

THE YALE LAW JOURNAL

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A “Full and Fair” Discussion of Environmental Impacts in NEPA EISs: The Case for Addressing the Impact of Substantive Regulatory Regimes

ABSTRACT. This Note argues that Environmental Impact Statements drafted pursuant to the National Environmental Policy Act should rigorously assess *all* major project impacts, including those that will be circumscribed by or substantively regulated under other environmental laws. This Note surveys forty EISs and determines that this assessment is not current practice. It contends that current practice impermissibly postpones some impact analyses until after the information-forcing and public disclosure processes required by NEPA. This Note proposes changes to the current practice to bring EIS discussions of substantive environmental laws in line with regulatory requirements, EPA comment letters, judicial precedent, and legal and normative policy considerations.

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INTRODUCTION

The National Environmental Policy Act (NEPA)—a chiefly procedural statute—requires federal agencies to examine “to the fullest extent possible” proposed major federal actions that will “significantly affect[] the quality of the human environment.”¹ Environmental Impact Statements (EISs) are the tangible output of the NEPA examination process and are meant to provide, during project planning and before project implementation, a “full and fair discussion of significant environmental impacts” expected from the proposed project.²

But such a discussion, this Note argues, cannot be full and fair if agencies fail to “[r]igorously explore and objectively evaluate”³ impacts that will be regulated under other environmental laws. A survey of forty EISs reveals that, in general, if a pollutant or impact is regulated under some substantive environmental law regime, then proponent agencies do not dedicate much time or space in their NEPA EISs to discussing how they will address that pollutant or impact when completing the project—save to say that they will comply with regulatory and permitting requirements. This practice allows NEPA EISs to defer some impact analyses from the planning phase to regulatory processes further down the road after plans have already been finalized.

This Note argues that the practice of deferring these assessments is wrong. If an EIS is to thoroughly assess a project’s significant effects on the human environment as required by NEPA, then it cannot merely assume that other regulatory systems will address or allay project impacts. Rather, NEPA EISs should evaluate if—and importantly, how—the substantive regulatory regimes to which the project will be subject will circumscribe the project’s environmental impacts. This information should be provided in EISs so that the public and coordinate agencies have an opportunity to assess and comment on the full scope of project impacts in accordance with NEPA’s core purpose.⁴ Though the EPA and some courts have advanced this approach when reviewing EISs that fail to discuss how the project will comply with other environmental laws, this

1. 42 U.S.C. § 4332 (2012).

2. 40 C.F.R. § 1502.1 (2014). The purpose of an EIS is to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.*

3. 40 C.F.R. § 1502.14 (2014). This requirement applies to project alternatives: that is, agencies must “rigorously explore and objectively evaluate all reasonable project alternatives.” This Note argues that this analytical requirement should extend to impacts from project alternatives regulated under other environmental laws.

4. See *infra* Parts I.A, I.C.1.

Note makes the novel argument that all federal agencies should adopt this approach as standard practice during the initial EIS drafting stage.⁵

This argument proceeds from both legal and normative angles. The legal argument is based on the regulatory requirement for agencies to include robust impact discussions in EISs.⁶ The normative argument proposes that such regulatory considerations be included in EISs because NEPA itself embodies the normative goal of ensuring that significant environmental impacts can be taken into account by decision makers and the broader public.⁷ More comprehensive information better equips the public to challenge agency action, and this itself may lead to substantive change.⁸ Moreover, better administrative procedures can facilitate better substantive project outcomes by forcing agencies to consider problems that they might not otherwise examine and to potentially pursue more environmentally conscious alternatives.⁹

This Note first introduces NEPA and the author's survey of current EIS discussions of substantive environmental laws. The survey reveals deficiencies in light of NEPA's goals and purposes, applicable regulations, EPA critiques, and judicial precedent. Second, the Note proposes changes to the current practice in line with relevant legal authority. This proposal—referred to herein as EIS Regulatory Review—argues that EIS authors should, as a matter of standard operating procedure, analyze how substantive regulatory regimes will shape and circumscribe project impacts. The Note also presents case studies to illustrate EIS Regulatory Review in practice. Finally, it offers and rebuts potential counterarguments to EIS Regulatory Review.

5. While there is an existing literature on other nuanced topics related to the scope of EISs—including what constitutes a “significant impact” or “reasonable alternative,” which federal projects are “major actions,” and what cumulative impacts should be considered—the literature does not explore in depth the extent to which EISs should discuss the substantive regulatory regimes applicable to a project subject to NEPA. *See, e.g.*, 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 17:19 (2d ed. 2013) (summarizing court decisions on “[m]ajor, [s]ignificant [a]ctions”); DANIEL R. MENDELKER, NEPA LAW AND LITIGATION § 10:42.30 (2d ed. 2014) (summarizing court decisions on the adequacy of EIS discussions about cumulative impacts); J. Matthew Haws, *Analysis Paralysis: Rethinking the Court's Role in Evaluating EIS Reasonable Alternatives*, 2012 U. ILL. L. REV. 537 (discussing courts' analyses of reasonable alternatives).
6. *See infra* Part I.C.2.
7. *See infra* Part I.C.1.
8. *Id.*
9. *See* MICHAEL R. GREENBERG, THE ENVIRONMENTAL IMPACT STATEMENT AFTER TWO GENERATIONS 12 (2012) (“Part of NEPA's appeal is the widespread assertion that it has changed practice by federal agencies, which has led to better decisions.”). *See generally* SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984).

To note, the expanded regulatory discussion advocated herein does not apply to every EIS and does not make sense for all projects subject to NEPA. More narrowly, it should apply only to projects that will be heavily regulated under substantive environmental law regimes such as the Clean Air Act (CAA)¹⁰ or Clean Water Act (CWA)¹¹ – where permits under those statutes will be central to project completion. In those instances, in which substantive regulations will distinctly govern how the project can be executed, agencies can and should discuss how they expect permits issued by other agencies to shape the project’s ultimate environmental impacts.

I. CURRENT PRACTICES AND PROBLEMS WITH THE STATUS QUO

This section provides background information about NEPA and surveys how EIS authors – administrative agencies¹² – currently address substantive environmental laws in their NEPA EISs. It concludes by presenting problems with the current practice in light of NEPA’s goals and implementing regulations and as identified by the EPA and the majority of courts that have examined this issue.

A. Background on NEPA

NEPA was passed in 1969.¹³ The Act contains three key provisions. First, Title I’s “[c]ongressional declaration of purpose” sets out the Act’s goals: to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”¹⁴

Second, Title I contains an action-forcing mechanism to achieve the Act’s goals. It requires agencies to prepare a “detailed statement” of environmental impacts, now referred to as an environmental impact statement (EIS), for any

10. 42 U.S.C. §§ 7401-7671q (2012).

11. 33 U.S.C. §§ 1251-1387 (2012).

12. While administrative agencies are the official authors of EISs, private project proponents – who may operate under agency contract – are often the entities that draft EIS documents and ultimately execute the project. For simplicity, however, this Note refers to agencies rather than other project proponents as the authors of EISs. The proposal advanced in this Note applies with as much force to private project proponents subject to NEPA through agency contract as it does to agencies directly subject to NEPA.

13. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370f (2012)).

14. 42 U.S.C. § 4321 (2012).

“proposals for legislation [or] other major Federal actions significantly affecting the quality of the human environment”¹⁵ At base, NEPA requires federal agencies to “carefully consider[] detailed information concerning significant environmental impacts”¹⁶ of proposed projects in the form of an EIS.¹⁷ EISs have two primary purposes: (1) to ensure that federal agencies make fully informed project decisions in light of potential environmental consequences, and (2) to inform the public about those consequences and allow the public an opportunity to comment on and challenge proposed actions.¹⁸ EISs must address¹⁹:

1. [T]he environmental impact of the proposed action,
2. any adverse environmental effects which cannot be avoided should the proposal be implemented,
3. alternatives to the proposed action,
4. the relationship between the local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

To achieve NEPA’s goals, EISs are prepared in two stages—a draft and final stage. At the onset, agencies undertaking a “major Federal action[] significantly affecting the quality of the human environment”²⁰ must compose a draft environmental impact statement (DEIS) and publish it to allow for comments from the public and agencies whose regulatory regimes will apply to the project.²¹ After a public comment period, agencies must prepare a final environ-

15. *Id.* § 4332(C) (2012).

16. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

17. For information as to whether and when an EIS is required in the NEPA process, see 40 C.F.R. § 1501.4 (2012).

18. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

19. 42 U.S.C. § 4332(C) (2012).

20. *Id.*

21. *See* 40 C.F.R. § 1503.1 (2012).

mental impact statement (FEIS) that responds to all comments received on the draft EIS.²² The EPA has authority to review and comment on draft EISs and final EISs.²³

Third, Title II of the Act establishes the Council on Environmental Quality (CEQ) in the Executive Office of the President, which is responsible for implementing NEPA.²⁴ The CEQ “was reportedly modeled after the Council of Economic Advisors.”²⁵ Subsequent to the CEQ’s initial statutory mandate in NEPA, in 1970 President Nixon issued Executive Order No. 11,514, entitled “Protection and Enhancement of Environmental Quality,” which conferred authority upon the CEQ to coordinate NEPA and develop guidelines for relevant agencies.²⁶ Part I.C.2 discusses CEQ’s regulatory authority and means to effect NEPA’s statutory requirements in greater detail.

Courts have consistently held that NEPA imposes a duty on federal agencies to take a “‘hard look’ at environmental consequences.”²⁷ This “hard look” requirement entails “both a complete discussion of relevant issues as well as meaningful statements regarding the actual impact of proposed projects.”²⁸ This duty, however, is chiefly procedural, not substantive. As established in a seminal NEPA case, *Vermont Yankee*, “NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to [e]nsure a fully informed and well-considered decision”²⁹ While NEPA does not contain substantive environmental standards, the Act’s two-stage EIS process constitutes an “action-forcing” procedure that aims to facilitate agencies’ “hard look” and satisfy NEPA’s goal of providing comprehensive information about proposed project impacts to environmental decision makers and the interested public,³⁰ as described below. Courts have repeatedly

22. *See id.* § 1503.4 (2012).

23. *See infra* Part I.C.3.

24. *See* 42 U.S.C. § 4342 (2012).

25. *See* Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation’s Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 483, 497 (2009).

26. Exec. Order No. 11,514, 3 C.F.R. 531 (1971).

27. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972) (quoting *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

28. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1172 (9th Cir. 2006).

29. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (citations omitted); *see also* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (“NEPA imposes only procedural requirements”); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

30. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066–67 (9th Cir. 2002) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000)).

recognized that “the requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for the agencies”³¹ and requires close judicial scrutiny of agency procedures implementing the Act.³² This requirement is grounded in NEPA’s implementing regulations (detailed in the following section), which mandate that EISs “[r]igorously explore and objectively evaluate” potential impacts from “all reasonable alternatives.”³³

Though NEPA has a chiefly procedural focus, the scope of its information-forcing mechanism – the EIS – logically encompasses some exploration of substantive environmental laws. This is because substantive environmental laws contain tangible limits for expected project impacts. Thus, determining whether a proposed project will comply with substantive environmental laws is central to crafting a feasible project plan that can be permissibly completed by a project proponent, given the limits of applicable law.

B. Survey of How Agencies Address “Other Environmental Laws” in EISs

At present, EISs are often devoid of discussions about how project impacts can and will be regulated under substantive environmental laws and instead only contain bare assertions that the project will comply with applicable laws. To determine the extent to which applicable substantive laws are addressed in EISs, the author sampled forty EISs, both draft and final.³⁴ EISs were selected based on a project’s likely need for substantive environmental permits (as related to an expected environmental impact) as a condition for project completion.

31. *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (citing 42 U.S.C. § 4332 (2012)).

32. *See, e.g., Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (explaining that a reviewing court must be “searching and careful” in considering “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”).

33. 40 C.F.R. § 1502.14 (2014).

34. This sample is by no means comprehensive, as thousands of EISs have been produced since Congress passed NEPA in 1978. The appropriateness of this sample size was determined through conversation with a former EPA General Counsel. Interview with E. Donald Elliott, Former Gen. Counsel, U.S. Env’tl. Prot. Agency, in New Haven, Conn. (Sept. 27, 2013). Other studies centered on NEPA have surveyed a similar number of (and sometimes far fewer) EISs or Environmental Assessments (EA; a precursor to an EIS). *See, e.g., GREENBERG, supra* note 9, at 14 (drawing conclusions from six EISs); Elisabeth A. Blaug, *Use of the Environmental Assessment by Federal Agencies in NEPA Implementation*, 15 ENVTL. PROF. 57 (1993) (detailing the results of a survey of fifty-two federal agencies that prepare EAs each year); U.S. GOV’T ACCOUNTABILITY OFFICE, B-170186, REPORT ON THE ADEQUACY OF SELECTED ENVIRONMENTAL IMPACT STATEMENTS PREPARED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (1972), <http://www.gao.gov/assets/200/199088.pdf> [<http://perma.cc/FGQ5-UMVQ>] (evaluating six EISs).

To form the sample set, the author searched the EPA EIS database³⁵ for the key words “permit” and “other environmental laws.” The author then examined the sections of those EISs that discussed project impacts that would likely be subject to substantive regulation. This survey qualitatively evaluated if and how proponent agencies contemplated applicable regulations in their EISs and recorded whether they discussed substantive regulations in any depth beyond mere mention of expected applicability.

This sample is therefore representative of projects where proponent agencies at least identified the need for applicable regulatory compliance. It excludes projects for which proponents may have failed to comply with their bare minimum duty to “list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal.”³⁶ As a result, inferences drawn from this review should be limited to projects for which proponents can anticipate the need for future conformity with other environmental laws. More broadly, this sample is not a complete collection of all relevant EISs, and this Note makes no claim to have conducted a fully comprehensive empirical assessment. However, the review of EISs in this Note can provide a useful overview of the extent to which EISs are taking into account impacts regulated under other environmental laws.

The results of this survey show that EISs commonly fail to discuss how expected regulation will shape the contours of project environmental impacts. More often than not, EISs merely offer a bare assertion that another agency will regulate a project component but do not describe how the expected regulation will affect project impacts.³⁷ Project proponents may be averse to extending the length of EISs with any discussion that they believe the EPA and courts may not consistently require of them.

One illustrative and problematic example of present practice is a recent joint EIS between the Federal Highway Administration (FHA) and the U.S. Army Corps of Engineers (USACE) for a project to construct a surface coal mine and adjacent highway. The authoring agencies noted that “[p]otential adverse effects from fugitive dust and noise associated with the mine area [will be] regulated by SMCRA, Clean Air Act, the West Virginia Air Pollution Control Act, and the Mine Safety and Health Administration (MSHA) to assure adequate protection of public safety, health and property” and that the “SMCRA program addresses aspects of construction and filing activities on natural and human environments through performance standards to avoid and

35. See *Environmental Impact Statement (EIS) Database*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/nepa/eisdata.html> [<http://perma.cc/9VAJ-FE6G>].

36. 40 C.F.R. § 1502.25(b) (2014).

37. See Table 1 in Part II.A.1 for examples of this practice and proposed changes to it.

minimize adverse effects”³⁸ However, the FHA and USACE did not detail how those adverse effects would be addressed or circumscribed by the regulatory provisions cited. Indeed, the EIS simply stated that “[t]he Corps defers to the regulatory authority and oversight of the[] agencies [charged with implementing those regulations] for adequate assurances that the activities for which [an environmental] permit is required[] [are] conducted to avoid and minimize these potential impacts.”³⁹

C. *Why Current Practice Is Problematic*

Current practice—whereby agencies do not detail in EISs the regulatory coverage (or lack thereof) that project environmental impacts will receive—should be changed in light of practical and policy rationales stemming from NEPA’s core purposes, as well as legal considerations informed by CEQ regulations, EPA comment letters, and judicial precedent.

1. *NEPA’s Purpose and Goals*

NEPA is centered on ensuring democratic decision making via public access to comprehensive information. As NEPA suggests, “the EIS is not an end in itself, but rather a tool to promote environmentally sensitive decision making.”⁴⁰ “Informed, environmentally responsible decision making is an objective in itself, as well as the means by which Congress sought to achieve its other NEPA objective—environmental protection.”⁴¹ The overall purpose of the NEPA process is to make available, to both agencies and the public, detailed information about project impacts and thereby ensure that “the public has sufficient information to challenge the agency.”⁴²

Congress established NEPA with an information-forcing purpose.⁴³ This purpose is effectuated by the CEQ through its NEPA regulations. NEPA and its implementing regulations “operate like other ‘sunshine’ laws (for example,

38. FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP. & U.S. ARMY CORPS OF ENG’RS, EIS No. 20130074, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR KING COAL HIGHWAY DELBARTON TO BELO PROJECT AND BUFFALO MOUNTAIN SURFACE MINE 328 (2013).

39. *Id.*

40. NICHOLAS C. YOST, NEPA DESKBOOK 13 (3d ed. 2003) (citing 40 C.F.R. §§ 1500.1, 1502.1).

41. *Id.* at 6.

42. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), *overruled in part on other grounds by* *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

43. See Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 879-82 (2006).

the Administrative Procedure Act) in that they require full disclosure to the public as well as extensive public hearings and opportunities for comment on the proposed project.”⁴⁴ Without a “reasonably accurate estimate of the effects of [a] proposal,” the public and agency decision makers “cannot rationally weigh its relative benefits and cost—and that, of course, is an ultimate NEPA objective.”⁴⁵

From a procedural standpoint, NEPA “provides the vehicle for agency [and public] consideration of overall project-related impacts prior to the permit decision.”⁴⁶ Ideally, EISs present comprehensive, rather than piecemeal, environmental impact and regulatory analysis, as exemplified by the EIS for an oil refinery project in Hampton Roads, Virginia. For that project, proponents needed to meet a number of substantive legal requirements before they could complete the project. Since building the refinery entailed the “dredging of state-owned bottomland in the Elizabeth River,”⁴⁷ the project would require⁴⁸:

- A subaqueous permit from the Virginia Marine Resources Commission;
- A Clean Water Act section 401 certificate from the Virginia State Water Control Board to establish “that the dredging and construction necessary for the marine terminal would not violate federal water quality standards or Virginia water quality laws;”
- A National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act from the Virginia State Water Control Board “to allow . . . wastewater to be discharged by the refinery into navigable waters of the United States;”

44. MATTHEW J. LINDSTROM & ZACHARY A. SMITH, *THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, AND EXECUTIVE NEGLECT* 94 (2001).

45. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 17:40 (2d ed. 2013).

46. Office of Water, *EPA’s National Hardrock Mining Framework*, U.S. ENVTL. PROT. AGENCY app. C-3 (Sept. 1997), http://www.epa.gov/aml/policy/app_c.pdf [<http://perma.cc/R3CJ-NQUT>]; see also *id.* at C-2 (“NEPA offers the opportunity to identify permit conditions, including those needed to avoid or minimize impacts or to mitigate for unavoidable impacts.”).

47. LINDSTROM & SMITH, *supra* note 44, at 81.

48. *Id.*

- A dredge and fill permit under the Clean Water Act from the U.S. Army Corps of Engineers;
- An air quality permit, pursuant to Clean Air Act requirements from the Virginia State Air Pollution Control Board, since “[t]he refinery would be a major new source of oxidants;” and
- A Prevention of Significant Deterioration permit under the Clean Air Act from the EPA to ensure that the “release of pollutants [does not] exceed federal standards for the region.”

According to an extensive study of the public controversy that ensued regarding the Hampton Roads refinery proposal, “no two agencies examined the same factors in reviewing the environmental impact of the . . . facility.”⁴⁹ While agencies should ideally avoid overlapping jurisdiction, disjunctive analysis across each agency’s separate permitting documents poses problems for citizens interested in understanding and commenting on comprehensive project impacts.

In the context of U.S. environmental law and policy – which tends to be decentralized both in terms of regulatory authority and the focus of substantive regulations⁵⁰ – an EIS is the only document that can provide a much-needed overview of across-the-board project impacts. For example, the Hampton Roads EIS was the sole document that provided decision makers and the public with a comprehensive view of all project impacts. Indeed, “NEPA is the one environmental statute that addresses the total spectrum of environmental issues that may result from a proposed agency action.”⁵¹

It is critical that NEPA EISs contain comprehensive, “full and fair” discussions of environmental impacts because such information can lead to substantive changes in project completion as a result of public challenges to the EIS.⁵² Importantly, “impact statements can have significant effects on the process and

49. Richard A. Liroff, *Oil v. Oysters—Lessons for Environmental Regulation of Industrial Siting from the Hampton Roads Refinery Controversy*, 11 B.C. ENVTL. AFF. L. REV. 705, 714 (1984).

50. See LINDSTROM & SMITH, *supra* note 44, at 81.

51. Julie Fegley, *The National Environmental Policy Act: The Underused, Much-Abused, Compliance Tool*, 31 A.F. L. REV. 153, 154 (1989).

52. For a discussion of the role of public participation and public challenges in the NEPA process generally, see William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 175, 177-85 (1997).

outcomes of policymaking.”⁵³ EISs function as a planning and organizing tool that gives stakeholders access to policymaking processes in a deliberative way.⁵⁴ The required public comment period mandated by NEPA⁵⁵ gives the public and “environmental groups a formal means to make their case to agency officials” and to challenge an agency’s planned actions, which in turn “rais[es] decision makers’ awareness of a policy’s environmental consequences.”⁵⁶ Public challenges to EISs through NEPA’s democratic decision-making process may even lead to wholesale project cancellation. As one example, the planned Driscoll Expressway in New Jersey never came into being as a result of pressure brought to bear during public hearings on the project EIS.⁵⁷ In sum, the EIS process gives the public the opportunity to challenge specific aspects of planned projects based on concerns with the environmental impacts detailed in an EIS. Therefore, the issue of *which* details are actually contained in an EIS is critical to facilitating substantive changes to planned projects via public challenges.

2. CEQ Regulations

The Council on Environmental Quality (CEQ) is responsible for regulations interpreting NEPA. It has issued regulations regarding NEPA’s procedural provisions that are binding on all federal agencies.⁵⁸ The CEQ’s regula-

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53. Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1296 (1997); see also GREENBERG, *supra* note 9, at 12 (“NEPA . . . has been instrumental in the cancellation or postponement of highways, dams, airports, nuclear waste disposal programs, outer continental shelf leases, and other proposals. More often, the scoping, preparation, and presentation of the results have caused changes in locations, designs, and other changes to mitigate undesirable environmental effects”); Note, *Sewers, Clean Water, and Planned Growth: Restructuring the Federal Pollution Abatement Effort*, 86 YALE L.J. 733, 758 (1977) (noting that EISs have “resulted in the alteration of an applicant’s plans”).
54. See GREENBERG, *supra* note 9, at 76-77.
55. See 40 C.F.R. § 1503.1 (2014).
56. Inman & Rubinfeld, *supra* note 53, at 1295.
57. See GREENBERG, *supra* note 9, at 35-38 (“Ultimately, the NEPA process exposed the details of the plan to scrutiny by the public and adamantly opposed environmental advocate groups, and to the skeptical eye of a new governor.”). In response to public outrage over the project, the governor refused to fund state contracts necessary to complete the project, eventually leading to its demise. *Id.* at 35.
58. Under sections 2(g) and 3(h) of Executive Order No. 11,514, as amended by Executive Order No. 11,991, CEQ NEPA regulations are binding on all federal agencies. See Exec. Order No. 11,514, 3 C.F.R. 104 (1970); Exec. Order No. 11,991, 3 C.F.R. 123, 124 (1978); see also YOST, *supra* note 40, at 374 (discussing the CEQ’s authority to issue regulations). Those regulations (entitled “Regulations for Implementing the Procedural Provisions of the National

tions also require each agency to adopt implementation procedures to “supplement” its provisions.⁵⁹ For example, regulations promulgated by the U.S. Army Corps of Engineers (USACE) state that they provide “guidance for the implementation of [NEPA’s] procedural provisions” and are “intended to be used only in conjunction with the CEQ regulations.”⁶⁰ While each federal agency maintains its own implementing regulations, the remainder of this Note will refer to the CEQ’s implementing regulations for NEPA since they provide a uniform baseline that is often cited and accorded “substantial deference” by courts,⁶¹ and because they mirror the content of most agency-specific regulations.

Three primary CEQ regulations inform the way in which substantive environmental laws should be treated in NEPA EISs, and each suggests that the treatment of these laws should not be fleeting. First, 40 C.F.R. § 1502.2(d) indicates that an EIS “shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of [NEPA] and other environmental laws and policies.”⁶² The semantics of § 1502.2(d) are important: this regulation directs agencies to examine how – not just whether – project alternatives will achieve the requirements of other environmental laws. Other agencies’ NEPA-implementing regulations provide context for and shed light on the scope of § 1502.2(d)’s requirement that EISs “state how” alternatives will comply with other environmental laws. For example, U.S. Postal Service regulations provide that EISs must “[c]ontain *discussions* of . . . how alterna-

Environmental Policy Act”) became effective and binding upon agencies in 1979. See 43 Fed. Reg. 55,978-56,007 (1978).

59. 40 C.F.R. § 1507.3(a) (2014).

60. 33 C.F.R. § 230.1 (2014). Similarly, regulations promulgated by the U.S. Department of Energy state that they “supplement[]” and are “to be used in conjunction with” the CEQ’s NEPA regulations. 10 C.F.R. § 1021.100 (2014).

61. *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979) (recognizing that “CEQ’s interpretation of NEPA is entitled to substantial deference,” particularly since its regulations form a “single set of uniform, mandatory regulations” adopted pursuant to a presidential directive to “transform[] advisory guidelines into mandatory regulations applicable to all federal agencies”); see also *LINDSTROM & SMITH*, *supra* note 44, at 7 (“While CEQ does not have punitive powers, the courts frequently use CEQ interpretations of NEPA in forming their decisions.”). “As a corollary to that deference owing the CEQ, it is important to keep in mind that no deference is due to other agencies’ interpretations of NEPA.” *YOST*, *supra* note 40, at 7 (citing *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001); *Am. Airlines v. Dep’t of Transp.*, 202 F.3d 788, 803 (5th Cir. 2000); *Alaska Ctr. for the Env’t v. West*, 31 F. Supp. 2d 714, 721 (D. Alaska 1998), *aff’d*, 157 F.3d 680 (9th Cir. 1998)); see also *Rails-to-Trails*, 267 F.3d at 1150.

62. 40 C.F.R. § 1502.2(d) (2014).

tives chosen will meet the requirements of NEPA and other environmental laws and policies.”⁶³

Two other regulations, 40 C.F.R. § 1502.16 and § 1506.2, require agencies to “discuss” project alignment with other environmental laws.⁶⁴ One of them, 40 C.F.R. § 1502.16, states that EISs “shall include discussions of . . . [p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned.”⁶⁵ The other, 40 C.F.R. § 1506.2, indicates that “[EISs] shall discuss any inconsistency of a proposed action with any approved State or local plan and laws” to “better integrate environmental impact statements into State or local planning processes.”⁶⁶ “Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.”⁶⁷ Together, these provisions capture the CEQ’s mandate that EIS authors consider and examine in EISs how other environmental laws will constrain project outcomes.⁶⁸

Another section of the CEQ’s NEPA regulations may appear less demanding: 40 C.F.R. § 1502.25(b) only requires a draft EIS to “list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal.”⁶⁹ However, the CEQ’s holistic guidance on implementing NEPA suggests that a more robust discussion of impacts is necessary, in line with the regulations at 40 C.F.R. § 1502.16 and § 1506.2. In the agency’s much-cited

63. 39 C.F.R. § 775.11(b)(2)(iv) (2014) (emphasis added).

64. 40 C.F.R. §§ 1506.2, 1502.16 (2014).

65. 40 C.F.R. § 1502.16 (2014).

66. 40 C.F.R. § 1506.2 (2014).

67. *Id.*

68. See also *Conservation Cong. v. U.S. Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 WL 4829320, at *16 (E.D. Cal. Sept. 6, 2013) (“[An agency] is required to prepare an EIS if the Project would ‘significantly’ affect ‘the quality of the human environment.’ ‘Significantly’ in this context includes, among other things, consideration of whether the action threatens a violation of federal environmental law.”) (quoting 42 U.S.C. § 4332(C) (2012)); 40 C.F.R. § 6.207(a)(3)(v) (2014) (EPA’s NEPA implementing regulations stating that a proposed action normally requires an EIS if it “would be inconsistent with state or local government, or federally-recognized Indian tribe environmental, resource-protection, or land-use laws and regulations for protection of the environment”). Another CEQ provision, 40 C.F.R. § 1508.27, counsels that an EIS be prepared when an action “threatens a violation of Federal, State, or local law.” 40 C.F.R. § 1508.27(b)(10) (2014). That provision further supports the notion that any potential intersection of a project’s impacts with a substantive regulatory regime should be afforded due consideration by proponent agencies. See *Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1026 (S.D. Cal. 2003) (citing 40 C.F.R. § 1508.27(b)(10)) (“An agency has an obligation under NEPA to consider whether an action might violate state or local rules.”).

69. 40 C.F.R. § 1502.25(b) (2014).

“Frequently Asked Questions,” the CEQ clarified that project proponents who will need permits under other environmental laws are to “integrate the NEPA process into other planning at the earliest possible time to [e]nsure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”⁷⁰ An agency-specific example supporting this reading is found in the U.S. Department of Energy’s (DOE) regulations implementing NEPA. Those state that, in accordance with the CEQ regulation at 40 C.F.R. § 1502.25 (requiring EISs to list federal permits which must be obtained to complete the project), “DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible” and “incorporate any relevant requirements as early in the NEPA review process as possible.”⁷¹ As the USACE regulations cogently recognize:

The NEPA process does not replace the procedural or substantive requirements of other environmental statutes and regulations. Rather, it addresses them in one place so the decision maker has a concise and comprehensive view of the major environmental issues and understands the interrelationships and potential conflicts among the environmental components. NEPA is the “umbrella” that facilitates such coordination by integrating processes that might otherwise proceed independently.⁷²

In this vein, NEPA EISs should address the substantive requirements of and expected methods for achieving project compliance with other environmental laws.

3. *EPA Assessments of Agencies’ Current Practice*

Several federal statutes task the EPA with reviewing EIS documents. First, section 309 of the Clean Air Act requires the EPA to review and issue written comments on any matter relating to that Act and authorizes the EPA to review other major federal projects to which NEPA’s EIS process applies.⁷³ Second,

70. Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,029 (Mar. 23, 1981). While these FAQs have not received equal deference from courts as the CEQ regulations upon which they expound, they have helped shape agency practice. ABA, *THE NEPA LITIGATION GUIDE* 155-57 (Albert M. Ferlo, Karin P. Sheldon & Mark Squillace eds., 2d ed. 2012).

71. 10 C.F.R. § 1021.341 (2014).

72. 32 C.F.R. § 651.14(e) (2014).

73. See 42 U.S.C. § 7609 (2012).

NEPA itself requires that all federal agencies completing EISs consult with and “[o]btain the comments of any Federal agency” that has “jurisdiction” or “special expertise” or “is authorized to develop and enforce environmental standards” for project execution.⁷⁴ This requirement often encompasses the EPA since it is the agency with enforcement jurisdiction over many key environmental laws. While the EPA’s comments “lack the force of law and ‘do not warrant *Chevron*-style deference,’”⁷⁵ courts do require agencies to “take them seriously”⁷⁶ and review whether agencies gave them sufficient consideration.⁷⁷

Because courts require agencies to consider EPA comments seriously, the author examined the EPA comment letters associated with the EISs surveyed for this Note. In most instances, EPA comment letters flagged draft EISs that lacked a discussion of how project impacts would be shaped by—and how project proponents expect to comply with—substantive environmental laws. The EPA often counseled project proponents to include such discussions in revised EISs in line with this Note’s proposed EIS Regulatory Review.⁷⁸ The EPA’s formal EIS reviews should be persuasive authority for how courts interpret EIS requirements.

4. *Judicial Review of Agencies’ Discussions of “Other Environmental Laws”*

Courts have consistently recognized NEPA’s information-forcing and public participation goals. In furtherance of those goals, courts compare the need for absent information with the cost of acquiring it and consider the possible adverse effects of acting without this data.⁷⁹ The lack of a “full and fair” EIS discussion of project impacts—including those that may be circumscribed by other environmental laws—undermines NEPA’s central focus on democratic decision making by an informed public with the statutory right to weigh in on the NEPA process.⁸⁰ As the U.S. Court of Appeals for the D.C. Circuit has

74. 40 C.F.R. §§ 1503.1(a)(1), 1503.2 (2014).

75. See *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 154-55 (3d Cir. 2004) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

76. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991).

77. See *Tinicum Twp., Pa. v. U.S. Dep’t of Transp.*, 685 F.3d 288, 296 (3d Cir. 2012).

78. See *infra* Table 1 for descriptions of and citations to EPA comment letter recommendations regarding three specific project proposals.

79. See GREENBERG, *supra* note 9, at 14.

80. According to the CEQ’s 1997 Effectiveness Study, “[t]he success of a NEPA process heavily depends on whether an agency has systematically reached out to those who will be most affected by a proposal, gathered information and ideas from them, and responded to the input by modifying or adding alternatives, throughout the entire course of a planning process.” COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A

acutely observed, uninformed decision making is itself a harm that NEPA was meant to address and for which relief may be granted: “[T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision makers to take environmental factors into account in the way that NEPA mandates.”⁸¹

Few courts have been presented with the question of how rigorously CEQ regulations require proponents to address project compliance with other environmental laws in their EISs. Most courts that have examined this question have instructed proponents to discuss other environmental laws in sufficient detail to facilitate public comment,⁸² but at least one court has declined to read § 1502.2(d) as requiring a robust analysis of other laws.⁸³ In judicial review of an EIS, courts “need not fly-speck the document and hold it insufficient on the basis of inconsequential, technical deficiencies, but will instead employ a rule of reason.”⁸⁴ This Note argues that a rule of reason in this context should be shaped by evaluating whether a lacking discussion of project compliance with other environmental laws hampers NEPA’s goals.

The U.S. District Court for the District of Oregon is the one court that has suggested that NEPA does not require a thorough analysis of a proposed project’s compliance with other environmental laws.⁸⁵ In *League of Wilderness Defenders v. U.S. Forest Service*, that court was unable to find any case interpreting 40 C.F.R. § 1502.2(d) as requiring a full discussion of every applicable environmental law.⁸⁶ This decision seemingly condones the minimal detail provided in most EISs about how a project’s environmental impacts will be regulated.

STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 17 (1997); *see also* *United States v. City of Detroit*, 329 F.3d 515, 529 (6th Cir. 2003) (en banc) (rejecting an EIS because the “[d]efenders were entitled to see, comment on and administratively appeal an analysis of, or any explanation regarding, CWA compliance set forth in the FEIS itself . . . [but, a]ll that the FEIS and ROD offered . . . were bare assertions of CWA compliance”), *vacated as moot*, 401 F.3d 448 (6th Cir. 2005).

81. *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974).

82. *See infra* notes 89-99 and accompanying text.

83. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 883 F. Supp. 2d 979, 994-95 (D. Or. 2012).

84. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996) (citation omitted) (internal quotation marks omitted). Judicial review of an EIS is “extremely limited.” *Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000). A court evaluates an EIS only “to determine whether it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences” of a challenged action. *Nw. Env’tl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006) (citations omitted) (internal quotation marks omitted).

85. *See League of Wilderness Defenders*, 883 F. Supp. 2d at 994-95.

86. *Id.*

However, this case can be distinguished from other precedent interpreting relevant CEQ regulations. In particular, it considered only whether a Forest Service EIS violated NEPA by failing to discuss possible *future* changes to how CWA permitting requirements might apply to project completion.⁸⁷ Indeed, the *League of Wilderness Defenders* court determined that “[c]learer reference to the Clean Water Act’s permitting requirements might have improved NEPA’s goal of ensuring public access to relevant information.”⁸⁸

Other courts have more clearly ruled in line with this Note’s thesis. The U.S. District Court for the District of New Hampshire held that the U.S. Air Force “violated NEPA by failing to discuss CAA conformity in [an] EIS” and neglecting to issue a supplemental EIS with a conformity discussion.⁸⁹ The court stated that NEPA’s requirement that EISs detail all relevant environmental information “acts to serve the underlying purpose of NEPA to disseminate the environmental information surrounding a particular agency decision and allow public comment prior to the final decision.”⁹⁰ It reasoned that, by failing to include a discussion of CAA conformity, the agency never subjected that aspect of the project to NEPA-mandated public comment and thus violated NEPA.⁹¹ The court echoed the EPA’s comments on the project EIS, which stated that “this lack of public review constituted a violation of the NEPA public disclosure requirements.”⁹²

Similarly, the U.S. District Court for the District of Montana has twice held that EISs violated NEPA by failing to discuss how other environmental laws would shape a proposed project’s environmental impacts. In *Montana Wilderness Ass’n v. McAllister*, the court found that the Forest Service violated NEPA by failing to explain in its EIS how a proposed project might comply with the Wilderness Study Act.⁹³ Similarly, in *Native Ecosystems Council v. Weldon*, the

87. See *id.* at 1012 (“LOWD argues that the Forest Service violated NEPA by not including in the Project FEIS a discussion of a pending change in law that would require the Forest Service to obtain permits before using herbicides under the Project. . . . The question here is whether NEPA obliges the Forest Service to discuss in its FEIS a likely future permit requirement.”).

88. *Id.* at 1013.

89. See *Conservation Law Found., Inc. v. Dep’t of Air Force*, 864 F. Supp. 265, 285 (D.N.H. 1994), *aff’d in part, rev’d in part sub nom.* *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996).

90. *Id.* at 284.

91. *Id.* at 284-85.

92. *Id.* at 285.

93. 658 F. Supp. 2d 1249, 1256 (D. Mont. 2009) (citing 40 C.F.R. § 1502.2(d) (2008), which requires agencies to examine how project alternatives will achieve the requirements of other environmental laws), *aff’d*, 666 F.3d 549 (9th Cir. 2011).

court held that a Forest Service draft EIS violated NEPA by not identifying the project's need for a CWA permit for stormwater discharges from logging roads.⁹⁴

In *Weldon*, the Forest Service offered several counterarguments as to why its omission was harmless, each of which the court rejected. First, the Service insisted that any error was harmless because it stated in its final EIS that it might need to obtain a discharge permit.⁹⁵ The court disagreed, finding that

[b]y failing to issue the notification in the Draft EIS, as opposed to the Final EIS, the Forest Service occluded the opportunity for public comment on that aspect of the decision-making process. Such input is why the regulations require the Forest Service to issue the notification in the Draft EIS and not the Final EIS—to provide an opportunity for public comment.⁹⁶

Second, the Forest Service contended that any error was harmless because it conducted a thorough analysis of potential stormwater discharge. As the court noted, while that may be true, “that analysis is of little moment”:

Understanding the effects of the runoff is a different matter than understanding how the Forest Service must comply with federal and state law when managing those effects (e.g., by obtaining a discharge permit). The Service's failure to comply with a NEPA regulation goes beyond the “fly specking” that the Ninth Circuit found when the Service failed to consider a[n] idiosyncratic state regulatory program for managing wetlands.⁹⁷

The court concluded that the Forest Service “should have given the public an opportunity to comment on the permits that might be necessary [for project completion]”⁹⁸ and ultimately directed the Forest Service to prepare a Supple-

94. 848 F. Supp. 2d 1207, 1223-24 (D. Mont. 2012) (citing 40 C.F.R. § 1502.25(b) (2011)) (requiring EISs to list federal permits that must be obtained to complete the project), *vacated as moot*, No. 11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov. 20, 2012) (vacating opinion below after a forest fire burned the project area and the Forest Service withdrew the proposal).

95. *See id.* at 1224.

96. *Id.*; *see also* *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011) (“[P]ublic scrutiny [is] essential to implementing NEPA.” (citing 40 C.F.R. § 1500.1(b) (2010))).

97. *Weldon*, 848 F. Supp. 2d at 1224 (quoting *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 897 (9th Cir. 2007)).

98. *Id.*

mental EIS.⁹⁹ These decisions from the U.S. District Court for the District of Montana and the District of New Hampshire highlight compelling reasons to change the current practice of deferring regulatory discussions until after the NEPA comment process is concluded.

II. PROPOSED CHANGES

This Part presents this Note's proposed changes to the current practice detailed in Part I.B. It also presents a series of case studies to illustrate how the current practice should be changed. As an initial matter, Congress need not amend NEPA for agencies to implement this proposal. Agencies have sufficient leeway to execute these changes and are arguably subject to an existing mandate to do so given the CEQ's standing regulations.¹⁰⁰ While not necessary to enact this proposal, the CEQ could clarify its regulations to explicitly require that EIS drafters conduct a "full and fair" analysis of how their project will comply with other environmental laws, as already strongly suggested by current regulatory language.

This Note's proposed changes center on how and why EISs should expand their discussions of the key regulatory regimes to which the project will be subject to bring EISs in line with CEQ rules, EPA critiques, and judicial precedent. As a matter of standard practice during the initial EIS drafting stage, agencies should describe how those key regulatory regimes will shape and govern significant project impacts. This Note refers to the idea of reviewing in draft EISs impacts regulated under other environmental laws as EIS Regulatory Review. EIS Regulatory Review should go beyond mere mention of which permits proponents expect to receive and should include details about *how* they will achieve permit compliance. Instead of waiting for the EPA to instruct proponents via comment letter to include this discussion in final EISs, EIS Regulatory Review should be standard practice at the draft EIS stage. Specifically, EISs should speak to two issues that are often left out of project discussions:

1. How the substantive regulatory regimes to which the project will be subject will influence project actions and thus dictate, shape, and/or govern expected project impacts;¹⁰¹ and

99. *Id.* at 1229.

100. See 40 C.F.R. § 1502.2(d) (2014) (requiring agencies to examine how project alternatives will achieve the requirements of other environmental laws); *id.* § 1502.16 (requiring agencies to "discuss" project alignment with other environmental laws); *id.* § 1506.2 (same).

101. To be clear, the approach recommended in this Note does not ask project proponents associated with any one agency to judge the effectiveness of another agency's regulations. Ra-

2. Impacts beyond the contours of applicable regulatory regimes, as illustrated by the *Coeur Alaska* Kensington Mine Project case study below.

Broadly, EISs should examine all major environmental impacts from a project, including those that proponents anticipate will be shaped by another agency's regulatory regime. Even if project proponents are aware of their duty to comply with other environmental laws, they should not “confuse[] this *substantive* duty with [their] *procedural* duty to comply with NEPA”¹⁰²—in other words, their procedural duty to discuss project actions and impacts in light of substantive environmental laws. A proponent's intentions to comply with other environmental laws “does not render environmental impacts . . . insignificant and does not absolve [the proponent] from its NEPA duties” to study significant impacts that will be otherwise regulated.¹⁰³ For EISs to provide a “full and fair discussion of significant environmental impacts,”¹⁰⁴ agencies cannot simply assume that other regulatory regimes and applicable permitting standards will address project impacts. Proponents must affirmatively initiate a discussion about these precise issues in their draft EISs.

The policy reasons for this proposal lie in its ability to advance NEPA's goals—among them, safeguarding democratic decision making via public access to comprehensive information—further than presently achieved through current practices. It addresses harms to public participation caused by current EIS procedural inadequacies. Remedying those inadequacies will help ensure that the public has access to the “full and fair” information that NEPA mandates. Full and fair discussions of environmental impacts can enable substantive project changes if and when the public, armed with robust regulatory information, challenges certain aspects of project execution. In particular, asking proponents to detail comprehensively in their EISs how they will comply with future legal requirements necessary for project completion may facilitate change by aggregating and making that information available to the public in an all-inclusive form. Otherwise, the public would only be able to comment on that information in a piecemeal fashion via later individual permit applications, at which point it may be too late for proponents to make broad-scale changes to the project's execution. Additionally, procedural improvements in the EIS process will force project proponents to think more critically about project de-

ther, it directs the proponents drafting an EIS to assess whether and how agencies with jurisdiction over the project's impacts will likely review and account for those impacts.

¹⁰². *Env'tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1198 (N.D. Cal. 2004).

¹⁰³. *Id.* (internal citation omitted).

¹⁰⁴. 40 C.F.R. § 1502.1 (2014).

sign—and, in particular, project implementation in line with applicable substantive regulations—which may lead proponents to pursue safer or more environmentally beneficial alternatives. Because this proposal, at base, recognizes the normative and legal need for fuller information in EISs regarding future regulatory compliance, it would better fulfill NEPA’s information-forcing purpose.

In practice, asking project proponents to anticipate which environmental laws will apply to their project and how they will apply simply moves up the timeline for when proponents must seek out this information. At present, proponents must determine these details during the project completion phase, at which point they enlist the assistance of environmental lawyers and consultants. These advisors counsel proponents as to (a) which substantive environmental laws will apply (and which permits they must seek), (b) how these laws will apply, and (c) how project choices must comply with these laws to avoid liability. This proposal moves the step of seeking this counsel to earlier in the process: to the draft EIS stage.

There are, however, two important limitations to the argument for moving up this timeline. First, agencies should expand discussions of expected regulatory regimes only in instances where permits under those regimes will be central to project completion. Indeed, “not all [project] impacts are significant, and accordingly not all missing information is important.”¹⁰⁵ CEQ regulations specifically advise against a detailed study of issues that are insignificant.¹⁰⁶ Second, because EISs are drafted before substantive regulation of the proposed project has occurred, EIS Regulatory Review may only be appropriate where project proponents can anticipate applicable permitting standards based on clear agency rules and guidelines and past agency permitting practice. This second limitation will be discussed further in Part III.A.

Both the EPA and judges have an important role to play in ensuring that agencies implement these proposed changes. The EPA, through its existing EIS comment authority, should closely examine whether draft EISs comply with this proposal. Though the EPA often does this,¹⁰⁷ it should issue agency guidelines to clarify how precisely it evaluates EIS adherence to 40 C.F.R. § 1502. Moreover, the EPA should critique EISs in line with the EIS Regulatory Review proposed here as part of the EPA’s standard comment procedure. When

105. GREENBERG, *supra* note 9, at 14 (citing David P. Lawrence, *Impact Significant Determination—Defining an Approach*, 27 ENVTL. IMPACT ASSESSMENT REV. 730 (2007)).

106. See 40 C.F.R. § 1501.7(a)(3) (2014); see also *League of Wilderness Defenders v. U.S. Forest Serv.*, 883 F. Supp. 2d 979, 1002 (D. Or. 2012) (“The agency does not need to consider remote or speculative alternatives . . .”).

107. See *supra* Part I.C.3.

reviewing challenged EISs, judges should reject as noncompliant any EIS that lacks a discussion in line with this proposal, as judges have done in the U.S. District Court for the District of Montana and the District of New Hampshire.¹⁰⁸ Judges should consistently require EIS Regulatory Review when presented with the opportunity to do so through citizen suits that challenge an EIS's NEPA compliance.

A. Proposed Changes to EIS Discussions of Substantive Laws

This Part describes how agencies should approach EIS discussions of the ways in which substantive environmental laws will shape project impacts. It includes three case studies that highlight the proposed changes to EIS discussions of “other environmental laws,” which are summarized in Table 1.

1. Examining How Substantive Changes Shape Project Impacts

While NEPA is chiefly a procedural statute, EISs should discuss “other environmental laws”¹⁰⁹ that impose substantive requirements on projects, such as the Clean Air Act (CAA) and Clean Water Act (CWA). This is because the substantive requirements of these other environmental laws, often enforced through mandatory permits, inform project actions and ultimately constrain project impacts. Permit requirements feature environmental quality standards established under statutes like CAA and CWA. The standards set forth under substantive environmental statutes set minimum safety levels necessary to receive required permits, and this process implicitly alerts proponents to the fact that they cannot move forward with particular project alternatives if they do not meet requisite permit standards.¹¹⁰ Consequently, as the EPA has noted, these standards “serve as thresholds in the NEPA document for determining the acceptability of project-related impacts or mitigation requirements.”¹¹¹

^{108.} See *supra* Part I.C.4.

^{109.} 40 C.F.R. § 1502.2(d) (2014).

^{110.} While NEPA does not impose a requirement on proponents to comply with substantive environmental laws, it is unrealistic for proponents to invest in project alternatives that would *not* meet required permit limits, particularly if such substantive permits will be required for project completion. Cf. *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 601 (E.D. Va. 1999), *aff'd*, 217 F.3d 838 (4th Cir. 2000) (“[T]he air pollution described in a FEIS can be well in excess of Clean Air Act limits, but so long as the pollutant amounts [described in the FEIS] were calculated without a significant error, NEPA is satisfied, even though the provisions of the Clean Air Act may not be.”).

^{111.} Office of Water, *supra* note 46, at app. at C-3.

Therefore, a discussion of these standards in EISs is essential to fulfilling NEPA's procedural mandate.

But merely stating *that* proponents will comply with these permitting thresholds, and not discussing *how* they will do so, evades the thrust of the CEQ's NEPA regulations.¹¹² If project proponents simply hypothesize that future regulation is likely to constrain particular environmental impacts without further detail, then EIS discussions of those regulated impacts will offer, at best, superficial treatment. The CEQ's regulations demand deeper analysis: 40 C.F.R. § 1502.2(d) directs agencies to examine how – not just whether – project alternatives will achieve the requirements of other environmental laws.¹¹³ As a result, the substantive requirements of other environmental laws and expected methods for achieving project compliance with these laws should be “[r]igorously explore[d] and objectively evaluate[d]”¹¹⁴ in draft EISs.

As courts have previously held, NEPA requires the public to have an opportunity to comment on the specific methods that will be used to achieve compliance with other environmental laws, since those methods ultimately shape project impacts.¹¹⁵ Indeed, those methods are part and parcel of project completion. Consider, for example, what would happen if proponents chose certain means to comply with environmental regulations and those means offended public sensibilities. The public has a right to understand the processes that will inform project impacts so they can critique the means of implementation in advance of project completion.

Table 1 summarizes the case studies discussed in further detail below. The case studies illustrate this Part's proposed changes regarding how EISs should discuss other environmental laws. Table 1 highlights four EISs examined as part of the author's survey. It specifies for each (a) a key project impact, (b) the major regulation that the key project impact implicates, (c) how the EIS originally discussed that regulation, and (d) suggested improvements to the regulatory discussion in (c). The main takeaway of these examples is that agencies should expand their EIS discussions of “other environmental laws” where applicable permitting requirements will necessarily shape the project's environmental impacts.

112. See *supra* Part I.C.2.

113. 40 C.F.R. § 1502.2(d) (2014).

114. 40 C.F.R. § 1502.14(a) (2014).

115. See *supra* Part I.C.4.

Table 1.
SUMMARY OF CASE STUDIES REGARDING PROPOSED CHANGES TO EIS DISCUSSIONS OF “OTHER ENVIRONMENTAL LAWS”

<i>Project</i>	<i>Key Impact</i>	<i>Major Regulation Implicated</i>	<i>Original EIS Discussion of Implicated Regulation</i>	<i>Proposed Improvement to EIS Discussion of Implicated Regulation</i>
Berths 136-147 Container Terminal Project, Port of Los Angeles, California	Increases in NO _x , PM ₁₀ & PM _{2.5}	Clean Air Act	“All applicable permits would be obtained.” ¹¹⁶	<ul style="list-style-type: none"> – Specify pollution control devices to be used to comply with permits, such as scrubbers or filters – Estimate amount/concentration of emissions reductions from control devices
Big Stone II Power Plant, Big Stone City, South Dakota	Increases in mercury emissions	Clean Air Act	“Mercury emissions . . . would comply with the Clean Air Mercury Rule (CAMR)” ¹¹⁷	<ul style="list-style-type: none"> – Specify mercury control equipment to be installed to comply with CAMR – Calculate net emissions expected, accounting for control equipment
Big Stone II Power Plant, Big Stone City, South Dakota	Wetlands degradation	Clean Water Act	Wetland “impacts [will] be mitigated under . . . a § 404(b) permit.” ¹¹⁸	<ul style="list-style-type: none"> – Detail the specific mitigation measures – Highlight potential wetlands impacts that might still accrue even if proponent takes mitigation measures
Hoosier Heartland Highway Improvements, Indiana	Wetlands degradation	Clean Water Act	Permit applications “will include detailed mitigation plans for wetland and stream impacts.” ¹¹⁹	<ul style="list-style-type: none"> – Discuss tangible actions under mitigation plans, such as enhancing or restoring existing wetlands – Assess the expected overall impact of the project once mitigation improvements are implemented

116. U.S. ARMY CORPS OF ENG’RS & L.A. HARBOR DEP’T, EIS 20070500, FINAL ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT FOR BERTHS 136-147 CONTAINER TERMINAL 3.13-25 (2007) [hereinafter U.S. ARMY CORPS OF ENG’RS, EIS 20070500].

117. W. AREA POWER ADMIN., U.S. ARMY CORPS OF ENG’RS & DEP’T OF AGRIC. RURAL UTILS. SERV., EIS 20070450, SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR BIG STONE II POWER PLANT AND TRANSMISSION PROJECT 2-22 (2007) [hereinafter W. AREA POWER ADMIN., EIS 20070450].

118. *Id.* at 2-26.

119. U.S. DEP’T OF TRANSP. & IND. DEP’T OF TRANSP., EIS 20040532, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR SR 25 HOOSIER HEARTLAND HIGHWAY S-33, V-5 (2004) [hereinafter U.S. DEP’T OF TRANSP., EIS 20040532].

If project proponents are able to demonstrate tangibly in their EIS *how*, explicitly, the preferred alternative will meet governing regulatory standards, then the EIS should serve as a valuable tool toward securing later permit approvals. In accordance with NEPA's goals and the CEQ's implementation vision, proponents of permit-centered projects should—as a matter of standard practice during the draft EIS stage—assess how applicable regulatory regimes will inform project actions and constrain its environmental impacts.

2. Case Study: Big Stone II Power Plant

This case study briefly outlines this Note's proposed changes by reviewing two regulatory discussions in the NEPA EIS for the Big Stone II Power Plant project¹²⁰—one involving CWA section 404,¹²¹ which pertains to wetlands filling, and the second involving CAA limits on mercury emissions. The draft EIS for that project contained the defects identified in Part I.B. In the final EIS, project proponents implemented revisions to the project's wetlands mitigation plans at the behest of the EPA and in line with the EIS Regulatory Review proposed herein.

The Big Stone II Power Plant EIS projected that the Western Power Administration would build a second coal-fired power plant in Big Stone City, South Dakota, adjacent to the existing Big Stone plant.¹²² The proponent anticipated some wetlands degradation as a result of the project because it would need to clear land to build the plant and transmission lines to connect the plant to the regional power grid.¹²³ The project's draft EIS stated—in mere tautological form and without much further discussion—that “[a] significant [wetland] impact would not occur as a result of any loss or degradation of any jurisdictional wetland, since these impacts would be mitigated under a section 404(b)

120. W. AREA POWER ADMIN., U.S. ARMY CORPS OF ENG'RS & DEP'T OF AGRIC. RURAL UTILS. SERV., EIS 20060178, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR BIG STONE II POWER PLANT AND TRANSMISSION PROJECT (2006) [hereinafter W. AREA POWER ADMIN., EIS 20060178].

121. CWA section 404 “establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. . . . Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States The basic premise of the program is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be significantly degraded.” *Section 404 Permitting*, ENVTL. PROT. AGENCY (2014), <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis> [<http://perma.cc/BV97-BB5X>] [hereinafter EPA Section 404 Permitting].

122. W. AREA POWER ADMIN., EIS 20070450, *supra* note 117, at 1-1.

123. *Id.*

permit.”¹²⁴ The EPA flagged this issue in its draft EIS comment letter and requested that the proponent agency demonstrate what the expected wetland impacts would be and precisely how the agency would mitigate those impacts consistent with CWA section 404(b) permitting requirements.¹²⁵ It was crucial that proponents demonstrate their compliance with section 404(b) because the project could not proceed to completion without a section 404(b) permit.

Proponents edited their draft EIS to reflect the EPA’s requested changes and section 404(b)’s requirements in line with this Note’s proposed reform. Though proponents had initially identified in their draft EIS that a section 404(b) permit would be necessary (the CWA clearly requires permits for filling wetlands),¹²⁶ the final EIS went a step further than mere identification and described *how* proponents would comply with this substantive regulation. Proponents were able to determine what section 404(b) would require of this project because EPA regulations and guidance specify that permit applications must “show that steps have been taken to avoid impacts to wetlands, streams, or other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts.”¹²⁷ The final EIS did just that. It detailed the specific mitigation measures that proponents could take to comply with section 404(b) – among them, pursuing alternate construction plans that would not disrupt wetlands to the extent initially proposed – and explained why one alternative containing those measures would satisfy the statutory threshold.¹²⁸ These procedural improvements were critical because they led to better environmental substance: they forced project proponents to consider mitigation problems that they had not yet examined, which led the proponents to pursue environmentally preferable alternatives.¹²⁹ Furthermore, and significantly, these changes provided the public with com-

124. *Id.* at 2-26.

125. See Letter from Kerrigan Clough, EPA Deputy Reg’l Adm’r, to Nancy Werdel, W. Area Power Admin. (Aug. 7, 2006) (on file with EPA).

126. See W. AREA POWER ADMIN., EIS 20060178, *supra* note 120, at 128.

127. EPA Section 404 Permitting, *supra* note 121. Proponents were also able to reasonably anticipate how section 404(b) would be applied to the contours of this project because the provision’s permitting requirements have been clearly articulated in U.S. Army Corps of Engineers regulations and applied to past projects of a similar nature.

128. See W. AREA POWER ADMIN. & U.S. ARMY CORPS OF ENG’RS, EIS 20090197, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR BIG STONE II POWER PLANT AND TRANSMISSION PROJECT tbls.2.2-7, 2.2-9, 2.6-1 & 2.6-2 (2009) [hereinafter W. AREA POWER ADMIN., EIS 20090197].

129. Compare, e.g., W. AREA POWER ADMIN., EIS 20070450, *supra* note 117, at 1-1 (recommending the construction of water storage ponds), with W. AREA POWER ADMIN., EIS 20090197, *supra* note 128, at 1-1 (recommending the use of groundwater as a back-up water supply, rather than constructing water storage ponds that would have disrupted wetlands).

prehensive information about the means that would be used to complete the project, thereby furthering their practical ability to challenge those means as envisioned by NEPA's foundational goals.

The Big Stone II Power Plant draft EIS also mentioned "other environmental laws" with respect to significant increases in mercury emissions. The draft EIS simply stated that "[m]ercury emissions from coal combustion would comply with the Clean Air Mercury Rule (CAMR)"¹³⁰ under the CAA. Here, the draft EIS again provided only superficial treatment of the issue. The EPA requested in its comment letter that the proponent specify which mercury control technologies it would use and the degree to which this equipment would reduce emissions, especially if anticipated CAMR emissions trading did not come into effect (it ultimately did not).¹³¹ To comply with the EPA's request and this Note's proposed EIS Regulatory Review, proponents should have clarified the project's projected mercury emissions: rather than merely stating what the allowable mercury limits were under the applicable regulation (CAMR, which was in effect when the project was initially proposed), proponents should have calculated overall expected emissions based on proposed mercury control equipment (that is, expected project emissions minus reductions provided by control technologies). Unfortunately the final EIS did not implement the EPA's recommendations, and this was ultimately to the detriment of the public and NEPA's deliberative decision-making aims.

3. Case Study: Berths 136-147 Container Terminal Project

The Berths 136-147 Container Terminal Project in the Port of Los Angeles, California was undertaken by the United States Army Corps of Engineers (USACE) to expand and modernize the terminal.¹³² The draft EIS identified significant increases in one-hour NO_x (nitrogen oxide) and twenty-four-hour PM₁₀ and PM_{2.5} (common air particulate matter pollutants) as projected project impacts, subject to regulation under the CAA.¹³³ However, both the draft EIS and final EIS failed to discuss how the USACE would comply with the CAA limits on those pollutants. The final EIS merely stated that "[a]ll applicable

130. W. AREA POWER ADMIN., EIS 20070450, *supra* note 117, at 2-22.

131. See Letter from Kerrigan Clough to Nancy Werdel, *supra* note 125, at 2-3.

132. See U.S. ARMY CORPS OF ENG'RS & L.A. HARBOR DEP'T, EIS 20070285, DRAFT ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT FOR BERTHS 136-147 CONTAINER TERMINAL ES-1 (2007).

133. See *id.* at ES-27; see also 40 C.F.R. § 50.6 (2014) (National Primary and Secondary Ambient Air Quality Standards for PM₁₀); *id.* § 50.7 (National Primary and Secondary Ambient Air Quality Standards for PM_{2.5}); *id.* § 50.11 (National Primary and Secondary Ambient Air Quality Standards for Oxides of Nitrogen).

permits would be obtained and the conditions in those permits would be implemented and monitored by the Port.”¹³⁴ This Note’s proposed EIS Regulatory Review would require that the draft EIS discuss the specific actions the proponent planned to take and the pollution control devices that the proponent would implement to comply with the CAA pollution limits. For example, did USACE plan to install scrubbers? Place filters on on-road and non-road sources?¹³⁵ By what amount would these actions reduce emissions? USACE should have estimated the concentration of emissions reductions that would result from these actions, which would have highlighted how the project would meet anticipated regulatory requirements. Armed with this information, the public could have participated more incisively in USACE’s EIS comment process and deliberative project decision making.

4. Case Study: Hoosier Heartland Highway Improvements

The Federal Highway Administration, part of the U.S. Department of Transportation, planned construction along the Hoosier Heartland Highway to improve the transportation corridor from Lafayette to Logansport, Indiana.¹³⁶ The agency identified the degradation of seven wetland areas in the project right-of-way as a significant project impact.¹³⁷ As noted in the Big Stone II Power Plant case study above, efforts likely to cause wetlands degradation are subject to substantive requirements under CWA section 404.¹³⁸ Like the Big Stone II Power Plant final EIS, the final EIS for the Hoosier Heartland Highway Improvements Project provided only tautological statements regarding the project’s CWA compliance. The final EIS asserted flatly that permit applications “will include [a] detailed mitigation” plan for wetland and stream impacts, with little supporting detail.¹³⁹ To comply with this Note’s proposed EIS Regulatory Review, the agency should have discussed the tangible actions that the mitigation plans would entail. For example, would these plans enhance or restore existing wetlands (which wetlands and at what ratio? 1 to 1.5?), or establish new wetland areas (where and how)? The draft EIS should have con-

¹³⁴. U.S. ARMY CORPS OF ENG’RS, EIS 20070500, *supra* note 116, at 3.13-25.

¹³⁵. See Letter from Nova Blazej, Manager, Env’tl. Review Office, Env’tl. Prot. Agency, to Spencer D. MacNeil, U.S. Army Corps of Eng’rs (Dec. 28, 2007), <http://www.epa.gov/region9/nepa/letters/ca/port-LA/berth136-147-traPac-contain-term-proj-port-LA-FEIS.pdf> [<http://perma.cc/7TQH-2WWD>].

¹³⁶. See U.S. DEP’T OF TRANSP., EIS 20040532, *supra* note 119.

¹³⁷. See *id.* at V-1 to V-7.

¹³⁸. See 33 U.S.C. § 1344 (2012).

¹³⁹. U.S. DEP’T OF TRANSP., EIS 20040532, *supra* note 119, at V-5.

tained sufficient detail to allow the public to comment on the contours of the mitigation plans and to assess, on balance, what the ultimate environmental impact of the project would be.

B. Proposed Changes to EIS Discussions of Impacts Beyond Regulatory Limits

This Part describes how agencies should approach EIS discussions of project impacts that are likely to accrue above and beyond the constraints of substantive environmental laws. It includes a case study regarding the Kensington Mine that illustrates this proposal's implementation and import.

1. Pinpointing Impacts Beyond the Contours of Substantive Laws

Where significant, EISs should describe project impacts that are beyond the scope of the project's governing regulatory regimes—that is, significant impacts that should be anticipated even if the project complies with all regulatory requirements.¹⁴⁰ This will reveal whether the applicable regulatory systems will allay the full scope of the project's environmental impacts, or whether some major impacts will be left unaddressed by substantive environmental laws. As noted by the DOE,

A statement that the proposed action or analyzed alternatives would be in compliance with applicable environmental regulations . . . or licenses does not substitute for a discussion of potential environmental impacts. As a practical matter, all alternatives must comply with applicable requirements, yet some actions may nevertheless have significant environmental impacts (e.g., a new nuclear power reactor).¹⁴¹

In line with the EIS Regulatory Review proposed in this Note, DOE recommends that project proponents “[e]xplain whether and how each alternative would be in compliance with applicable requirements,” but “not rely[] [solely] on compliance with applicable requirements (e.g., waste disposal permits, water or air emissions permits) as evidence that an analyzed alternative does not have potential for significant impact.”¹⁴² By ensuring a “full and fair discus-

¹⁴⁰. See *infra* Part II.B.2 for an example illustrating this argument.

¹⁴¹. OFFICE OF NEPA POL'Y & COMPLIANCE, U.S. DEP'T OF ENERGY, RECOMMENDATIONS FOR THE PREPARATION OF ENVIRONMENTAL ASSESSMENTS AND ENVIRONMENTAL IMPACT STATEMENTS 31 (2d ed. 2004), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-greenbook.pdf [<http://perma.cc/WUA4-TDY7>] [hereinafter U.S. DEP'T OF ENERGY, RECOMMENDATIONS].

¹⁴². *Id.*

sion” in this vein, agencies will illuminate if, how, and where there may be significant project impacts that may not ultimately be mitigated by substantive environmental regulation.

The discussion above highlights a semantic distinction within this Note’s proposal: the difference between *addressing* and *mitigating* project impacts. NEPA, as a procedural statute, does not require that proposed project alternatives featured in an EIS *mitigate* environmental impacts; it merely requires that agencies address them – that is, discuss them with sufficient detail to bring to light the full scope of major environmental impacts in accordance with NEPA’s information-forcing purpose.¹⁴³ Demanding that EISs address project impacts that will *not* be mitigated by other environmental laws highlights and puts those impacts into stark contrast for the interested public. The need for this distinction is illustrated by the *Coeur Alaska Kensington Mine Project* case study discussed below.

To ensure that NEPA’s core purposes are achieved, the CEQ should offer only tentative EIS approval for projects that are expected to have significant environmental impacts that will likely be unaddressed by applicable regulatory regimes. Such tentative EIS approval should be subject to reconsideration after coordinate agencies issue permits toward project completion if the EIS does not satisfactorily describe project impacts left unregulated by those permits. Moreover, EIS approval should be subject to reconsideration if substantive permits do not circumscribe environmental impacts in the manner anticipated in the project EIS.

2. Case Study: Kensington Mine and Impacts Beyond the EIS

The changes proposed in this Note are particularly salient because some judicial interpretations have limited and refined the reach of regulatory regimes through landmark cases like *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, which involved the proposed Kensington Mine.¹⁴⁴ In *Coeur Alaska*, the Supreme Court interpreted the CWA to require regulation of fill material discharges into jurisdictional waters under CWA section 404, rather than section 402.¹⁴⁵ The proposed mine’s environmental impacts – which would indisputably kill all of the fish and nearly all other aquatic life in the jurisdictional water where the fill would be placed – would have violated section 402’s water quality performance standards.¹⁴⁶ However, under section 404, these impacts

^{143.} See *supra* Parts I.A, I.C.1.

^{144.} 557 U.S. 261 (2009).

^{145.} *Id.* at 266.

^{146.} *Id.* at 297 (Ginsburg, J., dissenting).

would be permissible based on that section's focus on changing the bottom elevation of the jurisdictional water, rather than water quality.¹⁴⁷ Therefore, the simple assertion in the Kensington Mine EIS that the environmental impacts of fill material "would be addressed through a permit issued by the USACE . . . under Section 404 of the CWA"¹⁴⁸ was insufficient to characterize what those impacts would ultimately be, in full. This bare assertion glossed over critical environmental impacts that would not be tangibly addressed by the relevant regulatory regime.

In this vein, statutes meant to protect the environment may be interpreted such that, even if a project proponent complies with applicable regulations, significant environmental impacts will still remain. *Coeur Alaska* illustrates the distinct gap between the environmental impacts that would result from mining operations subject to CWA section 402 requirements and impacts that would result from operations merely subject to section 404 requirements. While it is impractical to ask project proponents to describe potentially more stringent requirements that do not apply to their project, it is reasonable to ask proponents to detail the environmental impacts that they expect to accrue above and beyond those addressed by governing regulatory regimes. In the case of *Coeur Alaska*, the Kensington Mine project proponents should have specified the environmental impacts to be expected beyond those accounted for by required section 404 permits. Discussing those impacts would have illuminated the dire consequences of the project for concerned members of the public who would have then had "sufficient information to challenge the agency."¹⁴⁹ Importantly, this information could have facilitated substantive changes in project completion through public challenge to those impacts via the NEPA public comment process.¹⁵⁰

147. See Env'tl. Comm., *Water Quality and Wetlands 2009 Annual Report*, in AM. BAR ASS'N, ABA ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2009, at 155, 161-62 (2009).

148. See U.S. DEP'T OF AGRIC., U.S. EPA, U.S. ARMY CORPS OF ENG'RS & ALASKA DEP'T OF NATURAL RES., EIS 20040589, KENSINGTON GOLD PROJECT FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT 1-11 (2004).

149. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), *overruled in part on other grounds by* *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("The statutory requirement that a federal agency contemplating a major action prepare . . . an environmental impact statement . . . guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.").

150. See *supra* Part I.C.1.

III. OBJECTIONS AND RESPONSES

This Part responds to three main counterarguments to the EIS Regulatory Review proposed in this Note. First, project proponents may contend that it is not possible to know fully what another agency’s substantive regulations will entail in advance of project approval. Second, proponents may argue that doing a more rigorous assessment of project-applicable regulatory regimes will make the EIS process excessively costly in terms of time and money – more so than it already is. Third, agencies might be hesitant to articulate a particular understanding of regulations early in the EIS drafting process for fear that courts may interpret this understanding as a binding interpretation of those laws and regulations. The following discussion will address each of these counterarguments in turn.

A. Anticipating the Regulatory Requirements of “Other Environmental Laws”

The first main counterargument centers on the fact that regulation of the particular proposals being analyzed in an EIS has not yet occurred. Proponents may argue that they are not able to anticipate the substantive regulatory requirements to which their project will be subject, and therefore are not able to discuss in their EISs how those regulations will drive project choices and shape project impacts. The force of this counterargument, however, is diminished by the limited application of this Note’s thesis. The proposed EIS Regulatory Review applies only to projects for which the permitting standards under governing regulatory regimes can be reasonably anticipated by proponents based on clear agency rules and guidelines and past permitting practice. This Note’s recommendations extend only to projects where future regulatory requirements are relatively clear, such as dredge/fill projects subject to the CWA section 404(b)(1) “least environmentally damaging practicable alternative” (LEDPA) standard.¹⁵¹

Courts have previously held that “[r]easonable forecasting . . . is . . . implicit in NEPA,” and thus “reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”¹⁵² Asking agencies to detail how project

151. 40 C.F.R. § 230.10(a)(4), (5) (2014); *see also* 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980). Regulatory guidance regarding the LEDPA standard details the comparative evidence that project proponents need to provide to demonstrate that their project is the “least environmentally damaging practicable alternative.” 40 C.F.R. §§ 230.10(a)(4), (5).

152. *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (quoting *Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); *see also* *Colo. Env’tl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1251 (D. Colo. 2012).

efforts will interact with existing regulatory structures, by contrast, is not a “crystal ball inquiry.” Rather, EIS Regulatory Review merely asks agencies to anticipate how existing regulations will apply to their project. This exercise should be quite reasonable in light of agencies’ current EIS practice, in which project proponents must and regularly do state whether certain regulations apply and affirm that they will comply with them.

1. *Case Study: Anticipating Industrial Waste Regulatory Requirements*

For example, proponents of the Blackfoot Bridge Mine Project could have anticipated (a) which environmental laws would apply, (b) how they would apply, and (c) how their application would affect the EIS, rather than simply affirming that the proposed mining operation would “comply with all laws and regulations for mining on public lands.”¹⁵³ Because the project was slated to produce waste from mineral processing, proponents could have anticipated (and indeed did anticipate per 40 C.F.R. § 1502.25(b)) that the Resource Conservation and Recovery Act (RCRA) would apply since that law is well-known in the environmental community to regulate mine processing waste as non-hazardous industrial waste.¹⁵⁴ Proponents could have determined how RCRA regulations would apply by referencing published rules and guidance containing numeric limits for particular industrial wastes.¹⁵⁵ Lastly, proponents could have demonstrated how these regulations’ limits would affect the EIS by documenting whether and how each proposed project alternative would restrict waste output and provide adequate disposal capacity at a facility that is permitted to receive the waste.¹⁵⁶ This information would be of distinct interest to local populations who may have to bear the burden of increased waste processing in their communities.

2. *Case Study: Anticipating CWA Regulatory Requirements*

While certain descriptive elements of the Big Stone II Power Plant Project were improved between the draft and final EIS, as previously discussed,¹⁵⁷ other elements remained deficient. In particular, proponents neglected to detail how they would comply with the National Pollutant Discharge Elimination

153. U.S. DEP’T OF INTERIOR, EIS 20110071, FINAL ENVIRONMENTAL IMPACT STATEMENT BLACKFOOT BRIDGE MINE, 1-5 (2011).

154. See 40 C.F.R. § 261.4(b)(7) (2014).

155. See, e.g., 40 C.F.R. § 436.142 (2014) (Potash Subcategory effluent limitations guidelines).

156. See U.S. DEP’T OF ENERGY, RECOMMENDATIONS, *supra* note 141, at 16-35.

157. See *supra* Part II.A.2.

System (NPDES) permits that they identified would be required under the Clean Water Act. Proponents merely stated that “[i]mpacts within the proposed transmission corridors . . . would be avoided or minimized by complying with the NPDES storm water permit for construction activities.”¹⁵⁸ Although proponents successfully identified which environmental laws would apply in accordance with their minimum duties under 40 C.F.R. § 1502.25(b),¹⁵⁹ they could have delineated how those laws would apply with the assistance of environmental counsel and with reference to past NPDES storm water permits. Moreover, they could have detailed how NPDES permit constraints would affect the EIS by specifying which technologies, building approaches, and methods would be used to curtail project pollution to allowable levels. Doing so would have provided the public with critical information about how proponents tangibly planned to complete the project in their backyards, and this information could have formed the basis for challenges to the proposed project.

B. Mitigating Increased EIS Costs with Permitting Synergies

The second main counterargument is that agencies may be wary of expanding discussions to include the proposed EIS Regulatory Review because EISs already require substantial investments of time and money, and adding to their analytical scope will likely increase costs. Indeed, the most prominent criticisms of the EIS process have focused on its costs: members of the business community often charge that the EIS process has an “inflationary impact” on the overall project pricetag.¹⁶⁰ Despite CEQ regulations limiting EISs to 150 pages—or, when necessitated by unusual complexity or scope, 300 pages¹⁶¹—the average length of a draft EIS is 198 pages of text and 385 pages total (in-

¹⁵⁸. W. AREA POWER ADMIN., EIS 20090197, *supra* note 128, at 32.

¹⁵⁹. 40 C.F.R. § 1502.25(b) (2014).

¹⁶⁰. GREENBERG, *supra* note 9, at 15; *see also* ABA, THE NEPA LITIGATION GUIDE 11-12 (Karin P. Sheldon & Mark Squillace eds., 1999) (noting that members of the business community charge EISs with causing “excessive delay” from a business perspective). *But see* NEPA: Lessons Learned and Next Steps: Oversight Hearing Before the H. Comm. on Res., 109th Cong. 36-46 (2006) (statement of Robert G. Dreher, Deputy Executive Director, Georgetown Environmental Law and Policy Institute), <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg24682/pdf/CHRG-109hhrg24682.pdf> [<http://perma.cc/NY8P-JAS2>]. During this 2006 congressional oversight hearing on NEPA, Robert G. Dreher—then Deputy Executive Director of the Georgetown Environmental Law and Policy Institute and current Acting Assistant Attorney General for the DOJ Environment and Natural Resources Division—presented empirical research to dispute the assertion that NEPA is a major cause of costs and delays. He testified that other actions related to business and government are instead the major sources of project planning inefficiencies. *Id.*

¹⁶¹. *See* 40 C.F.R. § 1502.7 (2014).

cluding figures).¹⁶² It is not uncommon for controversial EISs to be over 500 pages and several volumes long;¹⁶³ indeed, this was the case for most of the EISs surveyed here. The reason for this heft is often grounded in legal protection: “agency and industry lawyers seeking to defend the validity and adequacy of environmental documents [have] counseled their clients to err on the side of overinclusiveness.”¹⁶⁴ While this may be sound legal advice, it has had unintended and unfortunate consequences for NEPA implementation: EISs have ballooned in size, which may undermine NEPA’s goals of public understanding and thoughtful coordinate agency review.¹⁶⁵

Asking agencies to take on more in-depth analysis in their EISs may exacerbate the cost problem, but this worry can and should be overcome by looking to the practical implementation of this proposal and the potential synergies that can result from such an expanded discussion. In practice, proponents must explain how they plan to comply with substantive regulations at some point in the planning process: either at the EIS stage, as this Note recommends, or in later piecemeal permit applications after selecting a project plan, as is current practice. Given this, any increased costs that proponents may face at the EIS drafting stage as a result of implementing EIS Regulatory Review¹⁶⁶ should not exceed the cumulative costs that proponents would otherwise incur while shepherding the project through to completion—a process that would ultimately include substantive regulatory analysis to support individual permit applications. The coordination that would necessarily result from a more rigorous upfront assessment of how a project will comply with its governing regulatory regimes may even lead to streamlined permit application efforts and cost savings down the road.

162. See LINDSTROM & SMITH, *supra* note 44, at 94.

163. See *id.*

164. ABA, *supra* note 160, at 11 (“If an environmental factor is discussed—and discussed thoroughly—the EIS . . . of which the discussion is a part cannot be faulted for failure to consider that factor.”).

165. See *id.* at 11–12 (“Busy administrators do not have time to read multivolume documents. Members of the public are deterred by, not attracted to, mountains of paperwork. If NEPA documents are not read, they cannot achieve their purpose.”).

166. Though EISs often consider multiple project alternatives (whereas the final project plan only encompasses the selected alternative), agencies could avoid increased drafting costs by only completing EIS Regulatory Review for their “preferred alternative,” which they are already required to identify at the draft EIS stage. See 40 C.F.R. § 1502.14(e) (2014) (requiring draft and final EISs to “[i]dentify the agency’s preferred alternative”). Doing so should keep costs roughly equal for this proposal (to examine in the draft EIS the requirements of applicable substantive regulations) versus current practice (examining the requirements of substantive regulations during the project permitting phase).

Agencies can work to keep costs from increasing as a result of this Note's proposed EIS Regulatory Review in two key ways. First, proponents can leverage NEPA's mandate that proponent agencies obtain draft EIS comments from federal agencies with special expertise or jurisdiction over the project.¹⁶⁷ Agency comments are required to be as specific as possible, and agencies making critical comments must specify steps they believe should be taken to address the problems they identify.¹⁶⁸ If proponents provide reviewing agencies with a more comprehensive EIS draft to comment on and proponents shrewdly integrate guidance gleaned from coordinate agency comments into their final EIS revisions, then the final EIS will be more likely to satisfy substantive environmental requirements that will be enforced by coordinate agencies during the project permitting phase.

Second, proponents can work with coordinate agencies to ensure that their EISs comprehensively integrate forthcoming substantive requirements associated with the patchwork of requisite federal, state, and local environmental laws that will govern project completion. For example, a large industrial waterfront project might face permitting and environmental review requirements under the Endangered Species Act, the National Historic Preservation Act, and state NEPA laws.¹⁶⁹ If each of these procedural requirements were satisfied independently, there would inevitably be duplication of efforts and costly delays in permit issuance. To avoid this result, CEQ regulations encourage agencies to integrate these multiple reviews into a single, comprehensive EIS that is prepared concurrently and integrated with the requirements of other federal environmental laws.¹⁷⁰ The CEQ has formally sought to streamline the NEPA process, and in 2011 it issued a Memorandum for Heads of Federal Departments and Agencies that touted the benefits of "integrating environmental reviews, coordinating multi-agency or multi-governmental reviews and approvals"¹⁷¹

167. Both the Act, 42 U.S.C. § 4332(C), and its regulations, 40 C.F.R. §§ 1503.1(a)(1), 1503.2, include this requirement. For further discussion on the inter-agency EIS comment process, see Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990).

168. See 40 C.F.R. §§ 1503.3(a)-(d) (2014); see also GREENBERG, *supra* note 9, at 4 ("An assumption of the law is that intra- and inter-agency analysis, accompanied by input from private and public parties, will shape better decisions, that is, will avoid options that will exceed environmental standards . . .").

169. See Albert I. Herson, *Environmental Permitting: Expediting the NEPA Process*, NAT. RESOURCES & ENV'T, Winter 1987, at 13, 14.

170. See 40 C.F.R. § 1502.25(a) (2014).

171. Memorandum from Nancy H. Sutley, Chair, Council on Env'tl. Quality, to Heads of Federal Departments and Agencies on Improving the Process for Preparing Reviews under the Nat'l Env'tl. Pol'y Act (Oct. 2011), <http://www.whitehouse.gov/sites/default/files/microsites/ceq>

Several agencies have issued guidance on how to accomplish such streamlining with regard to substantive (and not merely procedural) environmental laws. Buried in an appendix of an EPA guidance document regarding hardrock mining is a helpful discussion of how NEPA processes can be integrated with the substantive requirements of other environmental laws, including CWA NPDES and dredge/fill permits, CAA conformity requirements, and Federal Land Policy and Management Act provisions.¹⁷² DOE has also issued thoughtful guidance on these points.¹⁷³ Additionally, the U.S. Army Corps of Engineers has identified a list of over thirty substantive environmental laws with which the EIS process can be streamlined.¹⁷⁴

Some agencies have already integrated substantive permitting considerations into their NEPA EIS processes—a fact that demonstrates the feasibility of EIS Regulatory Review. For example, the California Department of Transportation has merged its NEPA and CWA section 404 application processes.¹⁷⁵ The LEDPA standard in section 404(b)(1) requires proponents to identify the environmentally preferable project alternative,¹⁷⁶ which in part tracks NEPA's requirements in this regard.¹⁷⁷ As a result, when a proposed project must comply with NEPA and section 404 permits, its proponents can anticipate and dis-

/nepa_improving_efficiency_draft_guidance.pdf [<http://perma.cc/4HY6-DQ9C>]; see also Draft Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, 76 Fed. Reg. 77,492-02 (Dec. 13, 2011) (promoting a more efficient environmental review process).

172. See Office of Water, U.S. ENVTL. PROT. AGENCY, *supra* note 46, at app. C, C-5 to C-6.

173. See, e.g., U.S. DEP'T OF ENERGY, RECOMMENDATIONS, *supra* note 141.

174. See 32 C.F.R. § 651.14(e) (2014) (“Several statutes, regulations, and Executive Orders require analyses, consultation, documentation, and coordination, which duplicate various elements and/or analyses required by NEPA and the CEQ regulations; often leading to confusion, duplication of effort, omission, and, ultimately, unnecessary cost and delay. Therefore, Army proponents are encouraged to identify, early in the NEPA process, opportunities for integrating those requirements into proposed Army programs, policies, and projects. Environmental analyses required by this part will be integrated as much as practicable with other environmental reviews, laws, and Executive Orders (40 C.F.R. § 1502.25). Incorporation of these processes must ensure that the individual requirements are met, in addition to those required by NEPA.”).

175. See CALIF. DEP'T OF TRANSP. ET AL., MEMORANDUM OF UNDERSTANDING ON NATIONAL ENVIRONMENTAL POLICY ACT AND CLEAN WATER ACT SECTION 404 INTEGRATION PROCESS FOR FEDERAL AID SURFACE TRANSPORTATION PROJECTS IN CALIFORNIA (2006), http://www.dot.ca.gov/ser/downloads/MOUs/NEPA404/nepa404_2006_final_mou.pdf [<http://perma.cc/X53F-NNTK>].

176. See Clean Water Act § 404(b)(1), 33 U.S.C. § 1344 (2012). Regulations provide that only the least environmentally damaging practicable alternative (LEDPA) be permitted. See 40 C.F.R. §§ 230.10(a)(4), (5) (2014); 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980).

177. See 40 C.F.R. § 1502.14(e) (2014) (requiring the EIS to “[i]dentify the agency’s preferred alternative”).

cuss—and often fulfill¹⁷⁸—section 404 requirements in the EIS analysis of project alternatives. Such instances show that proponents can save resources they would otherwise have to expend at the permitting stage by demonstrating, through comparative evidence at the draft EIS stage, that their project is the “least environmentally damaging practicable alternative.”

Broadly, this kind of streamlining may be feasible if NEPA EISs consistently and thoroughly evaluate how proposed projects will achieve the substantive permitting requirements of “other environmental laws and policies.”¹⁷⁹ While the alignment between some laws—such as NEPA and CWA section 404(b)—is explicit, similar streamlining could be accomplished in a more implicit fashion for other laws that have specific environmental quality requirements. To sync NEPA analysis with these requirements, EISs could quantify project impacts in a way that demonstrates how the quality standards for those regulations might be met. This kind of thorough EIS analysis “should help ensure the project will be in compliance with the substantive requirements of other environmental laws and regulations. By fully considering these substantive environmental requirements throughout the NEPA planning process, [project proponents] can ensure that [they] avoid environmental noncompliance in the future,”¹⁸⁰ and thus avoid the substantial costs and project delays associated with noncompliance.

C. Articulating Agency Interpretations

A third counterargument is that agencies might be hesitant to articulate a particular understanding of regulations early in the EIS drafting process for fear that doing so may be seen by courts as a binding interpretation of those laws and regulations. In other words, outside actors might take an agency’s description of the regulatory landscape in an EIS as evidence of the agency’s interpretive position. This concern, however, should not prevent agencies from examining the applicability and contours of project-governing substantive regulations in EISs for two reasons. First, if an agency anticipates that it may later want to depart from an interpretation presented in an EIS, then it could include a disclaimer in the EIS stating that any interpretation advanced therein does not preclude the agency from adopting different interpretations in the fu-

178. The documentation required to satisfy NEPA’s alternatives analysis will “generally provide the information necessary for evaluating alternatives under CWA guidelines.” John Schutz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA’s 404(b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*, 24 UCLA J. ENV’T L. & POL’Y 235, 240 n.30 (2006).

179. 40 C.F.R. § 1502.2(d) (2014).

180. Fegley, *supra* note 51, at 154.

ture—in other words, that the EIS interpretation of the substantive regulation is merely tentative. Even without such a disclaimer, agencies are permitted to change their regulatory interpretations (and often do so from one executive administration to another), subject to limited judicial oversight.¹⁸¹ Second, and in the alternative, agencies may in fact welcome the opportunity to make a binding regulatory interpretation early in the project planning process. Doing so may bolster an agency's ability to later enforce that interpretation in courts based on notice and reliance arguments, should it wish to do so.

CONCLUSION

To comply with existing law and achieve NEPA's normative goals, agencies should expand EIS discussions of how applicable regulatory regimes will shape project impacts. Impact discussions are not “full and fair” without this information because they fail to allow the public and other agencies to comment on—and more importantly, to challenge—this crucial aspect of project planning. While an expanded regulatory discussion is not appropriate for all projects subject to NEPA, proponents should adhere to this approach for the limited sphere of projects in which an agency must issue an environmental permit before the proponent can complete the project. To this end, project proponents should explain in detail in draft EISs how their actions will or will not comply with substantive environmental laws and policies and, in turn, examine whether there may be any environmental impacts from the project that fall outside the scope of governing regulatory regimes. Such an approach would further NEPA's aim to “[r]igorously explore and objectively evaluate”¹⁸² the full scope of project impacts that “significantly affect[] the quality of the human environment.”¹⁸³

181. See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 118–20, 165 (2011).

182. 40 C.F.R. § 1502.14(a) (2014).

183. 42 U.S.C. § 4332(C) (2012).