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Interstate Environmental Impact Assessment

by Noah D. Hall

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I. The BP Lake Michigan Pollution Fight

In June 2007, the state of Indiana proposed issuing a permit pursuant to the federal Clean Water Act (CWA)[1] to the BP (British Petroleum) Oil Company for the discharge of 1,584 pounds of ammonia and 4,925 pounds of suspended solids daily into Lake Michigan from BP's Whiting, Indiana, refinery. BP sought the permit as part of a $3 billion expansion of its Whiting facility's capacity to refine heavy crude oil from Alberta, Canada. The BP Whiting refinery, originally built in 1889 by John D. Rockefeller, is now the fourth largest refinery in the country. The permit was issued by Indiana in August 2007, with almost no opposition from within the state. Indiana Gov. Mitch Daniels supported the refinery expansion and permit issuance, lauding it as "another huge step in Indiana's economic comeback."[2]

However, once news of the refinery expansion and permit issuance spread to neighboring Illinois, public and political opposition was dramatic. Chicago Mayor Richard M. Daley and then- Gov. Rod Blagojevich of Illinois harshly criticized both BP and Indiana. One Republican lawmaker from Chicago attacked BP's marketing claims of "beyond petroleum" as really standing for "bad polluter."[3] The rock band Pearl Jam sang a protest song "Don't Go to BP Amoco" at the Lollapolloza music festival in Chicago.[4] Over 50,000 citizens signed petitions opposing the plant expansion and permit.[5] Opponents initially sought action and oversight from the U.S. Environmental Protection Agency (EPA), but EPA made clear early on that it would not stop Indiana from issuing the permit.

After the permit was issued and public opposition mounted, Indiana politicians held a hearing to explore the issue. However, due to how the hearing was conducted, it only exacerbated the conflict. Mayor Daley sent two top city officials to the hearing, but the Indiana lawmaker chairing the hearing would not allow the Chicago officials to testify. The resulting war of words demonstrates the level of conflict that can arise in interstate environmental disputes. The Chicago Park Superintendent, one of the Chicago officials that intended to testify, was "insulted" by the snub and stated: "[T]hey can keep their pollution on their side of the lake. This is ridiculous."[6] The Indiana lawmaker that called the hearing was unapologetic. While claiming that time constraints prevented him from allowing the Chicago officials to testify, he also stated that "this is an Indiana hearing" and "[w]e here in Indiana know what the issues are."[7]

Unfortunately, what was lost in the political fighting was the opportunity to exchange information that could have minimized the conflict. The city of Chicago commissioned a report showing that BP could upgrade its wastewater treatment for less than $40 million (a significant sum, but only an increase of about 1% for the total project cost of over $3 billion dollars).[8] Equally important, the state of Indiana missed an opportunity to educate the concerned public in Illinois. The deputy water administrator for the Wisconsin Department of Natural Resources, who was not involved in the dispute (even though Wisconsin also shares Lake Michigan waters), concluded that there would not be "a problem [locally or lakewide] as a result of this discharge."[9] A

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1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. Kari Lydersen, *Pollution Fight Pits Illinois vs. BP, Indiana*, Wash. Post, Aug. 23, 2007, at A11.
3. Dan Egan, *BP Backpedals on Increasing Lake Pollution*, Milwaukee J. Sentinel, Aug. 23, 2007, at A1.
4. Pearl Jam, *Don't Go to BP Amoco (live at Lollapalooza)*, available on YouTube: http://www.youtube.com/watch?v=DFSM_lkk22Q&NR=1.
5. Michael Hawthorne, *EPA Will Ask BP to Offset Pollution*, Chi. Trib., Aug. 15, 2007, at 1.
6. Andrew Herrmann, *Chicago Gagged at Hearing on BP*, Chi. Sun-Times, Aug. 23, 2007, at 1.
7. *Id.*
8. Tim Evans, *BP Can Upgrade Plant for $40M, Report Concludes*, Indianapolis Star, Sept. 4, 2007, at 1.
9. Egan, *supra* note 3.

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University of Wisconsin scientist noted that the additional ammonia that would be discharged is "less than one-seven-millionth of the amount already in the lake."[10]

Because there was no process to allow the Indiana decisionmakers and the potentially affected Illinois public to educate each other and share concerns, the environmental impact of the discharge is not well understood. Instead, the dispute quickly devolved into a political shouting match that failed to address either Indiana's or Illinois' concerns. After intense public and political pressure, BP announced that it would not take advantage of its new permit to increase discharges. However, the permit remains in effect, so opponents in Illinois have no legal certainty that discharges will not increase in the future.

The BP Lake Michigan pollution dispute demonstrates why an interstate environmental impact assessment policy is needed and how it can benefit all parties. The decisions made by one state often impact environmental quality in neighboring states, but consideration of such impacts, and engagement of affected citizens, is usually lacking. To help address this problem, a state-based interstate environmental impact assessment policy that builds on the National Environmental Policy Act's (NEPA's)[11] environmental impact statement (EIS) process could be an effective and efficient policy tool.

II. Environmental Impact Assessment Law—From NEPA to the States to International Law

The foundation of environmental impact assessment law is NEPA. NEPA's central legal requirement is that federal agencies prepare an EIS whenever a proposed major federal action will significantly affect the quality of the human environment.[12] "[T]his simple information disclosure mandate forces agency managers to identify and confront the environmental consequences of their actions, about which they otherwise would remain ignorant. It also opens governmental decisions to an unprecedented level of public scrutiny, with consequent political implications that decisionmakers ignore only at their peril."[13] At its best, NEPA's EIS process provides a "combustible blend of information, transparency, and political accountability [which] creates powerful pressures on agency decisionmakers to avoid the most environmentally damaging courses of action, and to mitigate environmental harms when it is cost effective to do so."[14]

NEPA uses information exchange and public process to create accountability for federal agencies that are not directly accountable to an electorate. Not only must the EIS be provided to the public,[15] but federal regulations implementing NEPA further require public notice and comment at the key stages of EIS preparation, including determining the scope of the EIS and after a draft has been prepared.[16] By "open[ing] government decisionmaking to public scrutiny" NEPA "exerts a powerful prophylactic influence on the course of agency action."[17] This model could similarly be used to create accountability for state decisionmakers not accountable to the electorate of another state.

The statutory language of NEPA is silent regarding its applicability to externalized environmental harms imposed outside of the United States. However, the Council on Environmental Quality (CEQ), which is charged with the task of ensuring that federal agencies meet their obligations under NEPA,[18] has issued Guidance on NEPA Analyses for Transboundary Impacts.[19] The guidance recognized that as a policy matter, NEPA's environmental impact assessment procedures should apply to projects within the United States that have externalized impacts imposed on other countries.[20] In addition to the CEQ Guidance, numerous federal court decisions have interpreted NEPA to apply to actions within the United States with externalized environmental impacts in other countries.[21] Thus, while NEPA is primarily intended to address intrajurisdictional environmental harms, it is certainly an applicable (but perhaps not ideal) model for a new policy to address interjurisdictional environmental harms at the state level.

NEPA has already served as a model for advancing the general concept of environmental impact assessment under state law.[22] A recent survey indicated that 32 states have some form of an environmental impact assessment policy modeled after NEPA.[23] Not only do these state laws provide for environmental impact assessment of state projects and permit decisions, but many of these NEPA-inspired state laws offer improvements over the original federal Act. Two key differences between some of the state laws and NEPA are worth noting for purposes of this discussion.

First, while NEPA is purely procedural and does not require a specific outcome based on the EIS, a few states have established substantive requirements in their environmental impact assessment laws that require mitigation of environmental impacts.[24] Second, in addition to covering state proj-

10. *Id.*
11. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
12. Sierra Club v. Peterson, 717 F.2d 1409, 1412, 12 ELR 20454 (D.C. Cir.1983); *see also* 42 U.S.C. §4332(2)(C).
13. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Environmental Performance*, 102 Colum. L. Rev. 903, 904-05 (2002).
14. *Id.* at 905.
15. *See* 42 U.S.C. §4332(2)(C).
16. *See* 40 C.F.R. §§1501.7, 1502.9, 1503.
17. Karkkainen, *supra* note 13, at 913.
18. The Council on Environmental Quality was established by NEPA as an agency within the Executive Office of the President charged with the task of ensuring that federal agencies meet their obligations under NEPA. See generally 42 U.S.C. §§4342, 4344.
19. Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts (July 1, 1997), *available at* http://ceq.eh.doe.gov/nepa/regs/transguide.html.
20. *Id.* ("NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects . . . .").
21. *See, e.g.,* Wilderness Society v. Morton, 463 F.2d 1261 (D.C. Cir. 1972); Swinomish Tribal Cmty. v. Fed. Energy Regulatory Comm'n, 627 F.2d 499 (D.C. Cir. 1980); Province of Manitoba v. Norton, 398 F. Supp. 2d 41 (D.D.C. 2005).
22. *See* Karkkainen, *supra* note 13, at 905.
23. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 617-18 (2001). For a listing of the state environmental impact assessment laws, see Daniel R. Mandelker, NEPA Law & Litigation §12.02(1) (2d ed. 1992).
24. The states that have a substantive requirement to reduce or mitigate negative environmental impacts identified in the environmental impact assessment are

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ects and decisions, some of the state laws also apply to local governments.[25] This is particularly important in addressing interstate environmental harms from sprawl, since most land use decisions are made by local governments. Thus, as discussed in more detail in the next section, an interstate environmental impact assessment policy should follow the legal model of states such as California, New York, and Minnesota and include local government actions and decisions.

The concept of environmental impact assessment first provided by NEPA has not only spread to state law, but also to other countries. Since NEPA was enacted in the United States, over 100 countries have established some form of domestic environmental impact assessment laws.[26] The widespread adoption of domestic environmental impact assessment law has facilitated growth of the concept of transboundary environmental impact assessment under international law.[27] But international transboundary environmental impact assessment law should not be viewed as merely an extension of domestic environmental impact assessment laws. It is also a necessary procedural duty related to preventing transboundary pollution harms, and in this way can serve as a useful model for addressing interstate environmental harms.

International transboundary environmental impact assessment is a logically required first step to prevent international transboundary pollution, since addressing a harm requires knowing something about it.[28] The importance of transboundary environmental impact assessment under international law is evident in the United Nations Conference on Environment and Development Rio Declaration of 1992:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[29]

Despite the widespread adoption of domestic environmental impact assessment laws and the Rio Declaration supporting the principle of transboundary environmental impact assessment, there is still no global treaty on transboundary environmental impact assessment.[30] There are, however, several regional models worth noting. A leading example is the Convention on Environmental Impact in a Transboundary Context,[31] known as the Espoo Convention, which was signed by primarily European countries in 1991. It requires parties to perform an environmental impact assessment for any activity that is likely to cause a significant transboundary environmental impact.[32] The Espoo Convention also provides a significant role for public participation[33] in an effort "to improve the quality of information presented to decision makers so that environmentally sound decisions can be made."[34]

Information and public participation could similarly be used to directly address the underlying causes of interstate environmental harms. In some respects, interstate environmental impact assessment is more promising than the international proposals, as the systems of law and principles of nondiscrimination are more firmly established among the American states than among the many nations of the world. Further, this approach builds on the legal tradition of using information and public process to minimize environmental impacts. The concept of environmental impact assessment, first established in the United States, spread relatively quickly to over 100 other legal systems. This facilitated the use of transboundary environmental impact assessment as a way to address the challenge of transboundary environmental harms under international law. Now, the domestic legal system should "rediscover" the concept and apply it to the century-old problem of interstate environmental harms in the United States.

California, the District of Columbia, Massachusetts, Minnesota, and New York. *See* Cal. Pub. Res. Code §21,002.1(b); D.C. Code Ann. §6-981; Mass. Gen. Laws ch. 30, §61; Minn. Stat. §116D.04(6); and N.Y. Envtl. Conserv. Law §8-0109(1).

25. The states that subject local governments to environmental impacts assessment requirements are California, Massachusetts, Minnesota, New York, and the state of Washington. *See* Cal. Pub. Res. Code §§21,003(a), 21,063 (defining "public agency" to include "any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision"), 21,151; Mass. Gen. Laws ch. 30, §62 (defining as an "agency" subject to the statute "any authority of any political subdivision which is specifically created as an authority under special or general law"); Minn. Stat. §116D.04(1)(a); N.Y. Envtl. Conserv. Law §8-0105 (defining covered "state agencies," as "any . . . public authority or commission" and further defining "local agency" as "[a] ny local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state); and Wash. Admin. Code §43.21C.020 (*see also* Barrie v. Kitsap County, 93 Wash. 2d 843, 613 P.2d 1148 (1980)).
26. *See* Lois J. Schiffer, *The National Environmental Policy Act Today, With an Emphasis on Its Application Across U.S. Borders*, 14 Duke Envtl. L. & Pol'y F. 325, 327 (2004).
27. *See* John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 Am. J. Int'l L. 291, 294 (2002).
28. *See id*. at 295-96.
29. *See* Rio Declaration on Environment and Development, U.N. Doc. A/Conf. 151/26 (1992), 31 I.L.M. 874, 879 (Principle 19) (1992).
30. *See* John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. Envtl. L.J. 153, 155 (2003).
31. Convention on Environmental Impact in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991).
32. *Id.*, art. 2(2), 30 I.L.M. at 803.
33. *See id.* art. 2(6), 30 I.L.M. at 804 ("The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."); *id.* art. 3(8), 30 I.L.M. at 806 ("The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin."); *id.* art. 4(2), 30 I.L.M. at 806 ("The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.").
34. *Id.* pmbl., 30 I.L.M. 802.

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III. Crafting an Interstate Environmental Impact Assessment Policy

While offering some initial guidance on the key aspects of an interstate environmental impact assessment policy, it should be made clear that the specific statutory language and drafting of such a proposal should be left for another day and a more collaborative process involving state decisionmakers. The best policies are developed with the input of numerous stakeholders, especially those with knowledge and perspectives unique to their experience and interests. Furthermore, a specific model statute should come from the geographically and politically diverse state policymakers themselves. However, to begin the discussion and frame the issues, it is important to establish the fundamental principles of an interstate environmental impact assessment policy.

The key aspects of an interstate environmental impact assessment policy can be summarized as follows: A state would be required by its own state law to provide a public process for the exchange of information regarding interstate environmental impacts. Either the government or the citizens of a potentially affected state could petition the source state to engage in the interstate environmental impact assessment. However, the source state would only be obligated to consider petitions from the government or citizens of a state that also provides interstate environmental impact assessment. This creates the necessary incentive for states to impose the statutory obligation on themselves. The interstate environmental impact assessment duty would apply to both state actions and state decisions allowing private actions. The assessment itself would contain not only environmental impact information but also a cost-benefit analysis that includes costs externalized on other states. The interstate environmental impact assessment duty is merely procedural and does not dictate a specific outcome, even if less impacting alternatives are clearly identified. Nonetheless, a procedural interstate environmental impact assessment duty would affect decisionmaker choices and could be used to complement substantive legal obligations.

To take a more detailed look at how an interstate environmental impact assessment policy would be enacted and operate, it is useful to ask the basic questions of *who, when, what, and where*?[35]

A. Who Would Enact an Interstate Environmental Impact Assessment Policy?

First, who would enact an interstate environmental impact assessment policy? To avoid the "political obstacle course" of passing and approving an interstate compact,[36] interstate environmental impact assessment laws should be enacted by states individually. This could be accomplished either by incorporating an interstate environmental impact assessment duty into existing state environmental impact assessment law (for the 32 states that have such a law) or adopting a new model interstate environmental impact assessment statute. Either way, nondiscrimination and reciprocity provide the underlying foundation and incentive for adoption of an interstate environmental impact assessment duty by individual states. States would only have an interstate environmental impact assessment duty to those states that also have a similar law. This could be implemented either by requiring some minimum standards for adequacy of an interstate environmental impact assessment policy, or by the source state only providing what would be provided to it by the affected state if the roles were reversed.

Admittedly, this does create a risk of free riders. Some interstate environmental harms affect multiple states, and it is possible that one of the affected states would not have adopted an interstate environmental impact assessment policy but would be able to free ride off of the duty owed to another affected state that has adopted such a policy. This concern is minimized, however, as the free riding affected state would not have the benefits of public hearings in their jurisdiction and other measures described in this section. The reciprocity approach is also a potential way of addressing the issue of substantive versus purely procedural state environmental impact assessment laws. Using a reciprocity approach, these states would only extend a substantive duty to mitigate interstate environmental impacts to those states that also have a substantive duty law. As Massachusetts and New York are currently the only neighboring states with a substantive environmental impact assessment law,[37] this would be relatively rare.

Premising the interstate environmental impact assessment duty on reciprocity addresses a major challenge of interstate environmental harms. On any given interstate environmental problem, there is a source, i.e., upwind or upstream, state, and at least one affected, i.e., downwind or downstream, state. On the basis of individual "transactions," source states would not have any incentive to provide even procedural relief to affected states. However, all states (excluding Alaska and Hawaii, which do not share a border with any other state) are potentially affected states on an aggregate basis. This point was made in an amici brief filed by over 30 states in *Rapanos v. United States*:[38]

> [W]ater flows downhill, and each of the lower 48 States has water bodies that are downstream of one or more other States. As set forth in the Appendix to this brief, every State in the continental United States has at least one traditional navigable water with a portion of that river or lake within one or more other States; many have several such waters.[39]

All states recognize that they face potential risks from interstate environmental harms, and would want the proce-

35. The "where" is, for purposes of this discussion, limited to the continental United States, although the principles and concepts may apply on a broader scale internationally.
36. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. Colo. L. Rev. 405, 454 (2006).
37. *See* Mass. Gen. Laws ch. 30, §61; N.Y. Envtl. Conserv. Law §8-0109(1).
38. 126 S. Ct. 2208, 36 ELR 20116 (2006) (concerning federal jurisdiction over "isolated" wetlands under the federal CWA).
39. Brief of the States of New York et al., at 2, Rapanos v. United States, 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384), 2006 WL 139208.

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dural rights afforded by an interstate environmental impact assessment policy. Further, citizens and environmental nongovernmental organizations (NGOs) would have little trouble identifying specific interstate environmental harm risks to drive home this point with their respective legislators. And, unlike an interstate compact, a decision by some states to not enact an interstate environmental impact assessment policy does not doom the process, but only limits its applicability. Thus, individual state action premised on reciprocity and nondiscrimination provides the incentives and benefits of collective action without the political and transaction costs.

B. When Would an Interstate Environmental Impact Assessment Need to Be Prepared?

Second, when would an interstate environmental impact assessment need to be prepared? This is essentially a question of triggering. Borrowing (with slight modification) from NEPA, an interstate environmental impact assessment would be required for any major state action with potential to significantly affect the quality of the human environment in another state.[40] The source state, the affected state, or the citizens of either state could request an interstate environmental impact assessment when this standard is met (assuming that both the source and affected states have enacted an interstate environmental impact assessment policy). While this standard may appear vague or ambiguous, there is a massive body of case law under both NEPA and state environmental impact assessment laws to provide guidance. Again, borrowing from both NEPA and state law, state action should be defined to include both projects funded or constructed by the state, as well as decisions by the state to permit or approve a private action.

To address the interstate environmental harms from sprawl, it is critical that local governments be subject to an interstate environmental impact assessment policy. Most land use decisions are made by local government, and these decisions may have impacts in other states. Over 30 of the largest metropolitan areas in the United States extend across state lines.[41] An interstate environmental impact assessment policy should build on the examples set by California, Massachusetts, Minnesota, New York, and the state of Washington[42] and apply to local as well as state government.

C. What Should Be Required of an Interstate Environmental Impact Assessment?

Third, what should be required of an interstate environmental impact assessment? First, public participation throughout the process is necessary to inform the interstate environmental impact assessment. Public participation could produce a better knowledge base to inform decisions. Equally important, the public participation is itself an important element in addressing the underlying problem of interstate environmental harms. At a minimum, public hearings should be held in the communities affected by the potential interstate environmental harm, forcing the decisionmakers to visit such locations and hear the concerns of citizens. Ideally, an interstate environmental impact assessment policy would go beyond traditional public participation, which is often characterized by "relatively infrequent and superficial opportunities for consultation," often limited to "peak-level moments" such as when an EIS is issued.[43]

A new interstate environmental impact assessment policy also provides an opportunity to improve on NEPA and craft a "smarter" environmental impact assessment law.[44] Specifically, an interstate environmental impact assessment policy should incorporate Prof. Bradley C. Karkkainen's recommendations and "require monitoring, ongoing policy and project reassessment, [and] adaptive mitigation."[45] While NEPA is based on a "1960s-style faith in comprehensive bureaucratic rationality,"[46] three decades of post-NEPA experience with environmental decisionmaking has produced valuable lessons to incorporate into a new interstate environmental impact assessment policy. Most importantly, NEPA's "naive faith in the predictive capacities of rational bureaucrats" should be modernized with "'post project assessment,' that is, ongoing monitoring, reevaluation, or project adjustments or adaptations in response to new information or changing conditions."[47]

Why is it so important that an interstate environmental impact assessment policy incorporate post-project assessment? Because pre-project assessments, the central feature of NEPA and most other environmental impact assessments, are often wrong. According to one recent study of EIS performed pursuant to NEPA, "fewer than one out of three verifiable predictions correctly forecast both the direction and the approximate magnitude of the environmental impact."[48] This should not be taken as a criticism of predictive environmental impact assessments, but a recognition of their limitations. Predictions are simply that, and environmental decisions should be based on both predictions of anticipated impacts and information learned after the initial decision has been made.

This leads to two of Professor Karkkainen's specific recommendations that should be incorporated into an interstate environmental impact assessment policy. First, post-decision monitoring is necessary to "gauge the actual environmental

40. *See* Sierra Club v. Peterson, 717 F.2d 1409, 1412-13 (D.C. Cir. 1983); *see also* 42 U.S.C. §4332(2)(C) (2006).
41. *See* U.S.Census Bureau, Census 2000 PHC-T-3, Ranking Tables for Metropolitan Areas: 1990 and 2000, tbl. 3: Metropolitan Areas Ranked by Population: 2000 (2000).
42. *See* Cal. Pub. Res. Code §§21,100, 21,151; Mass. Gen. Laws ch. 30, §62; Minn. Stat. §116D.04(1)(a); N.Y. Envtl. Conserv. Law §8-0105; and Wash. Admin. Code §43.21C.020.
43. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 Duke L.J. 795, 896 (2005).
44. The term "smarter" refers to Professor Karkkainen's recommendations to improve NEPA. *See generally* Karkkainen, *supra* note 13.
45. *Id.* at 908.
46. *Id.* at 925.
47. *Id.* at 927.
48. *Id.* at 928 (referencing Paul J. Culhane et al., Forecasts and Environmental Decisionmaking: The Content and Predictive Accuracy of Environmental Impact Statements, at 111-12 (1987)).

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consequences" of the state project or decision.[49] This information would be shared with the affected state and public consistent with the public participation principles discussed above. Second, using the information learned through post-decision monitoring, the source state should use adaptive management to avoid unpredicted harms. While this may seem to create an additional burden, it could actually make the initial interstate environmental impact assessment less costly and difficult, since less up-front certainty and conservatism in predictions would be needed.[50] These concepts are not new, as they are used in other environmental impact assessment policies. For example, the Canadian Environmental Assessment Act uses "follow-up programs" as a form of post-decision monitoring.[51] Domestically, the California Environmental Quality Act uses post-decision monitoring and reporting to verify mitigation measures.[52] An interstate environmental impact assessment policy should build on these leading examples.

Finally, as with any administrative decision, enforcement and judicial review would be essential. For this, no new legal or policy ground needs to be broken. A source state's failure to perform an interstate environmental impact assessment and the adequacy of an interstate environmental impact assessment would be reviewable in the source state's courts pursuant to either the source state's environmental impact assessment law or the source state's administrative procedure act. States would only need to provide a right for citizens in affected states that have adopted an interstate environmental impact assessment policy to participate in administrative and judicial proceedings pursuant to the source state's interstate environmental impact assessment law. This could simply be effected through a provision in the interstate environmental impact assessment statute. Alternatively, states could adopt the Uniform Transboundary Pollution Reciprocal Access Act, which provides citizens of other states with equal access to state judicial and administrative systems to address transboundary pollution.[53] The Uniform Transboundary Pollution Reciprocal Access Act only grants reciprocal access to citizens of states that have also enacted the model law.[54] As it has been enacted by only eight U.S. states, more widespread adoption would be necessary.[55]

This discussion of the key elements of an interstate environmental impact assessment policy is not intended to be either complete or definitive. It is only meant to address the major substantive issues necessary to understanding the concept of interstate environmental impact assessment. If state policymakers are persuaded that the concept has merit, then the next step is to gather their ideas and expertise and move forward collaboratively. Given the above discussion regarding the benefits of incorporating public participation, local knowledge, and adaptive management in an interstate environmental impact assessment policy, it would be hypocritical to suggest that the policy itself would not also benefit from these tools.

IV. Conclusion: The BP Lake Michigan Pollution Revisited

As a practical conclusion, it is important to evaluate the proposed interstate environmental impact assessment policy with three questions: why is it needed, will it do any good, and would states actually pass it into law? To answer these questions, it is useful to revisit the BP Lake Michigan pollution dispute discussed in the introduction.

First, the process itself would have provided a mechanism to overcome the informational and public participation biases that fueled the BP interstate dispute. Better information, more educated and engaged citizens, and the pressures of public participation can affect the choices of state decisionmakers. An affected state's elected officials, agency staff, and citizens may have useful information to improve proposed projects and reduce environmental impacts. The information produced to the public could empower citizens and spur community activism. Even a basic cost-benefit accounting of the project that includes costs externalized on other states would prevent state decisionmakers from operating under "fiscal illusions,"[56] forcing them to confront the true costs of their decisions.

Second, the interstate environmental impact assessment process and informational outcome would complement existing substantive duties under both federal and state law that restrict excessive interstate environmental harms. Interstate environmental impact assessment should thus be viewed as a facilitative improvement to the current interstate environmental harm prevention and liability regime, not a substitute. For example, the information gathered and produced in an interstate environmental impact assessment would be tremendously valuable to a federal court adjudicating an interstate nuisance claim, especially a claim involving complex technical and scientific issues. The U.S. Supreme Court has expressly stated its reluctance to adjudicate complex technical environmental disputes between states,[57] and would likely view a comprehensive interstate environmental impact assessment as a valuable source of information, especially if it carries the additional legitimacy of public participation. The information produced in an interstate environmental impact assessment could also complement federal statutory duties regarding interstate pollution.[58] A reciprocal interstate environmental impact assessment policy would also counter the

49. *Id.* at 938.
50. *See id.* at 941.
51. Canadian Environmental Assessment Act, 1992 S.C., ch. 37 §§2(1), 14, 16(2)(c) (cam.).
52. *See* Cal. Pub. Res. Code §§21,100, 21,081.6 (2007).
53. Uniform Transboundary Pollution Reciprocal Access Act §§1-10, 9C U.L.A. 392-98 (1982), *available at* http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1t4.
54. *See id.* §§1-3.
55. *See* Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. Mich. J.L. Reform 681, 744-45 (2007).
56. Ammon Lehavi, *Intergovernmental Liability Rules*, 92 Va. L. Rev. 929, 942 (2006).
57. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 504-05 (1970).
58. *See* Clean Air Act §§110(a)(2)(D), 126(b), 42 U.S.C. §§7410(a)(2)(D), 7426(b) (2000); Clean Water Act §402(b)(3), (5), 33 U.S.C. §1342(b)(3), (5) (2000).

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lack of incentives for states to gather information and learn more about commonly shared interstate resources.

To answer the third question, the Illinois-Indiana Lake Michigan pollution dispute helps demonstrate that state lawmakers may be willing to enact an environmental impact assessment policy. In the wake of the dispute, the Midwestern Legislative Conference of the Council of State Governments held its annual meeting in Traverse City, Michigan, a few hundred miles up the Lake Michigan shoreline from the BP Whiting refinery. At the meeting, the state lawmakers in attendance unanimously adopted a resolution recognizing that resources such as the Great Lakes are a shared responsibility of neighboring states, and urged the states and the U.S. Congress to consider new policies to better meet their shared environmental goals. After disputes such as this, it becomes even clearer that management of interstate environmental harms (as well as multibillion-dollar investments) should not be based on a political war of words or state rivalries, but instead should utilize an open process of public participation and information exchange. Interstate environmental impact assessment could thus produce better results for all interested parties on both sides of an interstate environmental dispute.