1383 (Ind. Ct. App. 1976).

266. *Indiana Dep't of Pub. Welfare v. Payne*, 592 N.E.2d 714, 725 (Ind. Ct. App. 1992). "An arbitrary and capricious act is one which is . . . without some basis which would lead a reasonable and honest person to the same conclusion." *Id.*

267. *Stewart v. Fort Wayne Community Schs.*, 564 N.E.2d 274, 278 (Ind. 1990). Earlier in its opinion, the court acknowledged the overlap between the "substantial evidence" standard and the "arbitrary and capricious" test, noting that "[w]hatever differences exist between the two tests create more confusion than they are worth." *Id.* at 277. The court went on to note:

The leading scholar on administrative law, Professor Kenneth Culp Davis, has stated that no other area of administrative law is in more need of general reform than the common law of the state courts concerning standards of judicial review. . . . Davis noted in his most recent treatise on the subject that the best way to reform this area of the law would be to simplify the standards. "Everyone should learn from the experience of the past quarter of a century that refining the verbalisms about scope or review is not merely unprofitable but harmful."

Id. at 277 n.3 (quoting KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:7 at 363 (2d ed. 1984) (footnote omitted) (omission in original)).

268. "If a reasonable person would conclude that the evidence and the logical and reasonable inferences therefrom are of such a substantial character and probative value so as to support the administrative determination, then the substantial evidence standard of I.C. § 4-21.5-5-14(d)(5) is met." *Indiana Civil Rights Comm'n v. Weingart, Inc.*, 588 N.E.2d 1288, 1289 (Ind. Ct. App. 1992).

269. *City of Indianapolis v. Hargis*, 588 N.E.2d 496, 498 (Ind. 1992).

first be met. The most difficult of these conditions are showing standing and proving that there are no administrative remedies available. Once these conditions are met, the plaintiff may have recourse to the courts, but judicial review may not satisfy the purposes of IEPA. Ultimately, the courts will apply a substantial evidence standard of review and defer to the agency if any evidence supports the ruling. This fulfills IEPA's objectives if the agency has in fact held a hearing, for the environmental issues will have been discussed and the public informed. If the agency has not held a hearing, then substantial evidence review short circuits the policies behind the Act. To ensure that IEPA's goals are met, standards of review should be developed to ensure that an agency considers the environmental effects of its action and allows the public to have a voice in the decision.

III. RESHAPING THE INDIANA ENVIRONMENTAL POLICY ACT

Indiana's Environmental Policy Act falls woefully short of meeting its stated purposes for three principal reasons. First, because the Act does not apply to actions permitted by state agencies, many environmentally significant actions slip through the cracks of the statute. Second, because the Act does not define its terminology, agencies and the public are uncertain of when the statute's provisions are triggered. Third, by omitting any mention of judicial review, the Act loses a valuable means of enforcement which could ensure that the Act's mandates are fulfilled. By amending IEPA to alleviate these shortcomings, the General Assembly could ensure that agencies take environmental factors into account and involve the public in the decision-making process.

A. Requiring Review for State Permits and Licenses

The General Assembly should amend IEPA to require impact statements before state permits or licenses are granted. By excluding permits and licenses from the Act's reach, the General Assembly severely limited IEPA's scope.²⁷⁰ The Act may be applied only to projects undertaken or approved by government agencies. This limitation is unique to IEPA. Other states' policy acts specifically require environmental impact statements for all actions before a permit or license is issued.²⁷¹ Where the legislature failed to specify whether the act applies to permits and licenses, the courts of those states have had little difficulty holding that impact statements should be prepared for such actions.²⁷² In construing the act, those courts have examined the statements of policy and purpose. These provisions outline the broad goals of the act, goals which will be advanced by requiring agencies to

270. See *supra* note 207 and accompanying text.

271. See, e.g., CAL. PUB. RES. CODE § 21100; N.Y. ENVTL. CONSERV. LAW § 8-0105(4); WASH. REV. CODE ANN. § 43.21C.060.

272. See *supra* notes 109-12 and accompanying text.

conduct environmental review before permitting or licensing actions which may have a significant impact on the environment.²⁷³

Allowing agencies to permit or license such activities without carefully considering the environmental impact runs directly counter to the purposes of IEPA.²⁷⁴ State agencies may still make decisions which are environmentally irresponsible, for they will not have all relevant environmental data before them when they grant the permit or license. If the impact statement were prepared, the agency might make the same decision; however, that decision would be an informed one. The statute's goal is to encourage agencies to get the facts before committing the state to a course of action which could damage the environment.²⁷⁵ Permitting or licensing a private action is no less a commitment than expending state funds; a privately funded activity may significantly affect the environment and should therefore be given the same measure of consideration as if the state were taking the action itself.

Granting permits and licenses without first considering the environmental impact also ignores IEPA's other purpose: facilitating public involvement in agency decisions.²⁷⁶ A construction project approved by the state, for example, might kill the fish in a nearby stream, thus affecting a community's livelihood. Alternatively, the traffic patterns in the area might increase, disturbing a nearby wildlife refuge. These effects are local, yet they may reach the point of significance. They are exactly the type of factors an EIS should discuss, for an agency might fail to consider these types of factors unless an EIS is prepared. Requiring environmental review before such actions are permitted ensures that the effects will be brought to the agency's attention and allows the public an opportunity to express its opposition before a commitment is made. This clearly advances the purposes underlying IEPA. Therefore, the General Assembly should repeal Section 13-1-10-6 of IEPA, the section which excludes actions permitted or licensed by the state from environmental review.

B. Clarifying and Expanding the Scope of the Act

The General Assembly should also amend IEPA to clarify and expand its scope. One of the major problems with the Act is that agencies do not know when impact statements are required. It is not clear, for example, what actions are covered or when those actions reach the point of "significantly" impacting natural resources. These ambiguities should be addressed in the statute to help minimize further uncertainty. At the same time, the Act's scope should be expanded. Other states have encountered greater success with their policy acts because they require environmental review of a larger variety of projects. By

273. See *supra* notes 109-12 and accompanying text.

274. See *supra* notes 185-89 and accompanying text.

275. See *supra* text accompanying note 86.

276. See *supra* note 195 and accompanying text.

lowering the threshold for requiring an EIS, Indiana would advance its goal of forcing agencies to think about the environment when making a decision.

Three amendments to IEPA should be passed. First, the threshold for requiring environmental review should be lowered. Congress chose to require environmental review of "major Federal actions significantly affecting the quality of the human environment."²⁷⁷ Indiana chose to adopt the same approach.²⁷⁸ Other states have lower thresholds. Both California and New York require environmental review of actions which *may* affect environmental quality.²⁷⁹ Washington provides that environmental review is necessary whenever a more-than-moderate effect on the environment is a reasonable probability.²⁸⁰ These requirements recognize that a low threshold for the procedural requirements increases the likelihood that agencies will have the necessary environmental data before them when they make their decisions. The General Assembly should amend Section 13-1-10-3(C) to require an environmental impact statement for all actions which may have a significant impact on the quality of the human environment. Such an amendment would substantially advance the purposes of IEPA.

Second, IEPA should be amended to include definitions of its major terms. California and New York define certain terms in their acts.²⁸¹ These provisions give the legislatures greater control over the scope of the statutes. Among its definitions, IEPA should define "environment" and "action." The scope of the definition of "environment" determines the scope of the Act. For most areas of Indiana, "environment" need only include effects on natural resources;²⁸² however, in more densely populated areas such as Indianapolis, Fort Wayne, and Gary, the definition would be more effective if it included effects on neighborhoods and communities.²⁸³ To meet the needs of rural and urban communities, Indiana should adopt New York's definition and define "environment" to include "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character."²⁸⁴ By adopting this definition, the General Assembly could ensure that IEPA's provisions would be applied to urban and rural projects.

Another term which should be defined by IEPA is "action." New York's definition of "action" clarifies the types of government projects which require

277. 42 U.S.C. § 4332(C).

278. IND. CODE § 13-1-10-3(C).

279. CAL. PUB. RES. CODE § 21100; N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

280. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 552 P.2d 674, 680 (Wash. 1976) (en banc).

281. *See supra* notes 99-101, 145-48 and accompanying text.

282. For these areas, California's definition would be adequate. *See supra* note 101 and accompanying text.

283. For these areas, New York's definition would be more useful. *See supra* note 146 and accompanying text.

284. N.Y. ENVTL. CONSERV. LAW § 8-0105(6).

environmental review.²⁸⁵ By establishing that "actions" include projects directly undertaken by agencies, projects funded by agencies, or projects permitted by agencies, the General Assembly would inform agencies when environmental impact statements are required. Also, New York's statute groups actions by type—certain types require impact statements while others do not.²⁸⁶ The regulations interpreting IEPA fail to make such a distinction.²⁸⁷ Either the regulations or the statute should be amended to establish which actions require impact statements. While these lists need not be exhaustive, they should be relatively thorough to provide guidance to the agencies and to the courts.

Third, a substantive limitation should be imposed on the agencies. New York requires its agencies to minimize the action's adverse environmental effects, to adopt alternative measures with less significant effects, or to make findings that such measures are not practicable.²⁸⁸ This requirement not only forces an agency to give serious consideration to the impact its decision will have on the environment, but also ensures that the agency will examine whether that impact may be avoided. Imposing this requirement would not eliminate the agency's discretion, for the agency could still adopt a plan with adverse effects on the environment. Before it could do so, however, the agency would be forced to make findings that alternatives or other mitigating measures are not practicable. These findings would later be subject to judicial scrutiny. If the court did not agree with the findings, it could then remand the matter to the agency. Regardless of the ultimate resolution of the decision, imposing a findings requirement gives the court a record to review and forces agencies to consider other options that have a less significant impact. Because such a requirement would further the objectives of IEPA, the General Assembly should amend the Act to require agencies to adopt less environmentally damaging alternatives or to mitigate the impact of its decision to the maximum extent practicable and to require explicit findings to that same effect.

C. Allowing Judicial Review of Agency Decisions

Although judicial review of an agency's decision under IEPA might be possible under the Indiana Administrative Orders and Procedures Act,²⁸⁹ the purposes and intent of IEPA would be better advanced if IEPA were amended to allow plaintiffs direct access to the courts. Providing such access would not be unusual. In fact, a federal agency's decision under NEPA "is treated as an example of informal agency decision making subject to direct review in the

285. *Id.* § 8-0105(4).

286. *See supra* notes 149-56 and accompanying text.

287. *See supra* note 199.

288. *See supra* notes 160-61 and accompanying text.

289. *See supra* part II.C.

federal district courts."²⁹⁰ California and Washington's statutes also authorize judicial review of the agencies' actions under their state environmental policy acts.²⁹¹

The question which remains is what level of judicial scrutiny should be applied to these decisions. Indiana's supreme court has determined that the substantial evidence standard should be applied by courts reviewing an agency's decision.²⁹² Applying this standard would encourage agencies to fulfill their obligations under IEPA and would therefore further the purposes of the statute. Under the substantial evidence standard, the reviewing court considers the record as a whole, examining the evidence that supports the agency's decision and the evidence opposing the decision; the court may reverse the agency's decision only if the evidence demonstrates that the conclusion of the agency was clearly erroneous.²⁹³ Substantial evidence exists when a reasonable person would believe the evidence sufficient to support the agency's decision.²⁹⁴

Providing judicial review of agency decisions under IEPA has distinct advantages. First, once agencies realize that their decisions may be reversed by the courts, they will begin to take their role under IEPA more seriously. Since these decisions must be supported by substantial evidence, agencies will work harder to assemble the evidence necessary to ensure that their decisions will not be reversed. This will encourage agencies to hold hearings and to produce a record that can withstand judicial review, thereby furthering the statute's goal of forcing agencies to seriously consider the environmental impact of its decisions.

In addition, establishing the standard of review in the statute itself would clarify the role of the courts in the decision. At first blush, it may not appear necessary to explicitly provide that the agency's decision under IEPA will be reviewed by the courts under the substantial evidence standard, since the courts generally review agency decisions under this standard. Nevertheless, the vast body of case law under the environmental policy acts of other states illustrates how the courts will interpret state environmental policy acts narrowly.²⁹⁵ If IEPA did not explicitly establish a standard of review, Indiana courts might hold that they do not have the power to conduct such review—even though that power is apparent under IAOPA. By clearly establishing the role of the courts, the General Assembly can ensure that the courts will observe their duties and supervise agencies' decisions under IEPA.

Requiring a plaintiff to exhaust all the available administrative remedies before bringing an action under IEPA might detract from the statute's force.

290. MANDELKER, *supra* note 5, § 12.03, at 12-16; *see also* Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1021 (1993).

291. CAL. PUB. RES. CODE §§ 21168, 21168.5; WASH. REV. CODE ANN. § 43.21C.090.

292. *City of Indianapolis v. Hargis*, 588 N.E.2d 496, 498 (Ind. 1992).

293. *See supra* note 267 and accompanying text.

294. *See supra* note 268 and accompanying text.

295. *See, e.g.*, *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 764 P.2d 278 (Cal. 1988); *Jackson v. New York State Urban Dev. Corp.*, 494 N.E.2d 429 (N.Y. 1986).

As noted with regard to Indiana's Environmental Protection Act, requiring a plaintiff to exhaust all administrative remedies before obtaining relief from the courts may deter plaintiffs from bringing such suits.²⁹⁶ This requirement reduces the plaintiff's involvement in the early phases of the action and makes the plaintiff a powerless observer of the agency processes. Thus, IEPA lawsuits are less attractive, particularly to environmental public interest groups which benefit through the publicity they garner during a high profile lawsuit. By contrast, providing plaintiffs direct access to the courts brings them to the center of the action and allows them greater control over the ultimate resolution of the controversy. By amending IEPA to allow plaintiffs direct access to the courts, the legislature would increase public awareness of, and involvement in, agency decision-making by allowing citizens to challenge agency decisions. This advances the statute's second objective.

Therefore, the General Assembly should amend IEPA to allow plaintiffs direct access to the courts to challenge an agency for failing to comply with the statute. In addition, the Act should specifically establish that the court may review the agency's decision under the substantial evidence standard. By implementing these changes, as well as clarifying the scope of the Act and making it applicable to actions licensed or permitted by state agencies, the General Assembly can ensure that agencies would take their environmental obligations seriously and will substantially further the purposes of the Act.

CONCLUSION

The methods Indiana uses to protect its environment do not rank highly among the states. In a study by the Council of State Governments, Indiana ranked "near the bottom in two significant measures of state expenditures on environmental programs. Indiana ranked forty-ninth in per capita spending, and forty-seventh in expenditures as a percentage of the total state budget."²⁹⁷ Another means of evaluating a state's environmental programs is to consider the laws the state uses to protect its natural resources. Merely having laws on the books is not enough, however. Those laws must clearly set forth standards and procedures governing actions which affect the environment. These standards should be judged in light of the policies that the state seeks to promote.

The Indiana Environmental Policy Act sets forth broad policies and purposes, yet its action-forcing provisions ultimately fail to meet or advance these goals. The Act attempts to ensure that government agencies will give a

296. See *supra* notes 230-33 and accompanying text.

297. Newby et al., *supra* note 19, at 333.

Despite an obvious increase in concern about environmental degradation on the part of legislators and the general public alike, the state government has, in large part, failed to either address the major environmental issues with effective legislation or to provide the state's environmental agencies with sufficient staff or funding to administer existing programs. The legislature may also have inadvertently weakened Indiana's environmental protection strategy by effectively denying private citizen participation in the enforcement process.

hard look to the environmental effects of their actions; however, its provisions do not clearly establish the types of actions which are covered or even what constitutes the "environment." Ultimately, the Act is too flexible to be able to ensure that its procedural mandates are met. The Act also fails to meet its second goal of encouraging public involvement in decisions that affect the environment. Since IEPA does not include any mention of judicial review, individuals cannot challenge the agency's decision and ensure that the agency has in fact taken the required hard look.

By amending IEPA, the General Assembly could clarify the statute's scope and advance the statute's goals. First, the General Assembly should repeal Section 13-1-10-6, which exempts state permits and licenses from the Act's procedural requirements. By repealing this section, the General Assembly would require environmental review for additional types of actions and would require that state agencies give more consideration to environmental effects. Second, the General Assembly should clarify, and even expand, the scope of the statute. The threshold for requiring environmental impact statements should be lowered, the terms of the statute defined, and the actions which are covered specified. This would inform agencies, and the public, when the statute applies and would advance the goal of forcing agencies to carefully consider the effects that their actions have on the environment. Third, the General Assembly should specify in the Act what standards of judicial review will be applied to the agencies' decisions. This would not only encourage agencies to prepare environmental impact statements but would also invite the scrutiny of the public.

Implementing these changes will not make IEPA a perfect statute. Eventually, the General Assembly may want to consider whether the Act should also be applied to local actions or whether the Act ought to guarantee Indiana's citizens the right to a healthful environment. President Theodore Roosevelt once stated that foresight and planning are essential for avoiding environmental disaster.²⁹⁸ By amending IEPA, the General Assembly can ensure that agencies exercise foresight with an eye to preserving the state's natural resources. Such action would show a significant reordering of the state's priorities and would represent a valuable step in protecting Indiana's environment for many years to come.

298. Specifically, President Roosevelt stated:

We have become great in a material sense because of the lavish use of our resources, and we have just reason to be proud of our growth. But the time has come to inquire seriously what will happen when our forests are gone . . . when the soils shall have been further impoverished and washed into the streams . . . These questions do not relate only to the next century or to the next generation. One distinguishing characteristic of really civilized men is foresight . . . and if we do not exercise that foresight, dark will be the future!

Theodore R. Roosevelt, Opening Address by the President, *in* PROCEEDING OF A CONFERENCE OF GOVERNORS IN THE WHITE HOUSE, at 3-12 (1909).