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SEPAs, Climate Change, and Corporate Responsibility: The Contribution of Local Government

Catherine J. LaCroix

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Introduction

Today there is a scientific consensus that the cumulative decisions of all of mankind since industrialization began are causing massive changes in the world's climate. International conferences and international agreements are being brought to bear. There is intense public debate in the United States, and legislation is pending in Congress to counter climate change. And, in the absence of a federal regulatory structure in the United States, the past few years have seen an upsurge in attention to climate issues among state and local governments. From one perspective, it seems ironic that in this country the most active governmental efforts to defuse international climate change are occurring below the federal level. But from another perspective, this makes perfect sense: while certainly we might prefer a dramatic technological revolution or sweeping worldwide governmental cooperation, at this point it is clear that no single, readily-available measure will fully address the issue. In the absence of—or while we wait for—action on a broader scale, states and cities that are affected by climate change have concluded that they must do what they can. A problem that we all created can be

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addressed only if we all work to solve it. A problem that stems from many small decisions can begin to be addressed if many small decision-makers are mobilized to respond.

In this regard, the commitment of many municipalities in the United States to some sort of climate action plan is encouraging and welcome. Communities across the nation have perceived effects that can be linked to climate change, such as shortages in local water supplies, increased incidence of intense weather such as hurricanes, and loss of coastline. The measures that are being advocated are diverse and carefully-considered. For obvious reasons, direct governmental measures focus on matters most clearly within a community's control: its own buildings and equipment, and its own commitment to reorganizing a community through smart growth, wherever growth can be channeled. Beyond that, the local government effort focuses on education and advocacy, seeking to raise citizen awareness and change citizen behavior. All of this is productive. The purpose of this paper is to offer a modest additional suggestion.

One further contribution that communities can make concerns their ability to use their regulatory power both to diminish the climate effects of individual development decisions and to internalize climate change priorities among their corporate residents, particularly those companies that might not immediately come to mind as greenhouse gas emitters. While many regulatory efforts focus on manufacturers, power plants, and transportation, all local activities add to climate change. Indeed, data suggest that the physical layout of communities and the buildings they contain make significant contributions to greenhouse gas emissions and thus to climate change. Through a local government's ability to affect the location and construction of new buildings—including large retail complexes, office buildings, or other large non-manufacturing entities—local governments have the ability to put climate change effects squarely on the table.

Consequently, the climate change effort would be enhanced by an expansion of the role of the SEPA—the State Environmental Policy Act—that already is a tool in the hands of about fifteen states. A SEPA requires state governments—and, in six states, local governments as well—to consider the environmental effects of decisions they make. Affected decisions can include, at the state level, environmental permitting decisions for significant developments. In the six states where SEPAs extend to local decision-making, the SEPA requirements can affect such local decisions as rezoning or granting a variance to allow construction of a new major project. In

addition, through their own inherent regulatory powers, some localities may, if they choose, adopt a SEPA requirement of their own—even in the absence of a state SEPA. The environmental effects a SEPA considers are broad enough to include climate change, and the mitigation measures that the strongest SEPAs require can be used to reduce the climate effects of large developments that the local government approves. While some of these measures—such as green building standards—already are included in many climate action plans, the SEPA process offers additional opportunities.

Part I of this paper focuses on the climate change debate and current local government initiatives, offering a snapshot of this rapidly-changing field. Part II explains the SEPA process and how it can be used to address climate change concerns. Part III draws on developments in the area of corporate responsibility to suggest that the beneficial effects of such an effort can go beyond the specific mandates of the SEPA; that is, the community can influence its corporate residents towards a greater focus on climate responsibility.

I. CLIMATE CHANGE AND LOCAL CLIMATE ACTION PLANS

Concern about climate change is the hot environmental issue of the day. It is also an environmental issue of potentially comprehensive sweep, because virtually all human activity has some effect on climate change. At this point, it would be a waste of ink and paper—both carbon-intensive commodities—to offer a detailed explanation of climate change and the history of the debate; suffice it to say that there is an international scientific consensus that climate change exists and is caused by human activity,[1] and there is a growing government trend to attempt to diminish human effects that lead to climate change.[2] These actions focus on reducing emissions of so-

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[1] *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report*, *in* THIRD ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Robert T. Watson ed., 2001), *available at* http://www.ipcc.ch/ipccreports/tar/vol4/english/index.htm. The Supreme Court recently offered an extensive discussion of climate change and its causes in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[2] On the international level, the Kyoto Protocol to the Convention on Climate Change imposes requirements on its signatories, but the United States is not a participant. *See* U.N. Framework Convention on Climate Change, *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998), *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf; U.N. Framework Convention on Climate Change, Parties to the Kyoto Protocol, http://maindb.unfccc.int/public/country.pl?group=kyoto (last visited Apr. 23, 2008). Legislation currently pending in Congress includes S. 2191, "American's Climate Security Act of 2007," the Warner-Lieberman proposal to curb United States greenhouse gas emissions through a cap and trade mechanism. America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

called greenhouse gases—those airborne carbon-bearing pollutants that change the atmosphere and produce climate change.[3]

In the United States, to date, there has been no regulatory action at the federal level. Rather, governmental action to combat climate change has been centered at the state level, where a range of states have adopted climate action plans,[4] and at the local level, most notably through the U.S. Mayors' Climate Protection Agreement.[5] State level initiatives tend to focus on large corporations, power plants, and automobiles.[6] The international organization ICLEI Local Governments for Sustainability has led the way together with the U.S. Conference of Mayors to develop a Climate Action Handbook to guide local efforts.[7] In addition, the Center for Climate Strategies—a nonprofit organization formed to support states and localities in developing climate change plans and policies—offers recommendations for effective policy measures.[8] Many states and cities across the nation have developed climate action plans for their own use.[9]

The U.S. Mayors' Climate Action Handbook offers advice on steps that local governments can take to reduce emissions of greenhouse gases.[10] The overall focus is both on the governments' own operations and the manner in which the governments can influence local citizen decision-making. The categories of activities addressed include energy management, transportation, waste reduction, and land use or smart growth proposals. Energy use can be reduced, for example, both by limiting energy use in municipal

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[3] At this point, those who question the climate change evidence might consider a twenty-first century version of Pascal's Wager. In his *Pensées*, French philosopher Blaise Pascal suggested, in essence, that it is better to believe in God's existence and thereby reap the rewards if he does exist than to doubt his existence and—if wrong—suffer eternal damnation. BLAISE PASCAL, PENSÉES (A.J. Krailsheimer trans., rev. ed. 1995). Similarly, it is perhaps better to bet that climate change exists and thus prudent steps must be taken to respond, because the consequences of mistaken inaction could be dire.

[4] *See, e.g.*, Stephen C. Jones & Paul R. McIntyre, *Filling the Vacuum: State and Regional Climate Change Initiatives*, 38 BNA ENVT. REP. 1640 (2007); *see also* Pew Center on Global Climate Change, U.S. States & Regions, http://www.pewclimate.org/states-regions (last visited Apr. 23, 2008) (continually updated roundup of states' climate policies).

[5] *See, e.g.*, Seattle Mayor Nickels: US Mayors Climate Protection Agreement, http://www.seattle.gov/mayor/climate/ (a comprehensive description of this local-level effort).

[6] *See* Jones & McIntyre, *supra* note 4.

[7] U.S. MAYORS' CLIMATE ACTION AGREEMENT: CLIMATE ACTION HANDBOOK (ICLEI - Local Governments for Sustainability et al. eds.), *available at* http://www.seattle.gov/climate/docs/ClimateActionHandbook.pdf [hereinafter CLIMATE ACTION HANDBOOK].

[8] The Center for Climate Strategies, www.climatestrategies.us (last visited Apr. 23, 2008).

[9] *See generally* CLIMATE ACTION HANDBOOK, *supra* note 7; The Center for Climate Strategies, *supra* note 8.

[10] Except where otherwise noted, all of the information in this paragraph comes from CLIMATE ACTION HANDBOOK, *supra* note 7.

buildings and by fostering energy-efficient private construction through incentives (or possibly mandates) to meet green building standards. Cities are urged to purchase energy from renewable sources and to install solar panels on municipal buildings, as well as to take other measures such as improving municipal infrastructure including traffic and street lights. Transportation planning is an integral part of the energy use picture as well, as cities try to wean citizens from their automobiles and make alternative forms of transportation available, both to municipal employees and to residents. Cities are urged to purchase smaller vehicles for their fleets, preferably hybrid or alternative fuel vehicles. The cost of maintaining water systems comes under scrutiny as well, with suggestions to improve the energy efficiency of water treatment and delivery, and wastewater treatment and disposal. There are recommendations for waste reduction, recycling, and waste management. The Handbook also recommends land use management practices such as local measures to reduce sprawl by focusing on dense, mixed-use neighborhoods that save green space—thus facilitating carbon capture through tree growth—and to reduce citizen commutes by private cars. (Much of this can be achieved by considering the principles of Smart Growth advocated by the American Planning Association.[11]) Public information is a large part of the program, as well, to encourage local residents to make climate-friendly choices.

All of this is useful and productive. None of it, however, focuses on the particular additional step advocated here: creative use of the SEPA. The next section will allow us to consider whether this presents an additional opportunity.[12]

II. THE SEPA PROCESS AND CLIMATE CHANGE

A. The SEPA Process

The SEPA process brings environmental considerations into governmental decision-making. All SEPAs draw their inspiration from the same source: the National Environmental Policy Act, or NEPA, adopted by Congress in 1970.[13] The purpose of NEPA was to require federal government agencies to consider the potential

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[11] AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK (2002) [hereinafter GROWING SMART].

[12] *Cf.* Michael P. Vandenbergh & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673 (2007) (presenting an even more ambitious proposal).

[13] 42 U.S.C. §§ 4321–4370 (2006).

environmental effects of certain projects they undertook or authorized. The law did not impose any new substantive requirements; it just required federal agencies to give "appropriate consideration" to environmental effects before reaching a decision.[14] NEPA identifies two levels of agency review: an initial environmental assessment may be required to determine whether an agency action is likely to have significant environmental effects; and, if the action's environmental impacts are likely to be significant, the agency must prepare a detailed environmental impact statement (EIS).[15] Although there is no requirement in NEPA for agencies to adopt the least environmentally damaging course of action, the EIS process has had a profound effect on regulatory decision-making at the federal level by bringing environmental concerns to the table with specific details about the project or decision at hand.[16]

Following the example of NEPA, at least fifteen states have enacted their own versions of NEPA, commonly called SEPAs: state environmental policy acts that require state or local government agencies to consider the environmental effects of their actions.[17] In most of these states, the SEPA covers only state action—there is no environmental assessment requirement unless a particular action is a state-run project or requires a state permit. In Wisconsin, for example, the state issues stormwater runoff permits; thus, the state conducts an environmental assessment as part of the permitting process.[18] In six states, even the regulatory actions of local communities require an environmental assessment in some form.[19] Local decisions that might be affected by this requirement may include local land use planning as well as project-specific decisions. If, for example, a big box store proposal requires rezoning or a zoning variance, or some other form of local regulatory approval, the local government must determine

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[14] *Id.* § 4332(B).

[15] 40 C.F.R. §§ 1501.3, 1501.4, 1508.9–1508.11 (2007).

[16] *E.g.*, Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 453 (1990) (noting NEPA's accomplishments and its limits).

[17] *See* GROWING SMART, *supra* note 11, at 12-30 to 12-32. California, Connecticut, D.C., Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Puerto Rico, South Dakota, Virginia, Washington, and Wisconsin have enacted SEPAs. *Id.*

[18] Brent Denzin, *Stormwater Tool-Kit*, *in* THE BIG-BOX TOOL-KIT: A GUIDE TO SUSTAINING COMMUNITIES 3 (Midwest Environmental Advocates 2006), *available at* http://www.midwestadvocates.org/advocacy/Sustaining%20Communities/Toolkit/STORM%20WATER/Storm%20Water%20Tool-Kit.pdf.

[19] GROWING SMART, *supra* note 11, at 12-6. The six states are California, Hawaii, Massachusetts, Minnesota, New York, and Washington. *Id.* In addition, in North Carolina, local governments may require major development projects to submit impact statements. N.C. GEN. STAT. § 113A-8 (2007).

whether possible environmental effects merit an EIS.[20] (Environmental review of a particular project might not be required if the town already conducted an environmental analysis in devising its local plan and the land use is consistent with development envisioned in the plan.[21])

It is possible that some localities could use their own regulatory powers to impose a local environmental review requirement, even in the absence of directly-applicable state law.[22] The theory here is that local governments have land use regulatory power and power to adopt local environmental regulations, both through state legislation authorizing zoning, comprehensive planning, or other regulation, and through home rule power.[23] Over the past few decades, local governments have begun to use this authority to adopt local measures to protect the environment, building on specific delegations of power and their ability to regulate in the interest of the public health, safety, and welfare.[24] If there is no inconsistent state statute, a locality with broadly-stated delegated land use powers, environmental regulatory powers (which are specifically delegated in some states) or home rule power could adopt its own environmental review requirements. For example, the Midwest Environmental Advocates' Big-Box Tool-Kit recommends a mandatory environmental analysis as part of a big box ordinance,[25] even though the SEPA in Wisconsin applies only to state

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[20] GROWING SMART, *supra* note 11, at 12-3, 12-6.

[21] *Id.* at 12-13 (describing the law of Washington State); *accord* Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 422 (Cal. Ct. App. 2006). In practice, in Washington the EIS for a comprehensive plan is often too general to cover specific proposals such as a Wal-Mart, so a project-specific EIS might be required anyway. Telephone Interview with Claudia Newman, Esq., Bricklin Newman Dold LLP, in Seattle, Wash. (Jan. 21, 2008).

[22] *See* Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 236–43 (2002).

[23] In general in the United States, localities have no inherent powers; they have only the powers granted to them by the State. All States authorize localities to regulate land use and many States also delegate other powers to protect the environment. A collection of examples of local environmental laws can be found in JOHN R. NOLON ET AL., LAND USE AND COMMUNITY DEVELOPMENT 861–993 (7th ed. 2008). In forty-five states, localities have some form of home rule authority, but the source and scope of such authority varies widely among the states. Home rule power is the ability of a local government to regulate matters within its geographic boundaries. DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 14 (Congressional Quarterly Press 2001).

[24] Plunkett, *supra* note 22, at 242; *see also* Moviematic Indus. Corp. v. Bd. of County Comm'rs, 349 So. 2d 667, 669 (Fla. Dist. Ct. App. 1977) ("We find the inclusion of ecological considerations as a legitimate objective of zoning ordinances and resolutions is long overdue and hold that preservation of the ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare. We are not alone in this determination as courts in other jurisdictions have recognized the importance of considering the ecological objectives in zoning matters. [Citing cases in other jurisdictions]").

[25] Brent Denzin & Erin Elizabeth Hupp, *Conditional Use Permit (CUP) Tool-Kit*, *in* THE BIG-BOX TOOL-KIT: A GUIDE TO SUSTAINING COMMUNITIES 11 (Midwest

agencies and does not require environmental review by local governments.[26] Some municipalities across the nation have adopted their own SEPA requirements in the absence of an applicable SEPA.[27] Whether any particular municipality in any particular state would have such authority depends on the scope of municipal power under the relevant state constitution, state statutes, and related judicial interpretations; the most that can be offered here is a suggestion that, for interested municipalities, the question deserves investigation.[28]

Localities that engage in the SEPA process, then, may consider the environmental effects of any governmental decision to allow development that is likely to have such effects. This can include any major development at all: a hotel, a shopping mall, an office complex, a large retail store, or a warehouse or regional distribution center.

The SEPA in the State of Washington is an example. The purpose of Washington's SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences."[29] In preparing an environmental impact statement, or EIS, the responsible official is required to collect information reasonably sufficient to evaluate the

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Environmental Advocates 2006), *available at* http://www.midwestadvocates.org/advocacy/Sustaining%20Communities/Toolkit/Land%20Use/ConditionalUse/ConditionalUseToolKit.pdf.

[26] WIS. STAT. § 1.11 (2004). Home rule in Wisconsin is conferred by statute; localities may adopt legislation on matters of local or statewide concern as long as there is no conflict with state legislation. KRANE ET AL., *supra* note 23, at 454.

[27] The town of Mount Pleasant, South Carolina is an example, as is Bozeman, Montana. Plunkett, *supra* note 22, at 243–45, 250; *see also* Constance Beaumont & Leslie Tucker, *Big Box Sprawl (And How to Control It)*, 43 MUN. LAW. 5, 8 (2002). The South Carolina Constitution authorizes cities to exercise broad powers of self-government, consistent with state law. KRANE ET AL., *supra* note 23, at 376. Montana has, according to one authority, "one of America's most progressive state constitutions," with broad powers of self-government. *Id.* at 250.

[28] In particular, the scope of home rule power in any particular state is often difficult to delineate. *E.g.*, KRANE ET AL., *supra* note 23, at 4 ("Today, in any one state, the scope of home rule or local autonomy is often difficult to discern.") (citation omitted). The extent to which home rule power will allow a municipality to innovate can be unclear. *E.g.*, Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 550 (2000) (discussing difficulties in determining how home rule power and regional planning fit together). The combination of home rule power and state statutes delegating authority to localities may offer opportunities for new forms of local regulation. *See, e.g.*, David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 679 (2000) (discussing whether local governments in North Carolina may adopt innovative smart growth techniques).

[29] King County v. Boundary Review Bd., 860 P.2d 1024, 1033 (Wash. 1993). The Washington Supreme Court has stated that SEPA is "an attempt by the people to shape their future environment by deliberation, not default." Stempel v. Dep't of Water Res., 508 P.2d 166, 172 (Wash. 1973).

environmental impact of a proposal.[30] Applicable regulations describe the purpose of an EIS:[31]

> (1) The primary purpose of an environmental impact statement is to ensure that SEPA's policies are an integral part of the ongoing programs and actions of state and local government.
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> (2) An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.
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> (3) Environmental impact statements shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. . . .
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> (4) The EIS process enables government agencies and interested citizens to review and comment on proposed government actions, including government approval of private projects and their environmental effects. This process is intended to assist the agencies and applicants to improve their plans and decisions, and to encourage the resolution of potential concerns or problems prior to issuing a final statement. An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions.[32]

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[30] WASH. ADMIN. CODE 197-11-080 (2001). An EIS also "shall be supported by the necessary environmental analysis." *Id.* at 197-11-400.

[31] *Id.* at 197-11-400.

[32] *Id.*

> At the outset it is apparent that the very heart of the procedural requirements of SEPA is the necessity for preparation of an Environmental Impact Statement. RCW 43.21C.030(2)(c). . . . [A]n Environmental Impact Statement is particularly important because it documents the extent to which the particular agency has complied with other procedural and substantive provisions of SEPA; it reflects the administrative record; and it is the basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed "major action" and its impacts upon the environment.

Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 510 P.2d 1140, 1146 (Wash. Ct. App. 1973). Moreover, the "point of an EIS is to not evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions." *King County*, 860 P.2d at 1034. In addition, SEPA requires that the evaluation of impacts be based on adequate information. *See* WASH. ADMIN. CODE 197-11-030(2)(c) ("Agencies shall to the fullest

The environmental effects covered by these statutes can be extremely broadly defined, going well beyond the type of effect one might traditionally consider as environmental. For example, in California an 'environmental' effect includes an effect on "the physical conditions which exist within the area," including "both natural and man-made conditions," where "significant effects would occur either directly or indirectly as a result of the project."[33] Thus SEPAs can cover a wide range of effects including urban blight as an environmental effect. As under NEPA, the effects to be considered include the cumulative effect of similar decisions.[34] Significantly, these effects extend beyond impacts that might otherwise be regulated under federal or state environmental laws.

There is another key feature of SEPAs that distinguishes them from NEPA. The strongest SEPAs (including those of California, New York, and Washington) include a mitigation requirement: not only must the environmental report identify effects on the environment, but it must also identify alternative versions of the project or feasible measures that can be taken to mitigate those effects, and—wherever feasible—require those measures to be taken.[35] This means that an agency may regulate environmental effects that otherwise would be outside of its jurisdiction, and might not otherwise be regulated at all. For example, "if a project comes before the [New York Department of Environmental Conservation or DEC] for an air pollution control permit, and it appears that the project may have significant visual impacts, then the DEC must address those impacts through the [New York State Environmental Quality Review Act or SEQRA] process even though the DEC air pollution control program has no visual impact statutes or regulatory

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extent possible: . . . [p]repare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made"); WASH. ADMIN. CODE 197-11-400(3) (same).

[33] CAL. CODE REGS. tit. 14, § 15360 (2005). The definition is similar in New York. *See* N.Y. ENVTL. CONSERV. LAW at § 8-0105(6) (McKinney 2005) ("'Environment' means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."). Other state environmental laws, not just SEPAs, exhibit similar breadth. Vermont's growth management statute includes economic effects under the broad rubric of the environment. *See In re* Wal-Mart Stores, Inc., 702 A.2d 397 (Vt. 1997).

[34] GROWING SMART, *supra* note 11, at 12-7.

[35] *E.g.*, N.Y. ENVTL. CONSERV. LAW § 8-0109(8). Of course, the definition of "feasible" can become a battleground, and a city can avoid requiring mitigation or denying permission for a project by declaring alternatives or mitigation "infeasible." *See, e.g.*, Eric Goldman, *Legal Adequacy of Environmental Discussions in Environmental Impact Reports*, 3 UCLA J. ENVTL L. & POL'Y 1, 6–7 n.25 (1982).

scheme."[36] In most states, a proposal may be approved even if not all adverse environmental effects can be prevented or mitigated.[37] A municipality must, however, present a substantial basis for this approval. In California, for example, a municipality must show that "specific economic, legal, social, technological, or other benefits" of the project outweigh the unavoidable adverse environmental effects of the decision.[38]

SEPAs impose requirements in addition to the other requirements of local land use law: they are another layer of review that an applicant must undergo, and their mitigation requirements are imposed in addition to other legal requirements.[39] This is both an advantage and a drawback, depending on one's perspective. To the developer, it can seem another in a long line of annoying regulatory burdens that has to be factored into the cost of the project and its schedule. To the citizen, it offers a potential source of influence. The SEPA process typically is open to public comment. Citizens can take advantage of that opportunity to criticize the EIS and seek revisions.[40] A local government decision that fails to satisfy the SEPA requirements is vulnerable to legal challenge.[41] So citizens can and do use SEPA laws to question local government decisions.

For a municipality, if taken seriously, the SEPA requirement can be a useful decision-making tool.[42] The EIS can bring effects to light that trigger regulatory requirements.[43] And, as noted above, the EIS

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[36] John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 396 (2001).

[37] *See, e.g.*, CAL. PUB. RES. CODE § 21002 (West 2007); Fairview Neighbors v. County of Ventura, 82 Cal. Rptr. 2d 436 (Cal. Ct. App. 1999). The law of New York is similar. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(8) ("When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.").

[38] Woodward Park Homeowners Ass'n v. City of Fresno, 58 Cal. Rptr. 3d 102, 114 (Cal. Ct. App. 2007) (citation omitted). "Projects which significantly affect the environment *can* go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway." *Id.* at 129–30 (citation omitted).

[39] This poses an organizational issue for local governments, as they try to integrate the SEPA with their other requirements. *See generally* GROWING SMART, *supra* note 11, ch. 12.

[40] *See, e.g.*, Sprawl-Busters: Newsflash Database, Tumwater, WA. Three Years and Still no Wal-Mart (Dec. 21, 2007), http://www.sprawl-busters.com/search.php?readstory=2934.

[41] *See, e.g.*, *Woodward Park Homeowners Ass'n*, 58 Cal. Rptr. 3d 102; Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 231 (Cal. Ct. App. 2004).

[42] For a ringing endorsement of the SEPA process from an experienced municipal attorney, see Arthur Ientilucci, *SEQRA: Down the Garden Path or Detour for Development*, 6 ALB. L. ENVTL. OUTLOOK J. 102 (2002).

[43] Interview with Claudia Newman, Esq., *supra* note 21 (referring to EIS of a Wal-Mart in Mill Creek, Washington).

can cover environmental effects that otherwise are not regulated but are of environmental concern. Thus the EIS can provide regulatory leverage for a municipality that seeks to mitigate the environmental effects—broadly defined—of development.

Can a municipality use the information in the environmental impact statement to refuse approval of, for example, a zoning variance or a zoning amendment to allow a development with undesirable environmental effects? Washington's SEPA explicitly authorizes such a result,[44] as does New York's SEQRA,[45] although in such an instance "the unmitigable adverse environmental impacts of the action must first be weighed and balanced against the demonstrated public need for the project."[46] In other instances, general principles of land use law suggest a few conclusions. If the applicant wants a zoning amendment or some other change to local law that qualifies as a legislative action, a locality should be on firm ground to cite environmental effects in a decision not to approve the applicant's request. Legislative actions by their nature are policy decisions, and courts will uphold them as long as they are not arbitrary and they do not conflict with some other aspect of state law (or the local comprehensive plan, in states that require zoning decisions to be consistent with the plan).[47] Here, an adverse environmental effect identified and documented in an EIS looks like a sound public policy basis for such a legislative decision.[48]

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[44] WASH. REV. CODE ANN. § 3.21C.060 (West 1998).

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

Id.

[45] *E.g.*, Caffry, *supra* note 36, at 397. The author notes that "in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 648 (2d Cir. 1999) and *Wal-Mart Stores, Inc. v. Planning Bd.*, 668 N.Y.S.2d 774, 777 (App. Div. 1998) the Planning Boards decisions to deny permit applications were based on unmitigable adverse impacts." *Id.* at 397 n.32.

[46] *Id.* at 400.

[47] *See, e.g.*, Daniels v. Van Voris, 660 N.Y.S.2d 758, 760 (N.Y. App. Div. 1997) (noting there is a "strong presumption of validity that attaches to zoning amendments").

[48] *E.g.*, Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 439–40 (Cal. Ct. App. 2006) (ordinance restricting discount superstores that sold groceries supported by evidence

If the applicant is seeking some other form of regulatory permission, one that is quasi-judicial such as a zoning variance or a conditional use permit, the question shifts. Applicable law specifies the criteria that may be considered in reaching such quasi-judicial decisions, and SEPA statutes do not purport to change those criteria. The precise role of the EIS depends on the type of approval being sought and the standards that govern it, but as a general matter we can say that an EIS can provide support for a municipality's decision to the extent that the law allows environmental considerations—which as noted above can be quite broadly defined—to factor into it. For example, in theory it is difficult to qualify for a variance, and, in any event, a municipality may deny a variance request that is not in the public interest.[49] So an EIS identifying an adverse environmental effect could support a ruling that a variance to allow a particular development would not be in the public interest.

B. Climate Change

How does climate change fit into this picture? Urban development has significant effects on greenhouse gas emissions. By some estimates, buildings are responsible for 30 percent of greenhouse gas emissions in the United States.[50] Buildings and the activities in them are responsible for 12 percent of all water use, 65 percent of electricity consumption, and 30 percent of waste output.[51] Clearly, controlling the climate change effects of buildings can have significant environmental consequences, and the SEPA process offers a way to address these effects.

Developments in California point the way. California has been at the forefront of the state-level climate change effort. The state views itself as particularly vulnerable to the effects of climate change, which include rising ocean levels, increased air temperature-related air pollution problems, and the heightened possibility of drought.[52]

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of environmental effects). *But see, e.g.*, Hayes v. City of Seattle, 934 P.2d 1179 (Wash. 1997) (denial of approval was arbitrary and capricious because the environmental basis was not explained).

[49] DANIEL R. MANDELKER, LAND USE LAW § 6.41 (5th ed. 2003).

[50] U. S. Green Building Council: Why Build Green?, http://www.usgbc.org/displaypage.aspx?CMSPageID=291& (last visited Apr. 11, 2008).

[51] *Id.*

[52] CAL. HEALTH & SAFETY CODE § 38501(a) (West 2006). The California Global Warming Solutions Act of 2006 states:

> Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in

California has several pioneering state statutes directed at climate change, including a specific mandate to reduce statewide greenhouse gas emissions to 1990 levels by the year 2020. This is the California Global Warming Solutions Act of 2006.[53] (California also enacted a Clean Vehicle Law in 2002[54] and mandated further changes through Governor Schwarzenegger's June 2005 Executive Order.[55])

California has a SEPA—called the California Environmental Quality Act or CEQA—that requires assessment of the environmental effects of local regulatory decisions, and the effects that must be considered include climate change. The California legislature reinforced this mandate by passing new legislation requiring the state government to complete, by January 2010, guidelines "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by [CEQA], including, but not limited to,

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> the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.

Id.

[53] Assembly Bill No. 32 (codified in scattered sections of CAL. HEALTH & SAFETY CODE §§ 38501–38599). The Global Warming Solutions Act requires the reduction of emissions to 1990 levels by the year 2020. The law will be implemented through a series of California Air Resources Board (CARB) rulemakings including establishing emission source monitoring and reporting requirements, discrete early action emission reduction measures, and, finally, greenhouse gas emission limits and measures to achieve the maximum feasible and cost-effective reductions in furtherance of the greenhouse gas emission cap. CAL. HEALTH & SAFETY CODE §§ 38560–38565; *see also* KASSIE SIEGEL ET AL., THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: ON THE FRONT LINES OF CALIFORNIA'S FIGHT AGAINST GLOBAL WARMING (Center for Biological Diversity ed., 2007).

[54] Assembly Bill No. 1493 (codified as amended in CAL. HEALTH & SAFETY CODE §§ 42823, 43018.5). The implementation of the Clean Vehicle Law hit a snag in December 2007, when the federal EPA declined to allow California to impose its own vehicle standards. *See EPA Rejects California Waiver Request to Regulate Vehicle-Related Emissions*, 38 BNA ENVT. REP. 2696 (2007). The California law, which has been endorsed by at least sixteen other states, was implemented through a 2004 CARB rulemaking and would result in an 18% reduction in greenhouse gas emissions from California light-duty passenger vehicles by 2020 and a 27% reduction by 2030. These reductions would also be achieved, according to the CARB staff analysis, at a net benefit to the California economy. *See* SIEGEL ET AL., *supra* note 53. The proposal had survived a court challenge, just before the EPA denied permission to implement it. Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

[55] Governor of Cal., Exec. Order No. S-3-05 (2005). The Governor's Executive Order established greenhouse gas emission targets as follows: "by 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; [and] by 2050, reduce GHG emissions to 80 percent below 1990 levels." *Id.* The Executive Order also established the interagency California Climate Action Team to coordinate the State's reduction efforts and report back on the progress of those efforts as well as the ongoing impacts of global warming on the State. *Id.*

effects associated with transportation and energy consumption."[56] The State Attorney General recently reached a settlement with San Bernardino County for the County's failure to address global warming in its county growth plan, which the Attorney General asserted was a violation of CEQA.[57] And the Center for Biological Diversity, an advocacy group, has filed a number of lawsuits, including a suit against Wal-Mart and the City of Perris, California, for the approval of a Wal-Mart Supercenter without considering climate change effects.[58]

CEQA follows the pattern described earlier for strong state SEPAs. The CEQA environmental review process requires state and local agencies to analyze and disclose all significant environmental impacts of their discretionary project approvals.[59] These include, for example, land use decisions such as the development and adoption of local comprehensive plans, as well as project-specific zoning amendments, zoning variances, and conditional use permits, whenever the approvals have potentially significant environmental effects.[60] In California, once an agency has determined that a project's environmental effects will be significant, the agency is instructed to seek out feasible alternatives or feasible mitigation measures that will avoid or substantially lessen those effects; however, an agency may approve a project despite adverse environmental effects.[61] In that

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[56] CAL. PUB. RES. CODE § 21083.05(a) (West 2008).

[57] Press Release, Center for Biological Diversity, Settlement on San Bernardino County Growth Plan Announced: County Will Address Global Warming (Aug. 21, 2007), *available at* www.biologicaldiversity.org/swcbd/press/san-bernardino-08-21-2007.html.

[58] Sprawl-Busters: Newsflash Database, Perris, CA. Wal-Mart Sued Over Greenhouse Gas Law (Aug. 13, 2007), http://www.sprawl-busters.com/search.php?readstory=2804.

[59] The lead agency shall determine whether a project may have a significant effect on the environment; if substantial evidence exists that a project may have a significant effect, the lead agency must prepare an environmental impact statement. *See* CAL. PUB. RES. CODE § 21082.2 (West 2007); Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 864 P.2d 502, 506 (Cal. 1993); *see also* CAL. PUB. RES. CODE § 21006 (describing types of discretionary project approvals).

[60] CAL. PUB. RES. CODE § 21080.

[61] *Id.* § 21002 ("The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."); *see also id.* § 21003 (describing procedures for planning and environmental review).

instance, the agency must state the overriding considerations that led to approval despite significant remaining environmental effects.[62]

Climate change effects were included in CEQA even before the recent legislative action. The CEQA environmental analysis must consider any significant effect on the environment within the meaning of CEQA.[63] CEQA defines "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance."[64] Significant effects include those that are "individually limited but cumulatively considerable."[65] Climate change is the cumulative result of many small decisions, and there is a scientific consensus and a growing judicial consensus that even tiny contributions of greenhouse gases to the environment can be significant in the context of climate change.[66]

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[62] *Id.* § 21081.

> Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:
>
> (a) The public agency makes one or more of the following findings with respect to each significant effect:
>
> (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
>
> (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
>
> (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.
>
> (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

Id.

[63] *See* Protect the Historic Amador Waterways v. Amador Water Agency, 11 Cal. Rptr. 3d 104 (Cal. Ct. App. 2004).

[64] CAL. PUB. RES. CODE § 21060.5. This broad definition has been held to include urban blight. *See* Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 219 (Cal. Ct. App. 2004).

[65] CAL. PUB. RES. CODE § 21083(b)(2). The statute further explains that "cumulatively considerable" means that "the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." *Id.*

[66] SIEGEL ET AL., *supra* note 53, at 8 ("The solution to climate change lies not in any one single action, but in systematically reducing emissions from all possible sources. While a

Prior to the recent legislation, the California Attorney General's office interpreted CEQA as extending to climate change effects.[67]

The law of California now specifically requires that any EIS[68] must analyze the effects of the proposed action on climate change.[69] In order to provide full information to the public and to regulatory decision makers, the report should: "1) provide a regulatory and scientific background on global warming; 2) assess the project's contribution to climate change through an emissions inventory; 3) assess the effect of climate change on the project and its impacts [because climate change might exacerbate these impacts]; and 4) make a significance determination."[70]

Under this interpretation, the environmental statement needs to include an inventory of all of the project's emission sources, including direct and indirect sources in all phases of the project.[71] While the precise contents of the impact inventory will vary depending on the project, its scope can be quite broad. Effects of potential relevance to large developments such as shopping malls and office complexes include the following:

- Electricity and natural gas usage in buildings;
- Vehicle trips generated by the project;
- Water supply and transportation to the project;
- Operation of construction vehicles and machinery;
- Manufacture and transport of building materials;

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particular project's greenhouse gas emissions represent a fraction of California's total emissions, courts have flatly rejected the notion that the incremental impact of a project is not cumulatively considerable because it is so small that it would make only a *de minimis* contribution to the problem as a whole." (citing Communities for a Better Env't v. Cal. Res. Agency, 126 Cal. Rptr. 2d 441, 454 (Cal. Ct. App. 2002))); *see also* Massachusetts v. EPA, 549 U.S. 497 (2007) (EPA argument for not regulating vehicle-originating carbon dioxide under the Clean Air Act "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum . . . . Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.").

[67] S. Rules Comm., Analysis of SB 97, at 5 (Cal. 2007), *available at* www.leginfo.ca.gov./pub/07-08/bill/sen/sb_0051-0100/sb_97_cfa_20070822_142622_sen_floor.html. The analysis refers also to a 1997 interpretation of NEPA to include climate change, by the federal Council on Environmental Quality. *Id.* at 4.

[68] For simplicity, this article refers to all environmental impact statements as "EIS," even though the nomenclature in particular states varies.

[69] CAL. PUB. RES. CODE § 21083.05 (West Supp. 2008).

[70] SIEGEL ET AL., *supra* note 53, at 6.

[71] *See* CAL. CODE REGS. tit. 14, §§ 15151, 15126, 15358(a)(2) (2005).

- Waste disposal, including transport of solid waste and methane emissions from organics decomposition; [and] . . .

- Fugitive emissions, such as methane leaks from pipeline systems and leaks of HFCs from air conditioning systems.[72]

Although at first glance this might seem to be a daunting chore, there are methods by which to measure all of these effects, developed over the years by various federal and California regulatory agencies, as well as nongovernmental organizations.[73] In particular, the California Air Pollution Control Officers Association (CAPCOA) has published detailed technical guidance to assist local agencies to estimate greenhouse gas effects of particular projects and to recommend mitigation measures.[74]

Importantly, today there is no requirement in any federal environmental law to reduce or mitigate greenhouse gas emissions, nor are climate change effects consistently covered by existing state mandates (although California probably covers more than most states at this point). Only the EIS, by generating project-specific information, offers the municipality a comprehensive opportunity to work with the developer to achieve climate change related progress. This can occur, however, only if the effects are viewed as "significant" within the meaning of CEQA.

Here the CEQA's standard assists a finding of "significance." Once a project's effects are delineated, the regulators need to decide whether the effects are significant—both by themselves and on a cumulative basis—when considered in light of other similar projects.[75] Arguably any increase in greenhouse gases above existing levels is a significant impact within the meaning of CEQA. Because the California legislature has determined that "California's current greenhouse gas baseline is so high that it requires significant reductions, and any additional emissions will exacerbate existing conditions, it is difficult to see how a new source, even a small one, can be cumulatively insignificant."[76]

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[72] SIEGEL ET AL., *supra* note 53, at 6–7.

[73] *Id.* at 7, 14 (listing resources of methodologies, such as the California Climate Action Registry, http://www.climateregistry.org).

[74] *See* CAL. AIR POLLUTION CONTROL OFFICERS ASS'N, CEQA & CLIMATE CHANGE: EVALUATING AND ADDRESSING GREENHOUSE GAS EMISSIONS FROM PROJECTS SUBJECT TO CALIFORNIA ENVIRONMENTAL QUALITY ACT (2008), *available at* http://www.capcoa.org/.

[75] CAL. PUB. RES. CODE § 21082.2 (West 2005); *see also id.* § 21083(b); CAL. CODE REGS. tit. 14, § 15064(h)(1).

[76] SIEGEL ET AL., *supra* note 53, at 9. The Center's report adds:

What does this tell us about the last step, the evaluation of alternatives? This step is required so that the EIS can point regulators in the direction of a decision that minimizes effects on the environment.[77] Indeed, regulators cannot approve a project as proposed if there is a feasible alternative with fewer environmental effects or feasible mitigation measures that can be required.[78]

When we remember California's goal of reducing its overall greenhouse gas emissions, we can see that the implications for land use planning in general and new construction projects in particular can be significant. A California locality must consider climate change in its comprehensive planning process; it therefore must consider the cumulative effects of local growth and how to mitigate them.[79] This can provide a powerful incentive to include smart growth techniques, such as organizing new growth around mass transit. Of more specific relevance to this paper, however, the process also will have significant case-by-case implications for particular construction projects. For a retail development or office complex, for example, what might the options include? One might be selecting a location that benefits from existing infrastructure and reduces vehicle miles traveled to reach the site, is near a bike route, or taps into local mass

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> It does not follow from this analysis, however, that every project that generates greenhouse gas emissions will require an EIR. As with any other potentially significant impact, the project may include measures to reduce the impact of greenhouse gas emissions to below significance, allowing for a Mitigated Negative Declaration (Pub. Res. Code § 21064.5). . . . [T]here are many mitigation measures available for housing and other types of projects that can do so.

Id. A "negative declaration" is defined as "a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." CAL. PUB. RES. CODE § 21064 (West 2007). A "mitigated negative declaration" is defined as:

> a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

Id. § 21064.5.

[77] *See* CAL. PUB. RES. CODE § 21002; CAL. CODE REGS. tit. 14, §§ 15002(a)(3), 15021(a)(2) (2007). "Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 291 (Cal. 1988).

[78] CAL. PUB. RES. CODE § 21002.

[79] *See* GROWING SMART, *supra* note 11, at 12-12 (CEQA requires environmental impact review in the planning process).

transit. Studies consistently show that sprawling development, by increasing dependence on the automobile, can significantly increase vehicle miles traveled and, thus, greenhouse gas emissions.[80] Therefore an EIS for a proposed new development could suggest that climate effects would be reduced by building it at a different location. Another alternative might be to construct a more energy-efficient, water-efficient building, or one that taps into renewable energy resources. Beyond the four walls of the buildings themselves, the environmental impact of a development can be mitigated by appropriate use of trees or other measures, depending on the type or location of the building.[81]

Further interesting possibilities suggest themselves. Perhaps the store can mitigate the unavoidable effects of its operations,[82] such as by supporting the expansion of public transportation in the locality or by providing funds to retrofit other existing buildings in the area to reduce their carbon footprint. Retrofitting an existing building can cut energy use by 20–50 percent.[83] This concept of mitigating unavoidable effects goes beyond what can be achieved simply by requiring the new building to meet green building codes; it leverages the mitigation requirement to offer inventive measures beyond the boundaries of the new project.[84] As a last resort, developers could be required to offset emissions by purchases of carbon credits.

What about other states? For those states that also have SEPAs, the California example suggests that climate change effects lawfully may be included in environmental assessments in those states as well.

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[80] *See* REID EWING ET AL., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 2–3 (2008), *available at* http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf (noting that curbing vehicle emissions depends on improved vehicle efficiency, cleaner fuels, and a reduction in driving).

[81] David G. Mandelbaum, *Corporate Sustainability Strategies*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 27, 38 (2007).

[82] It is possible that the effects of new construction cannot be fully mitigated: analysis of the climate change effects of a Wal-Mart in Suisun City, California, led to a requirement of a series of mitigation measures, though it was concluded that the project still would have significant unavoidable impacts on climate change. MICHAEL BRANDMAN ASSOCIATES, WAL-MART WALTERS ROAD WEST PROJECT: DRAFT ENVIRONMENTAL IMPACT REPORT (2007), *available at* http://www.suisun.com/Business/CommunityDev/Docments/Walters%20Road%20West%20DEIR.html.

[83] LESTER R. BROWN, PLAN B 3.0: MOBILIZING TO SAVE CIVILIZATION 221 (2008).

[84] Although there are limits to what a town can require by way of an exaction, a city can tailor its requirements to meet applicable standards of nexus and proportionality, if such standards apply. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (imposing a standard of "rough proportionality" on exactions); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702–03 (1999) (suggesting that the proportionality requirement of *Dolan* does not extend beyond exactions in the form of dedication of real property to public use). Of course, most states have their own version of limitations on exactions and the *Dolan* standard, so any creative use of the mitigation requirement would have to confront such state standards.

Regulations in Washington, for example, specifically include climate as a relevant element of the environment.[85] Even without a specific climate change reference, California offers a precedent for including climate change effects in a SEPA analysis. SEPAs tend to include an ambitious statement of their aspirations to guide interpretive efforts, a broad definition of environmental effects, and often they echo the concept that environmental effects include the cumulative effects of similar decisions.[86] Many SEPAs are based on the language of NEPA, which has been held to cover climate change effects.[87] Even if a particular statute does not currently cover the same ground as the statutes in California and Washington, nonetheless, interpretive, regulatory, or legislative efforts could promote use of the SEPA for climate change benefits.

In states without SEPAs, an interesting question presents itself. As discussed earlier, a locality might be able to adopt its own EIS requirement using some combination of powers, including its land use power, its local environmental regulatory power, or its home rule power. Certainly there is an argument that a municipality's general land use regulatory powers, with their accompanying mandate to regulate land use for the protection of the public health, safety and welfare, could support the imposition of an EIS requirement in states that allow a sufficient degree of local innovation. Home rule, however, generally is limited to matters of local concern or matters of

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[85] WASH. ADMIN. CODE 197-11-444(1)(b)(iii) (2001).

[86] *See* CONN. GEN. STAT. § 22a-1b(c) (2004) ("cumulative, direct and indirect effects" of a project must be included in the EIS); D.C. CODE § 8-109.02 (2008) (broad definition of "environment" though covered projects are limited); *id.* § 8-109.03(a)(8) (EIS must describe the "cumulative impact" of projects); IND. CODE § 13-12-4-1 (2008) (purposes refer to "damage to the environment and biosphere"); *id.* § 13-12-4-5 ("all state agencies shall . . . [r]ecognize the long range character of environmental problems"); MASS. GEN. LAWS ch. 30, § 61 (2008) ("damage to the environment" is broadly defined, though insignificant effects are excluded); MINN. STAT. § 116D.02 (2006) (broad statement of the purpose of the state environmental policy); N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (West 2000) (broad definition of "environment"); N.C. GEN. STAT. § 113A-3 (2006) (broad statement of the purpose of the state environmental policy); WIS. STAT. § 1-11 (2004) (environmental impact statements must "substantially follow[ ]" NEPA guidelines); *see also* Massachusetts Executive Office of Energy and Environmental Affairs, *Greenhouse Gas Emissions Policy* (April 23, 2007), *available at* http://www.bdlaw.com/assets/attachments/2007-04-23_Massachusetts_Greenhouse_Gas_Emissions_Policy.pdf.

[87] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 552–56 (9th Cir. 2007) (an environmental impact statement under NEPA must consider the effect of the proposed decision on climate change). Where SEPAs are based on the language of NEPA, "[i]t is well settled that when a state borrows federal legislation [as Washington did with its SEPA] it also borrows the construction placed on such legislation by the federal courts." Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 510 P.2d 1140, 1146–47 (Wash. Ct. App. 1973). However, an analysis of the use of NEPA to combat climate change finds significant shortcomings with the statute in forcing action at the federal level. Kevin T. Haroff & Katherine Kirwan Moore, *Global Climate Change and the National Environmental Policy Act*, 42 U.S.F. L. REV. 155 (2007).

local and state concern where there is no inconsistent state regulation.[88] Although a general EIS requirement arguably fits that description, there might be objections to the use of an EIS requirement for climate change effects. The federal government offered an analogous argument in *Massachusetts v. EPA*,[89] when it asserted that the harm of climate change is international so that an individual state could not have standing to challenge the federal government's refusal to regulate greenhouse gases under the federal Clean Air Act.[90] The Supreme Court rejected this argument and concluded that Massachusetts had standing because it suffered the effects of climate change in the specific form of loss of some of its coastal lands.[91] Similarly, in response to a challenge to its use of home rule powers, a municipality could assert that climate change, by affecting us all, is both a global and a local matter, allowing local regulation in the absence of inconsistent state or federal mandates.[92] The authors of a fifty state survey of state home rule laws offer the following observation about the need to enhance home rule doctrine in the modern era: "Certainly, much effort has been put into helping officials and citizens alike 'think globally,' but once local plans are aligned with global [economic] changes, the local population must possess the capacity and discretion 'to act locally.'"[93]

At this point, everything is so new that it is hard to determine whether and when any particular initiative will have an effect. But climate change-based decisions that seemed unthinkable even a year ago are emerging in unexpected places. The creative use of a SEPA deserves serious consideration.

C. Possible Concerns

This leads to a question: What might be wrong with this picture? Even in California, this use of a SEPA is new. But it is fair to ask

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[88] MANDELKER, *supra* note 49, § 4.24.

[89] 549 U.S. 497 (2007).

[90] *Id.* at 1453.

[91] *Id.* at 1456. Although the Court also suggested that states deserve special treatment in standing analysis as sovereign entities, ultimately the injury that the Court found sufficient to confer standing was the harm to the state's interests as a landowner, not as a sovereign. *Id.* ("Because the Commonwealth 'owns a substantial portion of the state's coastal property,' . . . it has alleged a particularized injury in its capacity as a landowner.").

[92] The Supreme Court also rejected the federal government's further suggestion (again in connection with Massachusetts' standing) that the harm of climate change is not redressable by regulating new automobiles under the Clean Air Act. The Court noted that it is illogical to reject an incremental step, simply because it is incremental. *Id.* at 1457 "Agencies, like legislatures, do not generally resolve massive problems in one fell swoop." *Id.* at 1442 (syllabus prepared by the Reporter of Decisions).

[93] KRANE ET AL., *supra* note 23, at 6.

whether SEPAs have significant drawbacks and whether they have been effective. After all, many SEPAs were adopted in the 1970s and have had time to mature in their use.

One set of objections to SEPAs focuses on their cost, the delays they impose, and the suspicion that they are being used for the wrong reason—as a weapon of NIMBYism.[94] With regard to cost and delay, it is undeniable that it costs more to do an environmental impact analysis than not to do one, and it takes a while for the evaluation process to be completed.[95] This by itself is not an inherently persuasive objection; it simply suggests that the costs and delays are not worth the environmental payoff. Is the environmental payoff worthwhile? Here there seems to be no ready source of data to tell us whether SEPA requirements have had a discernible positive environmental effect. Anecdotal evidence, discussed below, offers room for doubt. But one might ask whether this is a relevant question in the present context, in which we assume that a sense of urgency will induce states and municipalities to take the SEPA process seriously and require meaningful mitigation.

Another cost objection concerns the inefficiency of a project-by-project approach. Do we really need a separate analysis every time a new office tower is proposed? But the individual impact analysis was a feature of NEPA from its inception, based on the recognition that each project poses its own issues. Moreover, the burden is likely to be less than meets the eye. Experienced environmental consultants prepare such reports daily. Today we benefit from the experience and expertise developed in California, where environmental impact statements focusing on climate change are being conducted across the state. It might be beneficial to have some form of standard to guide municipalities in using the information in the EIS—once greenhouse gas emissions are quantified, for example, perhaps a standard of "best feasible alternatives" or "best feasible mitigation measures" should guide localities, much as similar verbal standards have been adopted by Congress and implemented by EPA in environmental laws such as the Clean Air Act and the Clean Water Act.[96] Today, in the absence of such guidance, SEPA-required alternatives and mitigation

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[94] "Not in My Backyard," or NIMBY, objections are raised by residents who complain that a project will have undesirable local effects. *See* Plunkett, *supra* note 22, at 247–48.

[95] This is why states with SEPAs work to streamline their application and coordinate it with other governmental approvals. GROWING SMART, *supra* note 11, ch. 12.

[96] The Clean Water Act includes "best practicable control technology" and "best available technology economically achievable." 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A) (2004). The Clean Air Act offers "best system . . . adequately demonstrated" and "maximum degree of reduction . . . achievable," among other verbal standards. 42 U.S.C. §§ 7411(a)(1), 7412(d)(2) (2004).

measures tend to turn on the word "feasible"—that is, feasible alternatives and feasible mitigation measures are to be adopted.[97] In our current regulatory environment, this might be the best standard we can hope for in the short term.

What about the delays inherent in the SEPA process? Today any large development that requires regulatory approvals already is subject to delay—defined as any extra period of time, beyond that which the developer considers optimal. The preparation of an EIS might include an additional delay, but that is in part its purpose. The EIS requirement is intended to allow time for informed reflection before a government agency makes an environmentally-significant decision. The Supreme Court has emphasized the importance of careful decision-making in settings where the decision could have irreversible environmental effects. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[98] the Court rejected a challenge to moratoria totaling a period of thirty-two months on development around Lake Tahoe. The plaintiffs argued that the governmentally-imposed moratoria, by preventing development, were per se takings of private property in violation of the Fifth Amendment.[99] The Supreme Court rejected this argument, and in so doing emphasized the importance of allowing the regional planning authority the time to design a plan to protect Lake Tahoe from harm.[100] To the extent that an EIS imposes an unavoidable delay in government decision-making, it is worth it to allow the government time to evaluate the environmental effects of its decision and work with the developer to reduce those effects.

As for the charge of NIMBYism, it is possible that a project opponent might use the EIS as a weapon, regardless of whether or not the opponent really is concerned about the environment. In the annals of citizen battles against big box stores, environmental impact studies required by state law have offered a way to slow down, to increase the cost of, and sometimes thereby to prevent the construction of a store.[101] There are at least two reported instances in which the imposition of an environmental assessment requirement was enough to persuade a large retail store to locate elsewhere, because the cost involved was too great.[102] This is indeed NIMBYism at work. But at

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[97] *E.g.*, CAL. PUB. RES. CODE § 21002 (West 2007).

[98] 535 U.S. 302 (2002).

[99] *Id.* at 313–14.

[100] *Id.* at 337–42.

[101] *See, e.g.*, Bakersfield Citizens for Local Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 212, 231 (Cal. Ct. App. 2004) (noting that plaintiffs have objections to Wal-Mart unrelated to the environmental process but that these are irrelevant to the court's decision).

[102] Sprawl-Busters: Newsflash Database, Mill Creek, WA. Wal-Mart Cancels One

another level, this is no different than any other policy dispute, in which opponents use the legal mechanisms at their disposal. If there really are environmental concerns, the law serves its function by requiring that they be considered; from an environmental perspective, it does not matter that the opponent might instead be motivated by the thought that workers at a big box store, for example, will not be paid a living wage. Indeed, turning the charge around, the SEPA offers value as a way for citizen activists to participate in the decision-making process.

Another drawback with SEPAs is that they are not always used to achieve their full potential. Sometimes the issue is one of drafting: the statute as written is not strong enough to achieve ambitious environmental goals.[103] Sometimes the problem appears to be a failure in implementation—caused, perhaps, by the undeniable fact that it takes time, effort, and money to prepare a reliable environmental impact statement in a setting where the actors have no incentive to be thorough.[104] If a municipality wants a particular project to be built for economic reasons, it is unlikely to encourage preparation of an aggressive environmental impact statement. Developers do not welcome the SEPA process, and local governments can be reluctant to hold their feet to the fire.[105] In New York, one land use practitioner concluded that New York's SEQRA was not particularly effective because its requirements typically were not rigorously applied: consultants who prepared environmental impact statements would gloss over environmental effects, the municipalities would not insist that the consultants do a better job, and the courts would defer to the municipalities' decisions.[106] The author called for better regulations and more intensive judicial

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Superstore, Delays Two More (Dec. 8, 2007), http://www.sprawl-busters.com/search.php?readstory=2919; Sprawl-Busters: Newsflash Database, Northridge, CA. Wal-Mart Folds Its Tent and Leaves (Jan. 17, 2006), http://www.sprawl-busters.com/search.php?readstory=2202. In the Mill Creek example, a Wal-Mart spokesman is on record as saying, "When we signed the ground lease . . . we didn't expect to do an environmental impact study . . . We didn't expect to have this long, protracted process . . . All of those processes added time to that project." Sprawl-Busters: Newsflash Database, Mill Creek, WA. Wal-Mart Cancels One Superstore, Delays Two More, *supra*.

[103] *See* Jeffrey B. Carmichael, Note, *The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute*, 70 IND. L.J. 613 (1995) (analyzing the Indiana statute and comparing it to those in California, Washington, and New York).

[104] Certainly the history of NEPA suggests that it takes aggressive citizen activity to ensure that an agency adheres to the statute's mission and fully complies with its mandate. *E.g.*, Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

[105] Ientilucci, *supra* note 42, at 103.

[106] Caffry, *supra* note 36, at 410–12.

scrutiny,[107] but one is left to suspect that the situation will not improve until municipalities take SEQRA compliance more seriously. New York probably is not alone.

This exploration of the potential ineffectiveness of the SEPA might suggest that it is unlikely to be a particularly useful tool in the fight against climate change. Here, however, perhaps one could indulge in some optimism. If one spends any time at all reading the materials prepared by cities immersed in the climate change action program, one must be impressed by the level of energy, urgency, and invention that the materials display. It will take an effort of will for all of us to come together to slow or reverse climate change; surely, one can hope, a city that is imbued with a sense of mission can summon the willpower vigorously to enforce its environmental impact statement requirements. (In this regard, the participation of citizen activists might offer an additional incentive.) It is therefore useful to close this section with a statement by a New York practitioner who, by his count, has worked on thousands of local projects requiring environmental review under New York's SEQRA:

> I have had the privilege of working for a municipal government that, from the inception of SEQRA, has recognized the importance of environmental considerations in decision-making and emphasized the responsibility for compliance with those regulations. Based on my experience administering SEQRA at the local level, I have found it to be a sober, practical and useful tool for comprehensive project review and public participation. Whether it is an adequate substitute or not, SEQRA is still the most useful mechanism available that comes close to accomplishing what comprehensive and regional planning are supposed to accomplish. It causes both decision-makers and applicants alike to look beyond the boundaries of individual development sites and to confront and consider the broader impacts of individual projects and the cumulative impacts of concurrent projects on entire neighborhoods, communities and in some cases regions.[108]

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[107] *Id.* at 418.

[108] Ientilucci, *supra* note 42, at 104 (citation omitted).

III. SEPAS AND CORPORATE RESPONSIBILITY

Finally, here is a further modest suggestion: an invigorated SEPA process can add an impetus towards the elusive goal of "corporate responsibility": the concept that businesses should focus on their role in society outside of their pursuit of their own economic gain, including adherence to certain labor, environmental, and ethical principles. Discussion of corporate responsibility can focus on corporate governance,[109] influence by investor organizations,[110] or ways in which the corporate lawyer can enhance corporate responsibility.[111] In addition, in the environmental arena in particular, there is widespread recognition that environmental corporate responsibility is prompted by the complex and comprehensive environmental regulatory milieu in which some companies operate. This phenomenon can be observed most clearly with the companies that are most visible and most heavily regulated: large publicly-traded corporations engaged in manufacturing. More recently, the upsurge in public attention to issues of energy conservation and climate change has led to an equivalent upsurge in the number of large publicly-traded corporations proclaiming their dedication to the concept of sustainability. The invigorated SEPA process can boost this effort by bringing its message to bear on a population of businesses that might not otherwise be heavily regulated and are not sufficiently high profile to see a publicity benefit in hopping on the green bandwagon.

Joseph Singer offers the observation that corporate responsibility does not happen in a vacuum; it is prompted by the legal setting in which companies operate.[112] His specific point concerns the overall beneficial effect of the reasonableness standard in the law of tort, property, and contract: a company cannot knowingly harm others—even if that action fully complies with applicable regulations—if its action is vulnerable to suit on the ground that the action is

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[109] *E.g.*, Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008); Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. LAW REV. 1067 (2008).

[110] *E.g.*, Dean Scott, *Coalition of Investors, Others Petition SEC to Scrutinize Corporate Climate Disclosures*, 38 BNA ENVT. REP. 2012 (2007); *see also* Ceres, Investors and Environmentalists For Sustainable Property, http://www.ceres.org/NetCommunity/page.aspx?pid=705 (last visited Apr. 18, 2008) (the website for Ceres, a coalition of investors and environmental organizations).

[111] *E.g.*, J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—it's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89 (2004); A.B.A., Reprint, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 54 MERCER L. REV. 789 (2003).

[112] Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031 (2008).

unreasonable. This general obligation to act reasonably by itself, he argues, prevents a company from being entirely self-regarding.[113]

A general standard of reasonableness, however salutary, does not necessarily dictate a choice among reasonable alternatives. In the environmental arena another factor can come into play: environmental regulation has changed the definition of "reasonable" behavior for many businesses. Over the years, environmental regulations have become increasingly complex and comprehensive. A single manufacturing facility may be subject to many different legal requirements, stemming from federal laws governing hazardous waste disposal,[114] liability for hazardous substances disposal,[115] discharges to surface waters,[116] harm to groundwater that might serve as a source of drinking water,[117] emissions to the air,[118] manufacture of new chemicals or use of imported substances not properly registered with the United States EPA,[119] failure adequately to report substances in use at the site,[120] and more. Each of these laws is enforceable in many different ways, including the possibility of injunctions, civil penalties and—perhaps most worrisome to corporate management—criminal fines and jail time for responsible individuals.[121]

Companies that fear environmental enforcement have a strong incentive to keep track of their environmental compliance. This can both enable them to comply—in itself a worthwhile objective—and enable them to benefit from the provisions of EPA's policy of encouraging self-policing, under which the Agency suggests it will offer enforcement mercy to those companies that have developed effective environmental management systems (and display other indicia of effective self-policing).[122] There are international guidelines

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[113] *Id.*

[114] Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (2000).

[115] Comprehensive Environmental Response, Compensation, & Liability Act, 42 U.S.C. §§ 9601–9675 (2000).

[116] Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000).

[117] Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j (2000).

[118] Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

[119] Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2000).

[120] Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050 (2000).

[121] *E.g.*, 15 U.S.C. § 2615 (2000) (Toxic Substances Control Act penalties); 33 U.S.C. § 1319 (2000) (Clean Water Act enforcement); 42 U.S.C. § 6928 (2000) (penalties regarding hazardous wastes violations); 42 U.S.C. § 7413 (2000) (enforcement of the federal air quality program).

[122] E.P.A. Final Policy Statement, Incentives for Self-Policing, 65 Fed. Reg. 19,618, 19,618 (Apr. 11, 2000); E.P.A., Position Statement on Environmental Management Systems (EMSs), 71 Fed. Reg. 5,664, 5,664 (Feb. 2, 2006).

for such systems, and many major corporations have established systems that comply with such standards.[123]

Many companies have found that in addition to saving them the cost of enforcement actions, environmental management systems offer further bottom-line benefits.[124] A comprehensive environmental management review affords an opportunity to find ways to reduce compliance costs, by changing processes to avoid generating hazardous wastes, for example, or by finding other ways to reduce materials use and recycle materials that otherwise the company would need to pay to discard. This can lead to reduced costs and a healthier environment for employees—itself also a potential source of reduced medical costs and liability exposure.

Along with these monetary benefits, environmental management systems offer opportunities for good publicity: the company with a strong environmental management system can portray itself as an environmentally responsible corporate citizen. In today's networked society, information travels quickly; a company can send its green message far and wide on the internet.[125] Both the Securities and Exchange Commission and socially-conscious investors are quite interested in a publicly-traded company's environmental compliance posture.[126] Corporate counsel are urged to exhort their clients to greater environmental responsibility in advance of regulation, in order to reduce litigation exposure, director and officer liability issues,

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[123] The International Organization for Standardization (ISO) is the world's largest developer of standards. ISO 14001 concerns "environmental management," including what a business organization does to "minimize harmful effects on the environment caused by its activities." Int'l Org. for Standardization [ISO], ISO 9000 and ISO 14000, http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000.htm (last visited Apr. 19, 2008); *see also* ISO, Business Benefits of ISO 14001, http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000/business_benefits_of_iso_14001.htm (last visited Apr. 19, 2008).

[124] *See* David Monsma & John Buckley, *Non-Financial Corporate Performance: the Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 162, 164–67 (2004).

[125] Consider this observation by Gary Guzy, a former general counsel of the United States Environmental Protection Agency:

> [T]here is an enormous amount of environmental information available to the public, and that information can be readily mustered and advocacy campaigns simply turned on nearly instantaneously. Companies are beginning to recognize that they must operate in a transparent way in this "networked economy," and the more progressive ones are embracing that, making key information available in carefully prepared corporate environmental and sustainability reports. Fifty percent of the world's largest companies, the Fortune 100, now prepare these kinds of reports.

Gary S. Guzy, *Reconciling Environmentalist and Industry Differences: the New Corporate Citizenship "Race to the Top"?*, 17 J. LAND USE & ENVTL. L. 409, 414 (2002).

[126] *See* Monsma & Buckley, *supra* note 124, at 167–70.

shareholder initiatives, or Securities and Exchange Commission inquiries.[127]

All of these advantages, however, are prompted by a single reality: environmental noncompliance is illegal. While it is good to be a good citizen, in the environmental arena it has taken the threat of regulation over the years to produce the current professed ethos of environmental stewardship.[128]

The current emphasis on green business similarly has an external impetus, this time cost rather than regulation, together with a belief that regulation will be coming soon so it is best to gear up for it. With regard to cost, the idea of sustainability includes the concept of doing more with less: achieving corporate goals while wasting fewer resources and spending less money on energy.[129] Thus, for example, the World Business Council for Sustainable Development is a group of Chief Executive Officers of more than one hundred international companies, including Alcoa, Boeing, Coca-Cola, and United Technologies Corporation.[130] The Council's case for sustainability is as follows:

> We define sustainable development as forms of progress that meet the needs of the present without compromising the ability of future generations to meet their needs. . . . The business case [for sustainable development] has a financial

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[127] *See* Healy & Tapick, *supra* note 111; *see also* Prue Taylor, *The Business of Climate Change: What's Ethics Got to Do With It?*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161 (2007).

[128] It has been noted that "corporations generally are still far away from implementing their pledge to the philosophy of sustainable development, especially when the effect of doing so on the bottom line looks uncertain." Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENVTL. L. REV. 707, 726 (2006). Further, in the general context of corporate responsibility, the author observes that enforcement threats are important:

> One major reason why regulatory initiatives have failed to mould the actions of corporations along expected lines is a lack of effective implementation and enforcement mechanisms. Most of the regulatory initiatives encourage corporations to be responsive and act like good, responsible corporate citizens. However, these regimes do not offer adequate incentives for corporations to be encouraged, nor do they provide any sanction for those corporations which are not encouraged to behave in a socially responsible manner.

Id. at 741 (citation omitted).

[129] This is the view developed in Michael Northop, *Leading by Example: Profitable Corporate Strategies and Successful Public Policies for Reducing Greenhouse Gas Emissions*, 14 WIDENER L.J. 21 (2004).

[130] World Business Council for Sustainable Development, About the WBCSD: Membership & Governance, www.wbcsd.org (last visited Apr. 19, 2008) (follow "About the WBCSD" hyperlink; then follow "Membership" hyperlink. View members by region by clicking on the map at the bottom of the page).

> bottom line. During the five years before August 2001 the Dow Jones Sustainability Index clearly outperformed the Dow Jones Global Index [by] 15.8% to 12.5%. The DJSI consists of the top 10 per cent of companies in 68 industry groups in 21 countries seen as leaders in sustainable development. However, our rationale is not based solely on short-term financial returns. Companies comprise, are led by, and serve people with vision and values. Companies that do not reflect their people's best vision and values in their actions will wither in the marketplace in the long-term. The business case is also an entrepreneurial position: it looks to the next point on the business curve—the point at which business can be more competitive by being more sustainability driven. WBCSD companies intend to be at that point first and to stake it out as their value opportunity.[131]

Corporations also are becoming more aware of their carbon dioxide emissions, in anticipation of future federal regulation.[132] Companies that seek to reduce their carbon footprint are attempting to record their efforts, in order to gain carbon credits to use against future restrictions.[133]

Some of these efforts might stem from a desire to generate public good will, but no doubt there is also a goal of benefiting from that good will with improvements in the bottom line.[134] Wal-Mart, for example, has endured some rough publicity over the past several years, focusing on its employment practices and effects on smaller

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[131] Guzy, *supra* note 125, at 415 (citation omitted).

[132] *E.g.*, Leora Falk, *Reporting Carbon Disclosure Project Expands Study to Include Suppliers for Major Companies*, 39 BNA ENVT. REP. 205 (2008).

[133] *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: the Case of Climate Change*, 155 U. PA. L. REV. 1499, 1545 (2007); Robert L. Graham et al., *Cap and Trade: Early Action 'Bonuses' under the Lieberman-Warner Bill*, 39 BNA ENVT. REP. 286 (2008); *see also* United States Climate Action Partnership, www.us-cap.org (last visited Apr. 19, 2008) (list of corporations working with environmental groups for federal climate change legislation).

[134] It has been observed that:

> even without regulatory pressure, market pressure exists to reduce emissions of greenhouse gasses. Recall the BP and GM advertising campaigns. These company targets these [sic] campaigns at consumers and, possibly to potential investors in BP and GM stock. These corporations believe that associating themselves and their products with sensitivity to greenhouse gas emissions will induce consumers to buy more of their products or more of their stock. The companies assume that consumers have a desire to be "greener" and to "do their part." This desire is real, and is fed by government inaction. As a result, the market meets this demand.

Mandelbaum, *supra* note 81, at 32 (citations omitted); *see also* Monsma & Buckley, supra note 124, at 180–81.

retail stores. Sufficient bad publicity can have the effect of reducing sales in the competitive retail market. Perhaps not coincidentally, then, Wal-Mart recently has courted publicity for its green innovations in its segment of the market.[135] In addition, in the post-9/11 era, there might be an element of patriotism in the mix: companies might see a public relations advantage to efforts that reduce reliance on imported oil.

Where does the SEPA fit in? Wal-Mart is a high profile company that already sees the benefits of thinking green. Nobody needs to tell large chemical or automobile companies that there might be benefits in environmental responsibility. (Although even among these high-profile corporate giants there is room to suspect that the reality falls short of the publicity.[136]) The SEPA requirement brings the climate change message home—supported with regulatory power—to an array of smaller enterprises or non-manufacturing businesses for whom this way of thinking might be unfamiliar. These include retail stores, chain restaurants, shopping malls, and office buildings. A municipality can impose a green building code without a SEPA mandate, it is true. But a municipality can foster a broader range of overall climate consciousness in a company by requiring an EIS to accompany new construction.

Corporate responsibility evolves most dramatically where there is an external force that prompts it. The SEPA can add to that external force.

CONCLUSION

We will not save the world by requiring an EIS for a new shopping mall. However, there is no single effort we can take that will save the world, nor does it make sense to do nothing as we sit and wait for technological breakthroughs, miracles of international cooperation, or a comprehensive federal program. While the big headlines and the proposed federal mandates focus on power companies, the auto

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[135] *See* Wal-Mart Stores, Inc., Sustainability, http://www.walmartstores.com/FactsNews/FeaturedTopics/?id=6 (last visited Apr. 19, 2008) (marketing website describing Wal-Mart's sustainability initiatives); *e.g.*, Michael Barbaro, *Wal-mart Sets Agenda of Change: Chief Lays Out Environmental, Health and Ethical Goals*, N.Y. TIMES, Jan. 24, 2008, at C3; Ann Monroe, *Wal-Mart: Jolly 'Green' Giant?*, MSN MONEY, Jan. 18, 2008, http://articles.moneycentral.msn.com/Investing/StockInvestingTrading/Wal-MartJollyGreenGiant.aspx. Of course, the culture of consumerism fostered by Wal-Mart and indeed by all corporations that sell consumer products is inherently inconsistent with true sustainability. Deva, *supra* note 128, at 719.

[136] Deva, *supra* note 128, at 725–26; *see also* Sprawl-Busters: Newsflash Database, Washington, D.C. Environmental Group Charges Wal-Mart With "Forest Crimes" (Dec. 13, 2007), http://www.sprawl-busters.com/search.php?readstory=2927.

industry, and other prominent targets, local governments are busy adding their own contributions to the grassroots efforts that can help to slow the process of climate change. The environmental impact statement offers a way for localities and their residents to evaluate the effects of new development on climate change, and seek alternatives to mitigate its effect.