

Rules and Executive Nominations Committee  
HJ0001 – Environmental Human Rights  
Favorable  
Kathleen Gagnon, JD Candidate, University of Maryland School of Law  
March 3, 2023

## Introduction

The National Environmental Policy Act (“NEPA”) was enacted on January 1, 1970 and is widely acknowledged to be one of the most successful environmental laws in history. NEPA fundamentally altered the political process by requiring an understanding of likely environmental impacts before a project could be undertaken and empowering public participation in federal decision-making<sup>1</sup>. Following its enactment, many states, including Maryland, adopted their own environmental policy acts, ranging in breadth and effectiveness.<sup>2</sup> These state environmental policy acts (known collectively as “SEPA’s”) help states make environmentally-conscious decisions that protect the planet, public health, and the economy.

Maryland’s environmental policy act (“MEPA” passed in 1973) states that “[e]ach person has a fundamental and inalienable right to a healthful environment . . .”<sup>3</sup> To protect that right, “[a]ll State agencies must conduct their affairs with an awareness that they are stewards of the air, land, water, living and historic resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.”<sup>4</sup> The act further instructs all state agencies to “identify, develop and adopt methods and procedures” that would implement that right.

Despite this powerful language, most state agencies remain without such methods and procedures to guide their work. What exists instead is a patchwork of environmental guidelines that lack transparency and accountability, making the state’s commitment to the right to a healthy environment little more than a broken promise.<sup>5</sup> In comparison, other states such as New York, Washington, California, and Montana have successfully used their SEPA’s to stop poorly planned and economically inefficient projects that would have significantly harmed the environment. Several of these success stories are outlined below. They are meant to inform and inspire Maryland to recommit to the right to a healthy environment and use its environmental policy act to write the state’s next environmental success stories.<sup>6</sup>

---

<sup>1</sup> Kenneth S. Weiner, *NEPA and State NEPA’s: Learning From the Past, Foresight for the Future*, 39 ENV’T L. REP. 10675, 10678 (2009).

<sup>2</sup> Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 954 (2006)

<sup>3</sup> Maryland Environmental Policy Act (MEPA), MD. CODE ANN., NAT. RES. §§ 1-301 to 1-305, §1-302(d) (West 2022).

<sup>4</sup> Maryland Environmental Policy Act (MEPA), MD. CODE ANN., NAT. RES. §§ 1-301 to 1-305, §1-302(c) (West 2022).

<sup>5</sup> See generally, Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ENV’T L. REP. 10074 (2015).

<sup>6</sup> *Id.*

## A. New York State Environmental Quality Review Act (“SEQRA”)

New York is one example of a state that has used its SEPA to protect the environment, public health, and the economy since its enactment in 1978. The state uses a comprehensive handbook to inform both its citizens and rulemakers of the requirements and benefits of SEQRA.<sup>7</sup> Like California’s and Washington’s SEPAs (see below), SEQRA applies to both state and local agencies.<sup>8</sup> This specific success story illustrates how SEPAs can be used to fill the gaps left by NEPA.

In 1998, Queens, New York, was home to the Poletti Power Plant, which at the time was the biggest polluter in the city.<sup>9</sup> The power plant was owned and operated by the New York Power Authority (“NYPA”). The NYPA proposed to add a new 500 MW facility next to the plant and by taking advantage of loopholes in NEPA and the Clean Air Act, decided the project did not require a full environmental impact statement.<sup>10</sup> However, the Poletti plant was situated in the neighborhood of Astoria, Queens, which was located in an area of New York City known as “asthma alley,” due to the high rates of asthma, especially among young children.<sup>11</sup> Despite growing evidence of small particulate pollution being linked to a variety of serious health problems such as “heart attacks, pulmonary and cardiovascular disease, cancer, chronic bronchitis, and premature mortality” in addition to asthma, NYPA declined to include any negative health impacts on children in its impact reporting.<sup>12</sup>

In addition to the new 500 MW facility next to the Poletti plant, New York planned to build eleven new turbines in several overburdened communities of color across the city, including some in and around Astoria.<sup>13</sup> In the EIS (environmental impact statement) completed under the SEQRA, NYPA determined the additional turbines would have no negative environmental impact on the already overburdened communities.<sup>14</sup> Seizing on this determination, local activist and community groups took the agency to court.<sup>15</sup> The courts ordered NYPA to complete a more thorough EIS. These findings, including the negative impacts additional plants would have on the already overburdened communities, led NYPA to determine it was best to

---

<sup>7</sup> SEQR HANDBOOK, 4th ed., [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf).

<sup>8</sup> Selmi, *supra* note 2, at 957.

<sup>9</sup> Rebecca Bratspies, *Shutting Down Poletti: Human Rights Lessons from Environmental Victories*, 36 WIS. INT’L L. J. 247, 248 (2019).

<sup>10</sup> *Id.* at 253-54.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 253-54.

<sup>13</sup> *Id.* at 257.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The Coalition Helping Organize a Kleaner Environment (CHOKE) had a three point campaign position: (1) NYPA must prove that NYC actually needs new power before building more plants; (2) If new plants are built, there must be a system for retiring older filthy plants, or at least bringing them up to modern standards; and (3) plants must be dispersed fairly across the city so that no neighborhood has undue burden. *Id.*

cease operations of the Poletti plant by January 31, 2010, and in 2012, the plant was permanently demolished.<sup>16</sup>

There is no question that closing the Poletti plant was beneficial for both the health of the residents and New York's economy. The power plant was one of the dirtiest in the country and NYPA was losing tens of millions of dollars each year to keep it running.<sup>17</sup> The plant was replaced by one of the cleanest plants in New York city and by 2015, Astoria was below EPA's threshold for particulate matter and received a passing grade for particulate pollution from the American Lung Association.<sup>18</sup> This success story illustrates how SEPA's can play an important role helping to address the needs of local communities when national standards fail.

## **B. Washington's State Environmental Policy Act ("SEPA")**

Washington's SEPA, enacted in 1971, is its most powerful tool for protecting the environment.<sup>19</sup> The four primary purposes of the act are: (1) to declare a state policy which will encourage productive and enjoyable harmony between people and their environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) to stimulate public health and welfare; and (4) to enrich the understanding of the ecological systems and natural resources important to Washington and the nation.<sup>20</sup> Like NEPA and other SEPA's, missions central to Washington's act are to consider environmentally friendly alternatives and to involve the public in the decision-making process.<sup>21</sup> One area where Washington's SEPA has been an invaluable tool for planning is in the state's coastal development projects.

Washington's St. Paul Waterway Cleanup and Habitat Restoration project was the first completed Superfund cleanup in United States to integrate natural resource restoration.<sup>22</sup> The state took an innovative and transparent approach to the environmental review process by partnering with a private company, Simpson Tacoma Kraft, to create a comprehensive environmental impact statement that satisfied state, local, and federal requirements.<sup>23</sup> By fully committing to SEPA's four primary purposes, the project, including clean up, source control, and habitat restoration, was approved in six months and was implemented nine months later.<sup>24</sup> Not only did developers choose the most environmentally beneficial alternative approach, but the approach was also the most cost-effective and "was completed in record time and without

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 251-52.

<sup>18</sup> *Id.* at 264.

<sup>19</sup> *Overview of Washington State Environmental Policy Act (SEPA)*, DEP. OF ECOLOGY, <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Basic-overview> (last visited Feb. 26, 2023).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Weiner, *supra* note 1, at 10680.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

litigation.”<sup>25</sup> The project included a minimum 10-year monitoring and adaptive management plan and the St. Paul Waterway was removed from the EPA’s National Priorities List in 1996.<sup>26</sup>

The success of the St. Paul Waterway in Washington illustrates how SEPA and NEPA can be used in conjunction to satisfy local, state, and federal needs without being delayed by redundancy.

### C. The California Environmental Quality Act (“CEQA”)

The purposes of CEQA, which was passed in 1970, are to inform governmental decision-makers and the public about relevant environmental issues, and to identify ways environmental damage can be avoided or reduced.<sup>27</sup> Unlike NEPA, CEQA requires agencies to respond to information in environmental impact statements by either (1) changing a proposed project, (2) imposing conditions on the approval of the project, (3) adopting plans or ordinances to control adverse impacts, (4) choose an alternative way of meeting the same need, or (5) disapproving the project, to name a few.<sup>28</sup> CEQA applies to local agencies, as well as state agencies.<sup>29</sup> Over the past several years, CEQA has been an integral tool in preserving the state’s natural resources and securing justice for overburdened communities.

California has hundreds of success stories from over the past 50 years thanks to CEQA.<sup>30</sup> For example, in Kern County, the county Board of Supervisors prioritized passing an ordinance to allow new oil and gas drilling without considering the effects the ordinance would have on agriculture, “a major sector of the local economy,” or public health.<sup>31</sup> Farmers, residents, and activists sued the Board based on its failure to complete a full environmental impact statement, which would have required the Board to consider the failures of past oil and gas projects that had leaked harmful methane near homes and farms.<sup>32</sup> Because of the County’s failure to clean up past projects and refusal to properly implement CEQA, in 2020 a judge delivered an opinion in favor of the plaintiffs.<sup>33</sup> When the County still did not account for past oil and gas leaks or the new project’s effects on agriculture and public health, the public sued in

---

<sup>25</sup> *Id.* at 10681.

<sup>26</sup> *COMMENCEMENT BAY, NEAR SHORE/TIDE FLATS TACOMA, WA Cleanup Activities*, EPA.GOV, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=1000981> (last visited Feb. 25, 2023).

<sup>27</sup> CAL. PUB. RES. CODE, §§ 21000-21006 (Deering 2022).

<sup>28</sup> Cal. Pub. Res. Code, § 21002 (Deering 2022).

<sup>29</sup> Selmi, *supra* note 2, at 957.

<sup>30</sup> *CEQA Successes*, CEQA WORKS, <https://ceqaworks.org/ceqa-successes/> (last visited Feb. 26, 2023).

<sup>31</sup> Chelsea Tu, *Prioritizing Public Health and Farmland over Oil Companies in Kern County*, CEQA WORKS, <https://ceqaworks.org/prioritizing-public-health-and-farmland-over-oil-companies-in-kern-county/> (last visited Feb. 26, 2023).

<sup>32</sup> Colin C. O’Brien, *Court Ruling Deems Kern County’s Oil and Gas Review Violated the Law*, EARTHJUSTICE (June 8, 2022), <https://earthjustice.org/press/2022/court-ruling-deems-kern-countys-oil-and-gas-review-violated-the-law>.

<sup>33</sup> Tu, *supra* note 31.

2022, and again a judge ruled in their favor, forcing the County to halt the project and conduct another environmental review.<sup>34</sup>

CEQA has also been used to further environmental justice initiatives. In South Fresno, California, a predominantly low-income community of color, residents used the statute's mandate that agencies consider effects on the environment before issuing permits to advocate for stronger protections when plans for a new warehouse threatened to destabilize the housing market and increase air, water, and noise pollution.<sup>35</sup> The community's protests forced the developer to make concessions, "including establishing a community benefit fund for home improvements to mitigate impacts, committing to developing a pedestrian and bicycle safety plan, conducting and implementing a traffic study to reduce the impact of new truck and van traffic, extending city water and wastewater services to the affected community, providing a construction liaison to deal with problems during the project's construction phase, taking steps to facilitate third-party air quality monitoring, and providing funds for workforce development so the new warehouse creates local jobs."<sup>36</sup> The success in South Fresno illustrates how SEPA's can be used to collaborate with developers and plan for a better future that works for all.

#### **D. Montana's Environmental Policy Act ("MEPA")**

MEPA was passed in 1971 and "has undoubtedly saved the State of Montana from proceeding with hasty, ill-considered, and costly actions that may have foreclosed future opportunities or cost tens of millions of dollars to mitigate, restore, or repair."<sup>37</sup> Since 1971, Montana agencies have completed over 70,000 MEPA documents and only 79 of the actions approved in those documents have been litigated, illustrating how delicate planning leads to agreeable results.<sup>38</sup> This is evident throughout the MEPA Handbook, with its clear emphasis on public participation and "thinking first."<sup>39</sup> Although shifts in Montana's political landscape in recent decades has limited MEPA's jurisdiction, the act is still being used today to stop poorly planned projects from harming the environment.

Montana's Department of Environmental Quality ("DEQ") was recently brought into court for failure to properly consider environmental impacts before approving the Black Butte Copper Mine.<sup>40</sup> The proposed mine would excavate about 440 tons of concentrated copper ore every day in the Smith River watershed and would pollute the water with metals and acid-generating minerals that are lethal to aquatic life.<sup>41</sup> Plaintiffs alleged the DEQ did not adequately assess how the amount of water needed to be diverted in order to operate the mine would affect

---

<sup>34</sup> *Id.*

<sup>35</sup> Ashley Werner, *Protecting School Children and Public Health in South Fresno*, CEQA WORKS, <https://ceqaworks.org/protecting-school-children-and-public-health-in-south-fresno/> (last visited Feb. 26, 2023).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 12.

<sup>39</sup> *Id.* (stating MEPA is a "common sense" law).

<sup>40</sup> Complaint at 1, *Mont. Trout Unlimited v. Mont. Dep't of Env't Quality*, No. DV-20-10 (Mont. 14th D. 2022).

<sup>41</sup> *Id.*

local communities, nor did it properly consider alternatives that would avoid the most significant environmental impacts.<sup>42</sup> In a win for the plaintiffs, the Montana's Fourteenth Judicial District Court for Meagher County granted summary judgment, stating that the DEQ failed to consider alternatives proposed by its own consultants.<sup>43</sup>

Although proponents of the mine seem poised to appeal the decision, the District Court's decision shows how even in conservative states, SEPAs can be used to help citizens fight for their right to a clean and healthful environment. The Black Butte Copper Mine threatens to not only harm the health and safety of the river and the people and wildlife who depend on it, but it also threatens to harm two of the state's important economies, fishing and tourism. Without careful planning, shortsighted development projects like the Black Butte Copper Mine will continue to harm state economies and strip citizens of their right to a healthful environment for generations to come.

---

<sup>42</sup> *Id.* at 2.

<sup>43</sup> John Riley, *Montana Judge says DEQ unlawfully approved construction of Black Butte Copper Mine*, KTVH (Apr. 11, 2022, 6:25 PM), <https://www.ktvh.com/news/montana-judge-says-deq-unlawfully-approved-construction-of-black-butte-copper-mine>.