CHAPTER 12

INTEGRATING STATE ENVIRONMENTAL POLICY ACTS WITH LOCAL PLANNING

This Chapter discusses ways of evaluating the environmental effects of local comprehensive planning and the problems of integrating state environmental policy acts, where they exist, into local planning. It provides three statutory alternatives. Alternative 1 requires the local planning agency to prepare a written environmental evaluation of several elements of its local comprehensive plan in order to understand the significant effects of the plan on the natural environment. In contrast to Alternatives 2 and 3, which follow, this Alternative is not binding on the local government in a regulatory sense and does not involve a state environmental policy act that applies to specific projects or land-use actions, such as single-tract rezonings or conditional use permits. Alternative 2 presumes the existence of a state environmental policy act. The purpose of this alternative is to authorize the preparation of an environmental impact statement on a local comprehensive plan so that public agencies can avoid or carry out a more limited environmental review of land-use approvals that are based on that plan. By contrast to Alternative 1, this Alternative is more complex in that it goes beyond being a mere environmental evaluation with no regulatory implications. Finally, Alternative 3 integrates the consideration of environmental impacts under the state environmental policy act with the review and approval of land-use actions by a public agency. The focus here is on the decision to rezone or on the approval decision, and not on the project itself. An application for approval may, of course, include site-specific plans, as in the case of a special exception or a planned unit development. In these cases, the public agency will necessarily review the site-specific project plans as well as the approval request.

CHAPTER 12

Chapter Outline

12-101 (Three Alternatives)

Alternative 1: **Evaluation of Environmental Effects of the Land Use, Housing, Transportation, and Community Facilities Elements of a Comprehensive Plan**

Alternative 2: **Environmental Impact Statement on a Comprehensive Plan**

Alternative 3: **Environmental Requirements in Local Comprehensive Plan and Land Development Regulations**

Table 12-1 Approaches to Integrating Land-Use Planning and Regulation with Environmental Reviews

Appendix A – Articles Suggesting Improvements for SEPAs

Appendix B – Overview of SEPAs

Cross-References for Sections in Chapter 12

Section No.	Cross-Reference to Section No.
12-101	
Alt. 1	4-103, 6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 7-401, 8-102
Alt. 2	6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 8-102
Alt. 3	6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 8-102

CHAPTER 12

MELDING STATE ENVIRONMENTAL POLICY ACTS WITH LOCAL PLANNING

State environmental policy acts (SEPAs) bring a new dimension to land-use planning and regulation.[1] Plans establish policies that provide the justification for approving developments under land-use regulations. Several states also have SEPAs that require an environmental review of certain types of proposed developments. The SEPA review considers all of the significant impacts that a development can potentially have on the environment, including in some states scenic, aesthetic, and historic resources.[2] The land-use agency responsible for development approvals usually conducts the SEPA review, although it may delegate this responsibility to applicants.[3]

Problems of duplication occur when developments that require a SEPA review must also obtain approval under local land-use regulations. Duplication occurs because SEPA reviews may assess those environmental impacts previously considered in either a comprehensive plan or already addressed by development regulations. Developers may incur significant additional compliance costs, and delays may occur because agencies must consider the same environmental impacts more than once to satisfy different statutory requirements.

Conflict also arises between SEPA environmental reviews and comprehensive planning because they have different goals. One commentator stated, in a review of the California Environmental Quality Act, that it

> conflicts with a major component of comprehensive planning: the long-range perspective. . . . Because CEQA emphasizes project-by-project analysis, it misses the big picture. Despite legislative and administrative mandates, CEQA in practice has not effectively addressed either cumulative or growth-inducing effects.[4]

Conflict could be avoided, as a governor's task force in Washington State noted, if comprehensive planning under its Growth Management Act (GMA) could be integrated with SEPA environmental reviews:

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[1]The commentary and model statutes in this Chapter were written by Daniel R. Mandelker, Stamper Professor of Law at Washington University in St. Louis. The introductory commentary originally appeared in a slightly different form as "Melding State Environmental Policy Acts with Land-Use Planning and Regulations," *Land Use Law & Zoning Digest* 49, no. 3 (March 1997): 3-11.

[2]N.Y. Envtl. Conserv. Law § 8-0105(6)(2000); Minn. Stat. Ann. §§116B.02-04 and 116D.02-02 (2000).

[3]A court can reject an impact statement prepared by an applicant after an environmental review if it believes the applicant was biased in its analysis. For federal cases see Danel R. Mandelker, *NEPA Law and Litigation*, 2d ed.(Deerfield, Ill.: Clark Boardman Callaghan, 1993), §10.15 hereinafter cited as *NEPA Law*.

[4]Robert Olshansky, "The California Environmental Quality Act and Local Planning," *Journal of the American Planning Association* 62, No. 3 (1996): 313, 317.

> Both the GMA and SEPA seek health, sustainable communities and productive harmony between people and nature. . . . One of the promises of the GMA is to improve the planning process by allowing the cumulative impacts of development to be considered earlier in the process. In order for this promise to be met, local governments must conduct appropriate environmental reviews at the planning stage.[5]

This Chapter describes SEPA legislation and its environmental review requirements for those developments that must also comply with local land-use regulations based on comprehensive plans. It then proposes measures for integrating environmental review with land-use planning and regulation, drawing on experience from states that have legislated solutions to this problem.

States adopted SEPAs, in part, because planning failed to consider the environmental effects of planning policies, so proposals for integrating planning and environmental review must reconsider the role of planning in evaluating environmental impacts. The underlying questions are how to include environmental issues in decision making on land-use proposals, whether land use planning should include attention to environmental factors, and whether the independent environmental review process required by SEPAs is necessary.

In states with SEPAs that apply to land-use decisions, integration with land-use planning and regulation is crucial. Three options for integration are discussed in this paper. One requires an analysis of alternatives in a comprehensive plan. This option does not necessarily require changes in development regulations or in environmental mitigation requirements, but simply a conceptual analysis of alternatives in plans with no commitment to implementation. This is a limited approach, which deserves consideration even in a state that does not have a SEPA. It is intended to add an environmental element to comprehensive plans, but does not resolve problems of integration with SEPA reviews in states where SEPAs exist.

A second option would have a SEPA or SEPA regulations require a program environmental statement on comprehensive plans. This statement would review the environmental effects of the plan's land-use policies and would provide a basis for the environmental review of projects at the development approval stage. Only impacts not addressed by the program statement would be covered by a separate environmental review.

A third option would substitute environmental policies in a comprehensive plan and requirements in development regulations for SEPA review when a project receives development approval. An independent SEPA review of development projects is not required. A state adopting this option could take an additional step and conclude its SEPA should not even be applied to land use regulations and their implementation.

[5] *Final Report of the Governor's Task Force on Regulatory Reform* (Olympia, Wash.: Washington State Office of Financial Management, Dec. 20, 1994), 36, 37. See also Appendix A to this Chapter listing articles criticizing SEPAs and offering some suggestions for improvements.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) is the prototype for the state environmental policy acts.[6] Since the state acts transfer NEPA's environmental review requirements to the state level, a discussion of NEPA is essential to an understanding of the state counterparts. Congress adopted NEPA in 1970 in order to require an environmental review of major "actions" undertaken, funded, or permitted by federal agencies[7] because these actions often create a risk of environmental harm. Congress intended NEPA to correct this problem by requiring federal agencies to conduct an environmental review of their major federal actions that create "significant" environmental impacts. "Action" is a broad term that covers everything from development projects to agency regulations.

Regulations adopted by the Council on Environmental Quality (CEQ), as supplemented by regulations adopted by federal agencies, define how agencies should carry out this responsibility.[8] Under NEPA practice, an agency that proposes a major federal action must first decide whether it is "categorically" excluded so that the statute does not even apply. If NEPA does apply, the agency then prepares an environmental assessment to determine whether the action's environmental impacts are significant. If the impacts are significant, the agency must then prepare a detailed environmental impact statement.

Agencies usually prepare environmental impact statements for individual actions as agencies review them, one at a time, to determine their environmental significance. This kind of environmental review may be inadequate, however, because an environmental review of individual actions may not adequately consider the collective, cumulative impact of a group of actions on environmental resources. Applications before a federal agency for number of logging permits in a national forest are one example.

To deal with this problem, court decisions and CEQ regulations authorize a document known as a "program impact statement" or "program statement" that agencies prepare on related projects that require collective review.[9] In the example above, the federal agency may decide to prepare a program statement that considers all the logging permit applications and the environmental impacts they collectively create.[10] Agencies also prepare program statements on agency plans. A forest management plan is an example. The program statement would consider the environmental impacts of all of the projects included in the plan, such as road building and logging projects.

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[6]See 42 U.S.C. §§4321, 4331-4335, 4341-4347.

[7]NEPA reaches permits for development in wetlands under § 404 of the Clean Water Act, 33 U.S.C. § 1344. Agencies must integrate permit review under this Act with environmental review under NEPA. See *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

[8]*See* 40 C.F.R. Pt. 1500.

[9] See *NEPA Law* §9.03.

[10]Program statements are an administrative requirement under NEPA and may be mandatory. See *NEPA Law* §9.02.

Program statements can prevent redundant environmental review when agencies conduct a NEPA review of individual projects. A federal agency can rely on a program statement's environmental review of a forest management plan, for instance, to avoid a repetitious environmental review of a project covered by the plan. If the project has site-specific environmental impacts not covered in the program statement, however, the agency must carry out an environmental review of these impacts. Federal practice in the use of program statements provides a model for avoiding redundant environmental review when a SEPA applies to projects covered by plans and development regulations. Program statements on comprehensive plans can satisfy SEPA environmental review requirements for projects covered by the plan, if the program statement for the plan adequately considers their environmental impacts.

STATE ENVIRONMENTAL POLICY ACTS

In the decade after NEPA's adoption, several states enacted similar legislation that also requires an environmental review of projects with significant environmental impacts. Fifteen states, the District of Columbia, and the Commonwealth of Puerto Rico have environmental review legislation similar to NEPA. (See Appendix B.) Most of this legislation closely follows NEPA and requires a preliminary environmental assessment followed by an environmental impact statement on a covered project if this is necessary. Some SEPA states, especially California and Washington, have gone beyond NEPA to adopt highly detailed SEPA legislation that specifies requirements in the environmental review process.

Although NEPA applies to projects that federal agencies approve and projects they undertake, most SEPAs apply only to the environmental impacts of state and local government agency projects. Imprecise drafting in some states, however, has opened the way for unexpected court decisions that applied a SEPA to private-sector development covered by planning and development regulation. A 1974 California Supreme Court decision is an example.[11] Several states, notably Hawaii, Massachusetts, Minnesota, New York, and Washington have since applied their SEPAs, by statute or court decision, to private development covered by planning and development regulation. In these states, a project that requires development under land-use regulations must also receive an environmental review under the SEPA.[12]

PROBLEMS IN APPLYING SEPAS TO LAND-USE PLANNING AND REGULATION

Differences in scope, procedures, and legal effect are the major issues in integrating planning and development regulation with environmental reviews under a SEPA. Environmental reviews are open-ended. Most SEPAs require agencies to review the “significant” environmental effects of

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[11] *Friends of Mammoth* v. *Board of Supervisors of Mono County*, 502 P.2d 1049 (Cal. 1974). The court held that CEQA applied to a conditional use permit for a development. At the time CEQA applied only to projects an agency intended to “carry out” and did not define “project.” The court held the term “project” applied to projects public agencies approve as well as projects they carry out directly.

[12] *See NEPA Law* §12.05[1].

actions they propose. Some SEPAs define this term, but an environmental review can cover *any* environmental impact of a development project, even though plans and development regulations also consider the impact. Neither is a SEPA environmental review prohibited because another statutory program covers the same environmental impact of a proposed development. An environmental review must cover air pollution, for example, although air-quality legislation enacts air pollution standards.

Some states in which a SEPA applies to private development projects have legislation mandating local comprehensive plans and the consistency of development regulations with adopted plans, such as California and Washington. In these states, duplication between land-use planning and environmental review occurs because the planning legislation gives the plan a binding effect on development regulation. Land-use agencies must apply planning policies when they consider projects for development approval. However, since SEPA legislation does not make planning policies binding in an environmental review of a project, an agency can reconsider these policies when it carries out its environmental review of a project.

The SEPAs, following NEPA's lead, have also enlarged the review of development projects to consider problems that comprehensive planning often omits. The two most important additions are requirements that agencies consider the cumulative impacts of a development project and alternatives for the project. Legislation may therefore have to expand the scope of planning if plans are to provide effective substitutes for SEPA reviews.

Comprehensive planning is a decision-making process that produces land-use policies to guide future development in the community. Although it is not usually done, plans can consider alternatives to the land-use policies they propose. They cannot consider alternatives to projects likely to carry out the plan because plans do not usually include specific development proposals. For example, a plan can propose a range of densities and building types for residential development and can include a discussion of rejected alternatives, such as lower-density development options. However, the plan does not usually include site-specific development proposals that will carry out these planning policies, such as cluster development or major retail centers.

Plans can also consider the cumulative impact of planning policies on environmental resources, although this kind of analysis also is not typical in planning documents. One way a plan can consider cumulative environmental impacts is to include policies that specify limits on development in environmentally vulnerable areas. These limits then serve as a constraint on the amount of development that can occur in these areas and will prevent development that might harm the environment. Comprehensive plans can include this type of analysis, which is often known as "carrying capacity analysis."

There also are differences in substantive effect between planning and development regulation and environmental review. These differences are critical in designing integration programs because the decision about where to locate an environmental review determines its legal effect when a project receives development approval. Although a SEPA environmental review is far ranging, it

is not substantive except possibly in a few states, such as California and Washington.[13] In other states, agencies need only disclose the environmental impacts of projects they review. They need not make substantive changes, and courts cannot compel agencies to make substantive changes when they review an environmental analysis of a project. Analysis and disclosure in SEPA reviews are always site specific and do not start with a baseline. If a project will have impacts on groundwater, for example, the analysis is open-ended and does not assume that any particular quality of groundwater is necessary. If there is any baseline at all in an environmental review, it is that any change in the physical environment is undesirable and requires environmental review.

Planning and development regulations are different. Comprehensive plans can include environmental land-use policies that development regulations implement through development approvals. The effect of the comprehensive plan on zoning and subdivision approvals varies. In most states, these approvals need not be consistent with a plan, although courts often require consistency if a plan does exist. As noted earlier, some states that have SEPAs, such as California and Washington,[14] require planning and consistency between zoning and the plan. A comprehensive plan has a substantive effect whenever a statute or a court decision requires consistency with a plan.

Requiring an environmental review in a comprehensive plan as a substitute for a SEPA review is effective only if the plan is binding when a development approval is necessary. Development regulations, however, are legally binding, and they may provide substitutes for SEPA reviews if they contain substantive requirements that adequately mitigate the environmental impacts of projects covered by a SEPA. Groundwater is an example. Development regulations can include controls that protect groundwater from contamination by new development. These regulations can eliminate the need for a SEPA review of the effects of a development has on groundwater contamination.

There are important differences in procedures between SEPA environmental reviews and development approvals that complicate efforts at integration. State legislation and local ordinances contain procedures for development approvals, such as rezonings. The purpose of development approval is to decide whether a land-use regulation authorizes a proposed use of land. Some jurisdictions require approval by the local legislative body following a recommendation by the plan commission. Statutes may also delegate the power to approve solely to the plan commission, as in subdivision approval. Development approvals often require consideration in two or more stages. Subdivisions, for example, receive a preliminary and then a final approval. A zoning amendment may require an initial recommendation by the plan commission and final approval by the legislative body. Statutes and ordinances usually require a public hearing at each stage of the approval process. Review is site-specific for some development approvals, such as conditional uses and site plan review, but a rezoning does not require a site specific review of a proposed development.

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[13]California legislation requires agencies to consider alternatives and mitigation measures before they approve a project. Washington legislation allows agencies to deny a proposed action based on policies incorporated into "formally designated" regulations, plans, or codes. *NEPA Law* §§12.08[2], 12.08[4].

[14]Daniel R. Mandelker, *Land Use Law,* 4th ed. (Charlottesville, Va.: Lexis Law Publishing, 1997), § 3.12; Rodney Cobb, "Mandatory Planning: An Overview," *PAS Memo* (Chicago: American Planning Association, Feb. 1994).

The purpose of SEPA procedures is to decide whether an environmental impact statement is necessary, and to ensure that an impact statement is adequate if an agency must prepare one. Although specifics and terminology vary, states have procedures similar to the federal procedure to determine whether an agency should prepare an environmental impact statement. As in the federal procedure, if a categorical exclusion does not apply, the agency then prepares an environmental assessment to decide whether it should prepare an environmental impact statement. In state practice, the agency adopts what is usually called a "negative declaration" if it decides that a full environmental review is not necessary. An important practice, enacted into a statute in California[15] and followed elsewhere, is the mitigated negative declaration. In this document, the agency describes measures that will adequately mitigate the environmental impacts of a project that the impact statement discloses. The mitigated negative declaration provides an opportunity for mitigation if the agency responsible for the environmental review can rely on mitigation measures contained in plans and development regulations.

If an agency does not adopt a negative declaration, it must conduct a full environmental review in an environmental impact statement. (California legislation calls this document an environmental impact report.) The impact statement must cover all the environmental impacts of a project, including its cumulative impact and alternatives, and agencies circulate it for comment by individuals, organizations, and other public agencies. An agency can approve an impact statement after it responds to comments if it believes that the statement satisfies statutory requirements. Judicial review is available to decide whether an impact statement is adequate. New information or a change in circumstances may require the preparation of a supplemental impact statement.

This comparison of land-use planning and regulation with environmental review under SEPAs demonstrates how duplication and conflict arise under these programs. A hypothetical will illustrate. Assume a county has adopted a comprehensive plan for an agricultural area that recommends low-density clustered residential development at a one-acre minimum in designated locations. This zoning ordinance presently zones this area for exclusive agricultural use. The plan does not include proposals for development projects.

A developer proposes a clustered residential development in this area that is consistent with the comprehensive plan. This proposal requires both rezoning and subdivision review. The county council must grant the rezoning, but the planning commission is responsible for subdivision review. These bodies are prepared to grant the rezoning and approve the subdivision, but there must be an environmental review of both actions under the SEPA before either approval may issue. The county is the lead agency for the environmental review.

Redundant environmental review is the first problem with this hypothetical. A comprehensive plan may have analyzed several issues, such as the impact of new growth and the adequacy of public services. These are issues that the environmental review will also consider. Some legislation authorizes subdivision review to consider environmental impacts. Because the issues are the same, it should not be necessary to consider them at several stages in the development approval process.

[15] *NEPA Law* §12.06[2], discussing Cal. Pub. Res. Code § 21064.5.

Note that the council should grant the zoning approval if consistency with the comprehensive plan is necessary. Agricultural impact issues considered in the plan should not require reexamination at the zoning stage, unless there are site-specific problems not addressed in the plan or the plan itself needs updating.

Multiple reviews should not be necessary for this project in the zoning, subdivision control, and SEPA processes. Multiple zoning and subdivision reviews are a standard problem in the administration of land-use regulations, except in jurisdictions that have unified development control ordinances. Integrating land-use controls with environmental review will not resolve this problem but will remove an additional layer of unnecessary review and provide a basis for integrating approvals required by development regulations.

RECOMMENDATIONS FOR INTEGRATION

(1) **Environmental Analysis of Alternatives in Plan.** One approach to integrating land use planning with environmental review is to require an analysis of alternatives included in a comprehensive plan. The planning agency would prepare an environmental analysis of conceptual alternatives to the development proposals in the plan, perhaps through some combination of matrix and narrative. This option would only require a statutory amendment authorizing planning agencies to make this type of analysis.[16]

This option provides a limited approach to integration and does not necessarily require changes in development regulations or the adoption of mitigation measures. It simply requires an analysis with no commitment to implementation, although an environmental analysis in a plan would be controlling in the zoning process in states where zoning must be consistent with a plan. SEPA environmental reviews would still be required, but SEPA regulations could authorize the use of environmental analysis done in plans in SEPA reviews.

States should also consider the analysis of environmental impacts in comprehensive plans as an alternative to SEPA reviews of development projects, or the enactment of a SEPA that applies to land-use planning and regulation. This option is especially appealing in states that require comprehensive plans and that require zoning to be consistent with plans. In these states, land use agencies can use the consistency determination to apply the environmental analysis in the plan to individual projects.

There are some differences, however, between environmental review based on a plan and environmental review based on a SEPA. One is that a development project will not require environmental review based on a plan if the zoning ordinance allows it as of right. Mandatory site plan or some other discretionary review is necessary in these cases. Another difference is that environmental analysis occurs at the planning rather than the development approval stage. The purpose of project review is then to determine consistency with the plan. Project-based review for

[16] For example, the regional planning statute recommended by the *Legislative Guidebook* authorizes regional plans to contain "a statement of the economic, demographic and related assumptions used and alternative assumptions considered and rejected in the preparation of the regional plan." *Guidebook*, 6-41. Authority to consider environmental assumptions could be added to this list.

environmental effects not considered in the plan is not available unless specifically authorized by the statute.

This discussion suggests that using the comprehensive plan to do environmental analysis requires more than minimal attention to environmental impacts. Some planning laws already authorize the inclusion of environmental elements,[17] and statutes must authorize even more comprehensive environmental analysis to make environmental review in the comprehensive plan complete.

(2) **Program Statement Required by a SEPA.** Under this option, agencies prepare program statements on comprehensive plans and projects are exempt from repetitious SEPA review unless site-specific environmental impacts are present that the plan does not cover. The reason for shifting environmental review to the comprehensive plan is that environmental review at the planning stage can avoid repetitious environmental review during development approval of environmental impacts covered by the plan. One major legislative issue in authorizing program statements on comprehensive plans is whether to specify the environmental analysis the program statement must contain. Another legislative issue is whether the statute should state when significant impacts created by a project will require an additional site-specific impact statement.

Table 12-1: Approaches to Integrating Land-Use Planning and Regulation with Environmental Reviews

Approach	*What It Does*
Environmental analysis of alternatives considered in plan	Review of analysis in plan with no commitment to implementation
Program statement required by SEPA or SEPA regulations	SEPA review of projects only for impacts not covered by program statement
Environmental requirements in plans or regulations as substitute for SEPA review when development approval	No SEPA review of projects when environmental impacts adequately covered by plans and regulations

The New York statute that authorizes program statements for comprehensive plans does not specify the environmental analysis that the plan must contain.[18] Under this statute, the extent to which a plan's program statement covers later projects depends on how much environmental analysis

[17] E.g., Cal. Gov't Code §65302(d) ("conservation element for the conservation, development, and utilization of natural resources"); Fla. Stat. Ann. §163.3177(6)(d) (conservation element).

[18] N.Y. General City Law §28-A: "A city comprehensive plan may be designed to also serve as, or be accompanied by, a generic environmental impact statement pursuant to the state environmental quality review act statute and regulations." Note that the plan can be "designed" to serve as the program impact statement. There is similar legislation for towns and villages.

is contained in the program statement.[19] The statute allows a community to decide where environmental review should occur. A community can locate that review either at the plan or the development approval stage, depending on how much environmental analysis is in the program statement on the plan.

An alternative is to provide more statutory direction for program statements on comprehensive plans through statutes that indicate when they will preempt site-specific environmental review. California has adopted several statutes that illustrate this approach.[20] They specify what the program statement must contain and describe when additional analysis is necessary provide guidance that can eliminate redundant environmental reviews when projects receive development approval.

A statutory model based on the California legislation could provide that the program statement must examine the cumulative, growth-inducing, and significant environmental impacts of a plan's development policies and must also examine alternatives to these policies.[21] The program statement also could examine the intensity and location of development types, such as multi-family housing, and the availability of adequate public services.

At the development approval stage, the agency responsible for environmental review under the SEPA would prepare an initial study. It would determine whether the development has any additional significant effects on the environment not covered in the plan's program statement. SEPA review of individual developments is unnecessary if there are no additional significant environmental effects and if no additional mitigation measures or alternatives are necessary. If an agency cannot make this finding, it must show either that measures are available to mitigate additional significant environmental effects or prepare a comprehensive or "focused" environmental impact statement. A focused impact statement need consider only those significant environmental effects that the program statement did not consider.

For example, a program impact statement on a comprehensive plan would analyze the impact on traffic of the population growth and development proposed in the plan. A "focused"

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[19]"No further compliance with such law is required for subsequent site specific actions that are in conformance with the conditions and thresholds established for such actions in the generic environmental impact statement and its findings." Id.

[20]The text that follows outlines, with some modifications, statutory requirements for a Master Environmental Impact Report. Cal. Pub. Res. Code §§21156-21158.5. California also authorizes program statements on comprehensive plans in a different section. Id., §21083.3. The statute, generally, limits analysis of projects covered by the plan to "effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report." Id., §21083.3(b). Rezonings consistent with the plan are exempt from environmental review under the SEPA. Id., §21083.3(e). For discussion of these and other statutory provisions and regulations that attempt to avoid redundant environmental reviews see M. Remy, T. Thomas, J. Moose & W. Manley, *Guide to the California Environmental Quality Act (CEQA)* (Point Arena, Ca.: Solano Press, 9th ed. 1996), ch. X, hereinafter cited as *Guide*.

[21]The California statute also requires discussion of anticipated subsequent projects in the plan, but this condition requires the inclusion of too much detail. See *Guide* at 318-319.

environmental impact statement would analyze the traffic impacts of a development at its site and propose mitigation measures to remedy any negative impacts.[22]

Washington has a similar procedure. The statute does not require the preparation of an impact statement for "planned actions." A planned action must be a project that implements and is consistent with the plan and located in an urban growth area.[23] A program statement on a comprehensive plan must "adequately address" the "significant impacts" of a planned action to make it exempt from a SEPA review.

For example, a subarea plan for a city could discuss assumptions concerning future land uses, thresholds for uses and environmental impacts and mitigation measures the city will adopt to mitigate these impacts. Environmental thresholds would apply to a number of impacts, such as traffic, for which it could state a threshold in terms of maximum peak hour traffic trips. Any development consistent with the land use assumptions in the plan that either does not exceed the environmental thresholds, or whose environmental impacts are mitigated by adopted mitigation measures, would not require an additional SEPA review.[24]

(3) **Environmental Requirements in Comprehensive Plan and Development Regulations.** An alternate method of integration does not rely on a program statement prepared on a comprehensive plan. Rather, this method relies on environmental requirements contained in a comprehensive plan and development regulations as a substitute for SEPA environmental review when a project receives development approval. Under this approach to integration, the statute authorizing the preparation of comprehensive plans must be inclusive enough to authorize planning for environmental problems considered in environmental reviews, such as project alternatives and cumulative impacts.

This approach to mitigation must also authorize the inclusion of mitigation measures in plans and development regulations. Mitigation of significant impacts is an important factor in a SEPA review. An agency can attach mitigating conditions when it decides, after an environmental assessment, that an environmental impact statement is unnecessary. Agencies may also include mitigating conditions in environmental impact statements. Plans and development regulations can contain policies and requirements that mitigate environmental impacts. An agency can rely on these mitigation policies and requirements to avoid repetitious environmental review under a SEPA when a project receives development approval.

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[22] See County of Santa Barbara Planning & Development, *Orcutt Community Plan Update, Proposed Final Environmental Impact Report* (Santa Barbara, Ca.: The Department, Dec. 1995). In addition to analyzing the environmental impacts of the plan, the impact report also analyzes the environmental impacts of 45 "key sites" in the planning area on which development is expected to occur. This more detailed environmental analysis of key sites lessens further the need for focused impact reports when development on these sites is considered.

[23] Wash. Rev. Code §43.21C.031. This provision is in the SEPA. A planned action is still subject to "environmental review and mitigation." Id., §43.21C.031(1).

[24] See City of Everett, Wash. Planning & Community Development, *SW Everett/Paine Field Subarea Plan and EIS* (Everett, Wash.: The Department, Dec. 1996).

For example, assume a site would have erosion and runoff problems when developed. If the development regulations contain runoff and erosion controls, an agency could rely on these as mitigation measures and avoid a repetitious environmental review of these environmental impacts.

To carry out this approach to integration, the statute should define the environmental analysis required in a comprehensive plan and development regulations as an alternative to SEPA review. The Washington statute handles this problem by stating that plans and regulations must "adequately address" environmental impacts. They are adequately addressed if plans and regulations identify specific environmental impacts and show they are avoided or mitigated. In addition, "[t]he legislative body of the county, city, or town [must designate] as acceptable certain levels of service, land use designations, development standards, or other land use planning required or allowed by [the planning] chapter."[25] The Washington statute does not require consideration of alternatives and the mitigation of environmental impacts, although adding this requirement is desirable.[26]

If a plan and regulations "adequately address" environmental impacts, an agency need not conduct a repetitious environmental review under a SEPA when it considers a development for approval.[27] The effect on a SEPA environmental review is the same as when an agency prepares a program statement on a plan. The only difference is that planning and development regulations provide the basis for satisfying environmental review requirements. Note that development regulations can also include substantively binding environmental requirements, which plans covered by a program statement do not include.

An important question that arises when plans and regulations include environmental requirements is whether any role remains for environmental review under a SEPA. Under the Washington statute, the answer to this question depends on the adequacy of the environmental analysis in plans and regulations. A hypothetical will illustrate. Assume that a plan shows residential development in clusters on one-acre lots in a subarea covered by the plan. If the plan adequately addresses density levels and the other elements required by the Washington statute, additional analysis of these elements is not necessary at the project stage. Site-specific impacts not covered by the plan, such as impacts on groundwater supply, require analysis in the environmental review unless development regulations include adequate measures to prevent groundwater pollution.

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[25] Wash. Rev. Code § §43.21C.240(4)(b). For discussion of the Washington legislation see Richard Settle, *The Washington State Environmental Policy Act*: *A Legal and Policy Analysis* (Seattle, Wash.: Butterworth, 1986, and Supp. 1995) 501-544.

[26] A more flexible statutory approach would not specify the environmental content of plans and development regulations. Legislation could simply authorize a plan and development regulations to consider the "significant environmental impacts" of development policies without detailing what plans and regulations must contain.

[27] Wash. Rev. Code § 43.21C.240(1). A municipality reviewing a project under the SEPA "may determine that the requirements for environmental analysis, protection, and mitigation measures in the county, city, or town's development regulations and comprehensive plans ..., and in other applicable local, state, or federal laws and rules provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply." See also the provisions in Wash. Rev. Code § 36.70B.030(4).

An important effect of shifting environmental review to plans and regulations is to convert environmental disclosure under a SEPA to a substantive review. This change may provide more, not less, environmental protection but will not remedy environmental impacts not covered in the plan or regulations if the SEPA review cannot require substantive changes in the project. Disclosure of environmental impacts in an environmental review may be enough, however, if plans and regulations cover major environmental impacts and if the agency requires mitigation as a condition to its approval of an impact statement.

PROBLEMS IN INTEGRATING REVIEWS

Integrating planning and development regulation with environmental review can create controversy because the participants in the environmental review process have different views on whether integration is a good idea and what it should accomplish. Developers are concerned about duplication and delays in development approvals; they support integration that can remedy this problem. They may favor shifting responsibility for environmental review to plans and development regulations in order to obtain a determination on environmental problems before they begin project planning and the development approval process. Developers may oppose any attempt to retain site-specific environmental reviews when they present their projects for development approval because it could (and sometimes does) delay development and adds to costs.

Local governments may favor integration that avoids duplication but may be reluctant to assume the cost and additional responsibility of adding environmental review and requirements to their plans and regulations. Funding for environmental review as part of the planning process is another problem. In many SEPA states, local agencies delegate the preparation and funding of impact statement preparation to applicants for project approval. Public funding is necessary if local governments assume this responsibility and may, as in Washington, require a state appropriation. Another option is to levy fees on private applicants sufficient to cover the cost of environmental reviews, although this option may require legislative authority.

Planning agencies may also need flexibility in deciding when in the planning process they should consider environmental issues. For example, they may want to defer environmental review to subarea plans if different areas have different environmental problems and if consensus is easier at the subarea planning level.

The environmental community may not fully support integration if it believes that integration will weaken the environmental reviews that are available under SEPAs. It may resist any attempt at integration that eliminates or reduces the need for site-specific reviews of individual projects. To deal with this problem, a consensus is necessary on how integration will affect site-specific environmental reviews of projects. Program impact statements on comprehensive plans may have an advantage here because they are an accepted practice under SEPA statutes and so are less threatening than other alternatives.

Another problem is that integrating planning and regulations with environmental review does not remedy all of the problems of duplication and overlap that can occur in land-use regulation. Additional streamlining is possible if legislation integrates planning and regulation with environmental review through the development approval process. The land-use agency can then

decide whether a proposed development is consistent with the comprehensive plan at the same time that it determines whether the comprehensive plan contains an adequate environmental review. Legislation can also integrate subdivision approval with environmental review[28] and can then combine this integrated review process with other development approvals.

Related environmental land-use legislation and ordinances, especially wetlands regulations, may also require integration with environmental reviews under SEPAs. Several states have laws authorizing state agencies to regulate land uses in wetlands through permitting.[29] These laws may authorize the delegation of the permitting power to municipalities, and municipalities may adopt wetlands regulations even if there is no state regulatory program.

Wetlands laws and regulations vary by state, but many base their permit reviews on environmental impact criteria similar to those contained in SEPAs. For example, a wetlands regulation may require an evaluation of environmental impacts, a consideration of development alternatives, and the inclusion of mitigation measures. When a wetlands regulation requires consideration of environmental impacts similar to those considered under a SEPA, statutes integrating planning and development regulation with SEPA reviews can include development approvals in wetlands as well. An agency can use a program statement on a comprehensive plan, for example, as the beginning point for review under the wetlands law.

Basing permit decisions under wetlands statutes on comprehensive plans or their program statements has other advantages. Wetlands regulations usually provide for permit approvals on an individual basis, with no prior planning or delineation to show where wetlands are. Comprehensive plans can remedy this omission by indicating where wetlands exist and the restraints they impose on development. Agencies can rely on this guidance when they consider developments in wetlands for permit approval.

CONCLUSION

Environmental reviews under SEPAs provide needed protection from environmental damage by land-use development. Problems arise, however, when planning and development approvals duplicate SEPA reviews, thereby imposing additional costs and creating unnecessary delays in project development.

Integrating planning and development approval with SEPA reviews can help eliminate these problems. Legislation can require environmental analysis and requirements in comprehensive plans and development regulations, with SEPA environmental reviews performing a supplementary function. This kind of integration preserves the benefits of site-specific environmental review while

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[28]New York has adopted this reform. See N.Y. General City Law §32.

[29]E.g., Conn. Gen. Stat. §§22a-28 to 22a-45; Fla. Stat. Ann. §§403.91-403.929; Mass. Gen. Laws ch. 130, § 105; ch. 131, §40; Mich. Comp. Laws Ann. §§281.701-281.722; N.H. Rev. Stat. Ann. §§483-B:1 to 483-B:19; and N.Y. Envtl. Conserv. Law §§25-0101 to 25-0601; 71-2501 to 71-2507.

expanding the role of comprehensive plans and development regulations to consider the environmental impacts of land development.

Below are three alternative statutory models that offer different degrees of environmental integration with local planning, depending on the planning and regulatory climate in the state.

ALTERNATIVE 1

The purpose of this Section is to require the local planning agency to prepare a written environmental evaluation of several elements of its local comprehensive plan in order to understand the significant effects of the plan on the natural environment. In contrast to Alternatives 2 and 3, which follow, this Alternative is not binding on the local government in a regulatory sense and does not involve a state environmental policy act that applies to specific projects or land-use actions, such as single-tract rezonings or conditional use permits.

12-101 Evaluation of Environmental Effects of the Land Use, Housing, Transportation, and Community Facilities Elements of a Comprehensive Plan

♦ This Section requires the local planning agency to prepare a written report, or "environmental evaluation," in which it considers and evaluates the significant effects of several elements of the local comprehensive plan on the environment.

(1) The local planning agency shall consider and evaluate the significant environmental effects of the land-use, housing, transportation, and community facilities elements of the local comprehensive plan before it submits the plan to the local planning commission, if one exists, for its review and recommendations and to the legislative body of a local government for its review and adoption. The local planning agency may also consider and evaluate the significant environmental effects of any other element of the local comprehensive plan.

♦ Obviously, consideration of environmental alternatives will only be meaningful if it is carried out *before* a local planning agency makes a final recommendation on its comprehensive plan and while it is still considering a variety of options and alternatives.

(2) The purpose of the environmental evaluation is to ensure that an assessment is made of the significant effects, both beneficial and detrimental, of these elements on the environment, and that alternatives to these environmental effects are adequately identified. The results of the evaluation are not binding on the local government and the local government need not modify its local comprehensive plan as a result of the assessment.

- ♦ The requirement that the local planning agency consider and evaluate alternatives is not intended to be legally binding. The text makes it clear that the local planning agency need only consider and evaluate the environmental impacts of the plan.

(3) As used in this Section:

(a) "**Plan**" includes a plan for any subarea of the local government.

(b) "**Significant**" means that there is a potential to substantially affect or impair the quality of the environment.

(4) In its environmental evaluation, the local planning agency shall consider a reasonable range of alternatives at a level of detail that matches the level of detail contained in the element of the plan that is being evaluated.

- ♦ There is no magic figure to determine what is an appropriate number of alternatives that should be explored in the environmental evaluation. The text therefore states that the local planning agency should consider a "reasonable" range of alternatives. The point is that the local planning agency should evaluate and consider *enough* alternatives so that it properly understands the repercussions of the proposed elements of the comprehensive plan on the environment and knows whether other alternatives may be less damaging environmentally. Alternatives considered may be limited to the alternatives proposed in the plan if these alternatives include what the agency believes to be a reasonable range. However, the local planning agency may also decide that it also needs to consider the environmental impacts of alternatives not included in the plan in order to truly understand the benefits and the detriments of a proposed element on the environment. At a minimum, the agency should consider an "existing trends" alternative in which the plan makes no change to existing policies. This alternative is similar to the "no action" alternative that agencies must consider under many state environmental protection acts (SEPAs). Other alternatives could include modifications of proposals made by the local planning agency. For example, if the agency is proposing a slow growth plan, one alternative could consider a plan that contemplates more rapid growth.

  In addition, the level of detail considered in the alternatives should be comparable to the level of detail contained in the element itself to keep the document "balanced." In other words, it would be awkward for an element to present a lot of technical information and the environmental evaluation to be skimpy. Of course, the level of detail in the plan will vary by element, depending on a number of factors, including the area included in the plan (e.g., an entire local government versus a subarea). Also, in many instances a plan in its early stages will be in sketch form consisting of only a series of schematics. A consideration of alternatives need then only respond to this level of detail.

(5) The environmental evaluation shall be in the form of a written report, which may be in both text and map form, which shall be included as an appendix to the local comprehensive plan. The report shall provide a meaningful evaluation, comparison, and analysis of alternatives to elements of the local comprehensive plan. [Where a regional plan includes data, analyses, and mitigation measures that are relevant to the environmental evaluation of alternatives, the report may consider and incorporate such data, analysis, and measures.] The report shall:

♦ The local planning agency may determine the format of the report, so long as it contains a "meaningful" evaluation, comparison, and analysis. By including this report as an appendix to the plan, citizens can be permanently aware that a range of alternatives was considered by the local government before the plan was adopted. In some states, regional planning agencies are authorized to prepare regional plans affecting land use and other functional areas. In these states, it may be advisable to add the bracketed language that allows an environmental evaluation to take the regional plan into account if the regional plan elements are clearly identified in the evaluation.

(a) describe the significant environmental effects of each alternative;

♦ Subparagraph (a) requires the local planning agency to consider the "significant environmental effects" of each alternative so that it can then compare the effects of alternatives with the effects of the proposed plan. The statute defines the terms "significant." Regulations adopted to implement the statute can further define this term. Case law under NEPA and the various SEPAs also provides guidance on when an environmental impact of an action is "significant."

(b) describe how each alternative can avoid, substantially reduce, or mitigate any significant environmental effect of the element at issue; and

♦ Subparagraph (b) makes it clear that the reason for considering alternatives is to identify alternatives that are less damaging environmentally, or that can avoid, reduce, or mitigate any environmental effects caused by the specific element of the comprehensive plan. Although there is no requirement that the local planning agency must adopt an environmentally superior alternative, discussion of any environmentally superior alternative should be included in the report.

(c) describe how alternative sites in any site-specific proposal may avoid, reduce, or mitigate any significant environmental effects of such proposal.

♦ A comprehensive plan usually does not contain site-specific proposals. However, site-specific proposals may be the reason for amending a plan, and a plan may sometimes contain such proposals if it is for a limited area. When this is the case, subparagraph (c) requires the consideration of alternative sites for any site-specific proposals contained in a plan or its amendment.

(6) The local planning agency shall make its environmental evaluation available for inspection and comment at least (30) days prior to the public hearing on the local comprehensive plan as required by Section [7-401].

♦ The local planning agency should make its report on alternatives available a reasonable period of time prior to the public hearing on the adoption of the comprehensive plan. The text contains no formal mechanism through which the agency is to receive comments on the report since it is expected that comments on the report will be made when the hearing on the plan is held.

(7) The local planning agency shall also conduct an environmental evaluation of any proposed amendment to the land-use, housing, transportation, or community facilities elements of the local comprehensive plan. The evaluation of any amendment shall be conducted in the same manner as the initial evaluation and the written report shall also be attached to the appendix of the local comprehensive plan.

♦ This paragraph applies the environmental evaluation requirement to amendments to a local comprehensive plan.

(8) The [state planning agency *or* department of the environment] shall have the authority to adopt rules to administer this Section [pursuant to its authority under Section [4-103].

♦ This paragraph authorizes the state to establish the details of both procedure and content of the local environmental evaluation. If the state has a SEPA, these rules should be generally consistent with that statute and its regulations. The bracketed phrase refers to the basis of the state planning agency's rule-making authority, and should be removed if the power is given to the department of environment or similar agency.

ALTERNATIVE 2

Alternative 2 presumes the existence of a state environmental policy act and is based on N.Y. General City Law §28-A and similar legislation adopted for towns and villages, and on Cal. Pub. Res. Code §§21084 and 21157 to 21157.5. The purpose of this Section is to authorize the preparation of an environmental impact statement on a local comprehensive plans so that public agencies can avoid or carry out a more limited environmental review of land-use approvals that are based on that plan. By contrast to Alternative 1, this Alternative is more complex in that it goes beyond being a mere environmental evaluation with no regulatory implications.

12-101 Environmental Impact Statement on a Comprehensive Plan

(1) The local planning agency shall prepare an environmental impact statement on a local comprehensive plan [as authorized by Section___ of the *state environmental policy act*] and

shall incorporate the impact statement as an appendix to that plan. [Where a regional plan includes data, analyses, and mitigation measures that are relevant to the environmental impact statement and its evaluation of alternatives, the impact statement may consider and incorporate such data, analyses, and measures.]

♦ Paragraph (1) authorizes the local planning agency to make an environmental impact statement a part of the local comprehensive plan. If this alternative is chosen, the agency must be careful to comply with any SEPA requirements for impact statements. Therefore, as the bracketed language indicates, it may be necessary to amend the SEPA legislation or implementing regulations to include an impact statement on a comprehensive plan. As is also the case in Alternative 1 above, there is language that addresses the incorporation of any data, analyses, and mitigation measures contained in a regional plan to minimize duplication in the statement.

(2) The purpose of this Section is to authorize the preparation of an environmental impact statement on a local comprehensive plan that can avoid or minimize the need for the preparation of an impact statement on a site-specific land-use action.

(3) As used in this Section:

(a) "**Consistent With a Local Comprehensive Plan**" means that the land-use action furthers the goals, policies, and guidelines of the local comprehensive plan, and is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan.

(b) "**Feasible**" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(c) "**Land-Use Action**" means a rezoning, an approval of a subdivision, an approval of a special exception, conditional use, or variance, and an approval of a planned unit development or similar site-specific development plan.

(d) "**Plan**" includes a plan for any subarea of the local government.

(e) "**Significant**" means that there is a potential to substantially affect or impair the quality of the environment.

♦ Case law under NEPA and the various SEPAs also provide guidance on when an environmental impact of an action is "significant."[30]

[30] See D. R. Mandelker, *NEPA Law & Litigation* (Deerfield, Ill.: Clark Boardman Callaghan, 2d ed. 1992 & Supp. 1997), §§ 8.08, 12.06.

[(4) No further compliance with the state environmental policy act is required for a subsequent land-use action that complies with the conditions and environmental thresholds established for such action in the environmental impact statement on a local comprehensive plan.]

♦ This first Paragraph (4) simply excuses a land-use action from compliance with the SEPA if it complies with the environmental impact statement prepared on the plan. This provision is based on the New York law. As an option, more detailed provisions are provided in alternative Paragraphs (4) through (8) below.

[*or*]

[(4) Once the local planning agency has prepared an environmental impact statement on a local comprehensive plan, the public agency responsible for any subsequent land-use action that is consistent with the local comprehensive plan shall prepare an initial study of the significant environmental impacts of that action.

♦ Paragraph (4) requires the public agency responsible for any land-use action to prepare an initial study of that action. The public agency that does the initial study most likely will not be the local planning agency that prepared the plan. The initial study is intended to take the place of the preliminary environmental assessment that agencies do under SEPAs to determine whether an impact statement is necessary. A subsequent land-use action is covered by this Section, however, only if it is consistent with the plan. If it is not consistent, the environmental analysis in the plan will not apply.

(5) After completing its initial study, the public agency responsible for the land-use action may make written findings that an environmental impact statement is not required for the land-use action because it will not have significant effects on the environment.

♦ Paragraph (5) authorizes a written finding that the subsequent land-use action does not have significant environmental effects. This finding will be based on an analysis of the action's own impacts, but it is intended that the public agency can also rely on the environmental analysis in the impact statement on the plan when it determines whether the land-use action has "significant" environmental impacts.

(6) If the public agency determines that the subsequent land-use action will have significant effects on the environment, the public agency may make written findings that an environmental impact statement is not necessary if alternatives for the land-use action were adequately considered in the environmental impact statement on the local comprehensive plan, and if the significant environmental impacts of the action either:

(a) can be mitigated or avoided on the basis of the environmental impact statement on the local comprehensive plan; or

(b) were examined at an adequate level of detail in the environmental impact statement on the local comprehensive plan to enable those effects to be mitigated or avoided by revisions, conditions, or other means in connection with the land-use action.

♦ Paragraph (6) specifies when an environmental impact statement on a local comprehensive plan can be used to avoid the preparation of a new environmental impact statement on a subsequent land-use action if that action has significant environmental impacts. The public agency must first find that the impact statement on the plan adequately considered alternatives to the land-use action. This requirement allows the public agency to reexamine alternatives if the alternatives to that action were not adequately examined in the impact statement on the plan. In addition, subparagraphs (a) and (b) require a finding that the significant environmental impacts of a land use action can be avoided or mitigated either on the basis of the impact statement on the comprehensive plan, or through revisions, conditions, or other measures in connection with the land-use action. The public agency may make the second finding only if the significant environmental impacts of the land-use action were examined at an adequate level of detail in the comprehensive plan.

(7) If the public agency cannot make the written findings required by subparagraphs (5) or (6), it shall prepare an environmental impact statement on the land-use action unless it incorporates feasible mitigation measures or feasible alternatives in the land-use action that will avoid or lessen the effects of the land-use action so that no significant effects on the environment will occur. The environmental impact statement on the land-use action shall consider only those environmental impacts not considered in the environmental impact statement on the local comprehensive plan.

♦ Paragraph (7) requires the preparation of an environmental impact statement on a land-use action if the public agency cannot rely on the impact statement on the comprehensive plan to satisfy SEPA requirements. However, the public agency is not required to prepare an environmental impact statement if it can incorporate feasible mitigation measures or alternatives in the land-use action that will avoid or mitigate its environmental impacts.

Paragraph (7) also authorizes the approach known as "tiering," which refers to the process of preparing multiple levels of environmental review documents that first consider broad environmental issues and become more narrow as they focus on smaller areas or sites. Tiering helps to avoid repetition since issues that were adequately addressed in the broader review are not revisited. The language in Paragraph (7) incorporates "tiering" by requiring the consideration of environmental impacts of the land-use action only if they were not previously considered in the local comprehensive plan.

(8) Prior to approving a land-use action, the public agency shall incorporate all appropriate feasible mitigation measures or feasible alternatives contained in the environmental impact statement on the local comprehensive plan or on the land-use action.]

- Paragraph (8) reinforces the tiering process by requiring the incorporation in the land-use action of feasible mitigation measures and alternatives discussed in the environmental impact statement that are appropriate to the land-use action.

(9) A public agency may not comply with the requirements of this Section by relying on an environmental impact statement prepared on a local comprehensive plan if:

(a) more than five years have elapsed since the preparation of the environmental impact statement on the local comprehensive plan; or

(b) significant new circumstances or information require a new study of the environmental impacts of the local comprehensive plan.

- The purpose of this Section is to prevent reliance on a comprehensive plan impact statement that is outdated. The "significant circumstances or information" language is taken from regulations by the U.S. Council on Environmental Quality for the National Environmental Policy Act that specify when a supplemental impact statement is required under NEPA. [31] Some SEPAs have similar requirements. Case law under NEPA and the SEPAs can provide guidance on when a new study is required.[32]

ALTERNATIVE 3

Alternative 3 integrates the consideration of environmental impacts under the state environmental policy act with the review and approval of land-use actions by a public agency. The text is based on Wash. Rev. Code Ann. §43.21C.040. The focus here is on public agency review of land-use actions such as a decision to rezone, the granting of a variance, or a decision to approve a planned unit development. In some cases a land-use action will include site-specific plans, such as a site plan. In these cases, public agency review will include a review of these plans.

This Section can be placed either in the planning and land-use statutes or in the state environmental policy act. An argument for placing it in the planning and land-use statutes is that it deals with the land-use approval process and the local comprehensive plan, and should therefore be integrated with these measures. An argument for placing it in the SEPA is that it determines when an environmental analysis is required on a land-use decision.

12-101 Environmental Requirements in Local Comprehensive Plan and Land Development Regulations

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[31] 40 C.F.R. § 1509(c).

[32] D. R. Mandelker, *NEPA Law & Litigation* (Deerfield, Ill.: Clark Boardman Callaghan, 2d ed. 1992 & Supp. 1997), §§ 10.18, 12.09

(1) The purpose of this Section is to integrate the consideration of environmental impacts under the state environmental policy act [*cite to statute*] with the review and approval of land-use actions by a public agency.

(2) As used in this Section:

(a) "**Land-Use Action**" means a rezoning, an approval of a subdivision, an approval of a special exception or variance, and an approval of a planned unit development or similar site-specific development plan.

(b) "**Plan**" includes a plan for any subarea of the local government.

(c) "**Significant**" means that there is a potential to substantially affect or impair the quality of the environment.

(3) If a public agency reviews a land-use action and decides that it has significant environmental impacts, it may make written findings that these impacts are adequately avoided or mitigated by the following:

(a) the environmental analysis and mitigation measures contained in a local comprehensive plan; and/or

(b) the environmental requirements in land development regulations or other local, state, or federal laws or rules.

♦ Paragraph (3) authorizes the public agency to make written findings that the significant environmental impacts of the land-use action are "adequately" avoided or mitigated. The statute does not define the term "adequately," but SEPA regulations can provide guidance on this issue. Court decisions that decide when an environmental analysis in an impact statement is adequate will also be helpful.

The public agency can base its findings either on the local comprehensive plan or on land development regulations or other laws or rules. These laws or rules can be federal, state, or local. There is no problem of delegation of authority to another agency because the adoption of another law or rule is not automatic. The public agency that approves the land-use action must make a written finding that it is adequate.

Paragraph (3) applies only after a public agency has made a decision that a land-use action presented to it has significant environmental impacts. The SEPA will govern how this decision is made, and what type of analysis the public agency must conduct before it decides whether the environmental impacts of a land-use action are significant. In most states with SEPAs, the public agency must carry out an environmental assessment of an action to determine whether it has significant environmental effects. If the agency decides after it completes the

environmental assessment that an environmental impact statement is unnecessary, the environmental review under the SEPA will terminate and the public agency need not make the findings authorized by this Section.

(4) A public agency may make the written findings authorized by paragraph (3) above if:

(a) the local comprehensive plan has:

1. considered the significant environmental impacts of the land-use action and its alternatives; and

2. designates environmental thresholds, levels of public service, land-use designations and development standards;

♦ A public agency can rely on a local comprehensive plan to make the determination authorized by paragraph (3) if the plan has considered the environmental impacts of the land-use action and contains specified criteria, standards, and thresholds. The plan need only "consider" the environmental impacts of a land-use action. It need not decide whether these impacts are acceptable. The public agency will decide under paragraph (3) whether the plan's policies and standards have adequately avoided or mitigated the environmental impacts.

Subparagraph (4)(a)2 does not define what is meant by environmental thresholds, levels of public service, land use designations, and development standards. It is intended that public agencies should have the flexibility to decide the detail level at which they are identified in the plan and what they should contain. For example, a plan could state a threshold level for an increase in traffic that is considered environmentally significant. An impact statement would not be necessary if the traffic generated by a new development is within this threshold.

(b) land development regulations or other laws or rules include measures that will mitigate or avoid the significant environmental impacts of the land-use action; and

♦ Subparagraph (4)(b) contemplates that land development regulations or other laws or rules may contain environmental requirements that can avoid or mitigate the environmental impacts of the land-use action. For example, local land development regulations may contain requirements for development in floodplains. State air quality regulations may contain requirements for reducing air pollution.

(c) the public agency bases or conditions its approval of the land-use action on a finding of compliance with the local comprehensive plan and any applicable land development regulations, laws, or rules.

(5) In deciding whether a specific adverse environmental impact is adequately addressed by land development regulations or another rule or law, the public agency that reviews the land-use action shall:

(a) consult orally or in writing with the agency responsible for the administration of that regulation, law, or rule, or law; and

(b) consider any comments on the environmental impacts of the land-use action made by such other agency.

♦ Under paragraph (5), the public agency's obligation is only to "consider" these comments, but case law under NEPA and the SEPAs make it clear that the public agency must give these comments serious consideration.

(6) If a public agency decides that the local comprehensive plan, land development regulations, or other laws or rules adequately avoid or mitigate a land-use action's significant environmental impacts, the land-use action is not subject to additional environmental review under the state environmental policy act, but is subject to any applicable notice, hearing, and all other requirements contained in land development regulations or other laws or rules.

♦ The effect of paragraph (6) is to shift the decision on whether to prepare an environmental impact statement under SEPA to the land-use approval process, where the decision on whether an impact statement is required will be made. Although this paragraph does not require all of the public participation in this decision that SEPAs usually require, the land-use approval process requires a local notice and hearingwhich should help ensure adequate public participation.

(7) If the public agency cannot make the written findings required by paragraph (3) above, it shall prepare an environmental impact statement on the land-use action unless it incorporates feasible mitigation measures or feasible alternatives in its approval of the land-use action that will avoid or mitigate its environmental effects. The environmental impact statement on the land-use action shall consider only those environmental impacts that are not addressed in the local comprehensive plan, or that are not mitigated by land development regulations or laws or rules.

♦ Paragraph (7) requires an impact statement if the public agency cannot make the written findings required by paragraph (3), unless the agency is able to avoid or mitigate the environmental impacts of the land-use action. If the agency does prepare an environmental impact statement, it need consider only those impacts not addressed in the local comprehensive plan or mitigated by other land development regulations, laws, or rules.

(8) A public agency may not comply with the requirements of this Section by relying on a local comprehensive plan if:

(a) more than five years have elapsed since the adoption of the local comprehensive plan; or

(b) significant new circumstances or information require a new study of the environmental impacts of the local comprehensive plan.

(9) Nothing in this Section limits the authority of a public agency, in its review or mitigation of a land-use action, to adopt or otherwise rely on the environmental analyses or requirements in a local comprehensive plan or on other land development regulations, laws, or rules.

♦ Paragraph (9) is a nonderogation provision. The purpose of this paragraph is to ensure that nothing in this Section prevents a public agency from considering an environmental analysis in a comprehensive plan, or in other regulations, laws, or rules, when it carries out other functions assigned to it under the planning and zoning enabling acts.

Appendix A – Literature Suggesting Improvements for SEPAs

Magee, "Environmental Impact Statements: Application in Land Use Control," 10 *Zoning & Planning L. Rep. 113* (1987); Weinberg, "A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts," 5 *Pace Envtl. L. Rev. 1* (1987); "Symposium, The Role of Impact Assessment in Environmental Decision Making in New England: A Ten-Year Perspective," *6 Envtl. Impact Assess. Rev. 101* (1986). There also are articles specific to individual states with SEPAs:

California: Catalano & Reich, "Local Government Law and the E.I.R.: The California Experience," 9 *Urb. Law* 195 (1977); Catalano & Reich, "Local Government Response to State Environmental Impact Assessment Requirements: An Explanation and Typology," 7 *Envtl. L. 25* (1977); Lichman, "Courts v. Planning: The Anatomy of Four Conflicts," 15 *W. St. U.L. Rev.* 1 (1987); Pinkerton, "Conflicting Statutes in No-Growth Environments: CEQA and the PSA," 4 *UCLA J. Envtl. L. & Pol'y* 173 (1985); Rossmann, "Not So Well at Twenty," 20 *Envtl. L.* 10174 (1990); Sahm, "Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think," 19 *Santa Clara L. Rev.* 727 (1981); Varner, "The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas For Necessary Reform," 19 *Pepperdine L. Rev.* 1447 (1992); Comment, "Environmental Decision Making Under CEQA: A Quest For Uniformity," 24 *UCLA L. Rev.* 838 (1977); "Comment, Land Use Aesthetics: A Citizen Survey Approach to Decision Making," 15 Pepperdine L. Rev. 207 (1988). See also M. Azevedo, *Environmental Overdose: California's Environmental Law Needs Treatment* (Petaluma, Ca: Wood Rat Press, 1996).

Hawaii: Kim, "Environmental Impact Statements in Hawaii: Problems and Prospects," 11 *Envtl. Impact Assess. Rev.* 103 (1991).

Indiana: Note, “The Indiana Environmental Protection Act: An Environmentalist's Weapon in Need of Repair,” 22 *Val. U.L. Rev.* 149 (1987).

New York: Healy, “The Environmental Review Process in the City of New York: CEQR,” 5 *Pace Envtl. L. Rev.* 93 (1987); Nolon & Stockel, “Expanding Land Use Authority Through Environmental Legislation: The Regulation of Affordable Housing,” 2 *Hofstra Prop. L.J.* 1 (1989); Sterk, “Environmental Review in the Land Use process: New York's Experience with SEQRA,” 13 *Cardozo L. Rev.* 2041 (1992); Valletta, “Charter Revision: Focusing on the Essentials in Land Use Review,” 33 *N.Y.L. Sch. L. Rev. 599* (1988); “Symposium on the New York State Environmental Quality Review Act,” 46 *Alb. L. Rev.* 1097 (1982); Note, “SEQRA’s Emergency Provision: Exemption or Circumvention?,” 2 *Hofstra Prop. L.J.* 209 (1989).

Appendix B – Overview of SEPAs

State	Comments
Cal. Pub. Res. Code §§21000-21177	Requires environmental impact report similar to federal statement and including mitigation measures and growth-inducing effects. Applies to state agencies and local governments. Detailed provisions governing preparation of impact report and judicial review. State agency to prepare guidelines. Statutory terms defined.
Conn. Gen. Stat. §§22a-1 to 22a -1h	State agencies to prepare environmental impact evaluations similar to federal impact statement and including mitigation measures and social and economic effects. Actions affecting environment defined.
D.C. Code Ann. §§6-981 to 6-990	Mayor, district agencies and officials to prepare impact statements on projects or activities undertaken or permitted b District. Impact statement to include mitigation and cumulative impact discussion. Action to be disapproved unless mitigation measures proposed or reasonable alternative substitute to avoid danger.
Ga. Code Ann. §§12-16-1 to 12-16-8	Applies to projects proposed by state agencies for which it is probable to expect significant effect on the natural environment. Limited primarily to land-disturbing activities and sale of state land. Decision on project not to create cause of action.
Hawaii Rev. Stat. §§343-1 to 343-8	State agencies and local governments to prepare impact statements on use of public land or funds and land uses in designated areas. Statements must be "accepted" by appropriate official. Judicial review procedures specified.
Ind. Code Ann. §§13-1-10-1 to 13-1-10-8	Similar to NEPA. Applies to state agencies.

Md. Nat. Res. Code Ann. §§1-301 to 1-305	State agencies to prepare environmental effects reports covering environmental effects of proposed appropriation and legislation, including mitigation measures and alternatives.
Mass. Gen. Laws Ann. ch. 30, §§61, 62-62H	State agencies and local authorities to prepare environmental impact report reports covering environmental effects of actions, mitigation measures and alternatives.
Minn. Stat. Ann. §§116D.01-01-116D.06	State agencies and local governments to prepare environmental impact statements covering environmental effects of actions, mitigation measures and economic, employment and sociological effects. Procedures for preparation of statements and judicial review specified. State environmental quality board may reverse or modify state actions inconsistent with policy or standards of statue.
Mont. Code Ann. §§ 75-1-101 to 75-1-105; 75-1-201 to 75-1-207	Similar to NEPA. Applies to state agencies.
N.Y. Envtl. Conserv. Law §§8-0101 to 8-0117	State agencies and local governments to prepare impact statements similar to federal impact statement and including mitigation measures and growth-inducing and energy impacts. Statutory specified. State agency to adopt regulations on designated topics.
N.C. Gen. Stat. §§113A-1 to 113A-13	Similar to NEPA. Applies to state agencies. Local governments may also require special-purpose governments and private developers of major development projects to submit impact statement on major developments. Certain permits and public facility lines exempted.

P.R.Laws Ann. Tit. 12, §§1121-1127	Similar to NEPA. Applies to Commonwealth agencies and political subdivisions.
S.D. Codified Laws Ann. §§34A-9-1 to 34A-9-13	State agencies "may" prepare environmental impact statements similar to federal impact statement and adding mitigation measures and growth-inducing "aspects." Statutory terms defined. Ministerial and environmental regulatory measure exempt.
Va. Code §§3.1-18.8, 10.1-1200 to 10.1-1212	Similar to NEPA. Applies to state agencies for major state projects. Impact statements also to consider mitigation measures and impact on farmlands.
Wash. Rev. Code §§ 43.21C.010 to 43.21C.910	State agencies and local governments to prepare impact statements identical to federal statement but limited to "natural" and "built" environment. Proposal may be denied if it has significant impacts or mitigation measures insufficient. Judicial review procedures specified. State agency to adopt regulations on designated topics.
Wis. Stat. Ann. §§1.11	Similar to NEPA. Applies to state agencies. Statements also to consider beneficial aspects and economic advantages and disadvantages of proposals.

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