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Edited by Alyson C. Flournoy and David M. Driesen

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Part I NATIONAL ENVIRONMENTAL LEGACY ACT

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1 The Case for the National Environmental Legacy Act

Alyson C. Flournoy

THERE IS VIRTUALLY UNIVERSAL AGREEMENT ACROSS THE political spectrum that we should protect the interests of our children and grandchildren in setting environmental, health, and safety policy. The concepts of sustainability and intergenerational equity, which advance this same objective, have become increasingly important in environmental law and policy debates in the past thirty years, both in the United States and internationally. In a large number of statutes, Congress and many state legislatures have embraced the goals of protecting a resource legacy for future generations and of promoting sustainable use of the nation's stock of natural resources.¹ In addition, in polls, the American public consistently expresses concern for how well we steward resources and has shown a strong recognition of a responsibility to future generations.²

Yet by any measure, it is clear that the United States is neither using its natural resources in a sustainable fashion nor systematically considering how today's patterns of resource use will affect the next generation. Report after report document the decline in supplies of fresh water, fish species and biodiversity, energy resources, and many of the values and services associated with those.³ Many public natural resources are managed under statutes with notoriously open-ended standards that require federal agencies to

This chapter draws on a forthcoming report that also includes case studies illustrating how a "legacy act" would operate. RYAN FEINBERG, ALYSON C. FLOURNOY, MARGARET CLUNE GIBLIN, HEATHER HALTER & CHRISTINA STORZ, *THE FUTURE OF ENVIRONMENTAL PROTECTION: THE CASE FOR A NATIONAL ENVIRONMENTAL LEGACY ACT: A CENTER FOR PROGRESSIVE REFORM REPORT*, available at <http://www.progressivereform.org/articles>. The idea for a legacy act has developed over several years with contributions from all of the report's coauthors.

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“balance” a variety of often-incompatible uses, many of which degrade or deplete relevant resources.⁴ Many of these statutes contain no enforceable standard mandating protection of any particular quality or quantity of a resource. Instead, they generally charge the relevant agency with developing a plan for the resource that considers a list of competing potential uses. The agency is then granted considerable discretion to decide which of the competing uses to permit and on what terms. Not only do the statutes entrust the agencies with broad discretion to permit degradation and depletion of public natural resources, but also cases interpreting the statutes have removed some of the few effective checks on agency discretion.⁵ Courts have limited both citizens’ ability to enforce agency commitments to preserve resources set forth in agency management plans and citizens’ ability to force agencies to take action to comply with affirmative statutory mandates if such duties are found not to be sufficiently “discrete.”⁶

In light of these and other shortcomings of current law, the next generation of environmental laws should act on the laudable, widely embraced, but largely unrealized goal of protecting a resource legacy for future generations. This chapter outlines a proposal for a new statute – the National Environmental Legacy Act (Legacy Act) – that would require us for the first time to define in concrete terms the environmental legacy we wish to leave to future generations and provide a mechanism to ensure that we preserve that legacy.⁷

The Legacy Act proposed here focuses on preserving a public natural resource legacy for the next generation, because the quality and quantity of available natural resources are key determinants of the options and quality of life that future generations will enjoy. Public natural resources include water and land, as well as the ecosystems, biodiversity, and minerals found in or on the land or water. The Legacy Act seeks to protect both the resources and the many values and services they provide. As proposed, the Legacy Act applies to resources that are under public ownership or management or are protected by the public trust doctrine, but not to natural resources in wholly private ownership.

If we acknowledge that public natural resources are a significant form of natural wealth, concern for the resource legacy we leave follows naturally.⁸ The concept of defining and preserving a resource legacy builds on basic principles of wealth management. Just as an estate plan enables individuals with private wealth to ensure that their wealth is protected for the next

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generation, the Legacy Act provides a mechanism to ensure that public wealth is preserved for the next generation and not depleted or spent today. Financial professionals universally recommend that individuals adopt a savings plan if they truly wish to save for the future; they do not recommend that they spend all their currently available income. A default position that savings will occur and that a specified amount will be saved for the future is the keystone of success.⁹ The Legacy Act adopts this same approach to conserving natural resources. The statute requires us to determine a threshold of resources that we commit to leave to future generations, and it ensures that necessary savings will occur. Just as a savings plan requires that one protect and set aside the money needed for savings and spend only what income remains, the Legacy Act requires stewards of public resources to set aside a defined level of resources for future generations and to spend or use only that which remains or can renew itself.

The central and innovative feature of the Legacy Act is a clear and enforceable conservation mandate that focuses on sustainability and constrains resource use.¹⁰ Whatever standard of sustainability is chosen, the key is that a legacy is defined and a clear and enforceable mandate that will preserve the desired legacy is imposed.¹¹ The importance of a clear, enforceable mandate is perhaps best illustrated by considering the starkest alternative to adopting such a mandate – that is, to impose no enforceable standard, to make no meaningful commitment on what our legacy will be. Such a choice would reflect what is called a “spend-down ethic.” It would reflect the decision to use resources according to the dictates of our current short-term needs, however high the costs we are leaving our children and however strong the likelihood is that they will experience dislocation and loss from the anticipated depletion of key public natural resources, including fossil fuels, freshwater supplies, fisheries, and so on. A spend-down ethic is premised on a lack of any ethical or moral commitment. Such an approach leaves our children and their children to overcome these challenges and to use as they see fit whatever resources may remain.

Although it may sound harsh, this spend-down ethic is in fact the legacy we are currently pursuing. We do not embrace it openly, but by relying on highly discretionary resource management statutes with open-ended balancing tests, purely procedural impact assessment under the National Environmental Policy Act (NEPA), and analytic approaches like cost-benefit analysis that fail to adequately account for the future, we are tacitly

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accepting that we do not know and do not care what the impact of our resource use will be. Blithe and unfounded speculation and assumptions about the greater wealth and technological prospects of future generations are routinely offered as the justification for excluding consideration of our children's interests from critical decisions or for discounting them dramatically.¹²

If the Legacy Act is to avoid perpetuating this same ethic – in other words, if it is to achieve some purpose – it must include a clearly articulated mandate for conserving some defined quality and quantity of key public natural resources and a related prohibition on any resource use that will impermissibly deplete or degrade these legacy resources. Absent such an enforceable prohibition, agency decision makers will be subjected to the same pressures to which they respond under current law. These pressures have eviscerated the sincere but ineffectual aspirations to sustainability embodied in statutes like the Multiple-Use Sustained Yield Act,¹³ the Magnuson-Stevens Fishery Conservation and Management Act,¹⁴ and the National Environmental Policy Act.¹⁵

Notwithstanding the critical importance of an enforceable mandate for sustaining a defined quality and quantity of individual resources, the statute must also take account of two fundamental insights from ecology that arguably stand in tension with the goal of preserving a defined quality and quantity of individual resources. The first of these ecological insights is that, to preserve natural resources, we must ensure not just the continued existence of the individual resources but also the health of the ecosystems of which they are part. The solution embedded in the Legacy Act is to require that, while pursuing the mandate to prevent impermissible depletion and degradation of protected resources, resource stewardship agencies also plan to ensure that the ecosystems of which the resources form part maintain their resilience.¹⁶

The second ecological insight arguably in tension with the Legacy Act's central feature is that natural systems are dynamic and change even in the absence of human intervention. The Legacy Act seeks to respond to this insight but without reverting to a statutory design that simply accords agencies standardless discretion to manage adaptively, thereby replicating the shortcomings of current laws. The solution incorporated in the Legacy Act is to set a clear standard and focus regulatory efforts on preventing changes in natural systems that result from postenactment human conduct.¹⁷

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Given the evidence of a long-term trend of depletion and degradation of natural resources, as well as the systemic biases in favor of economic and consumptive use of resources, we need a better method to help us account for impacts on future generations. The Legacy Act would help us to make conscious policy choices about the legacy we leave and would provide the tools to ensure that we manage our natural resource wealth wisely and in accord with our chosen priorities.

This chapter offers a brief overview of the contours of the proposed statute. The remainder of this chapter discusses some of the key attributes of the proposed statute, identifies some issues that the design of the statute raises that warrant further debate, and addresses some of the objections to the Legacy Act concept that will likely be raised.

The Contours of the National Environmental Legacy Act

The concept of the National Environmental Legacy Act is to define and protect a legacy of public natural resources for future generations, something no statute has done successfully to date. Building on the goals already expressed in numerous laws, the Legacy Act would, for the first time, require management of public resources to conserve some stock of resources for future generations. Embrace of the Legacy Act concept would impel us to identify our long-term goals and would then help us chart and maintain a course to achieve our shared goals. It would also improve our decisions over the long term by generating the information base needed to support adaptive learning.

For purposes of discussion, I propose a very broad definition of public natural resources that includes all resources under federal ownership or protected by the federal public trust doctrine, together with all the values and services associated with those resources. Thus, public natural resources would include forests, wetlands, uplands, and all other types of ecosystems found on public lands and all the species of life found in these ecosystems, as well as fisheries under federal protection or control. Minerals encompassing an array of hard-rock minerals as well as oil, gas, and other nonrenewable energy sources would also be covered. The values and services these resources provide to humans are numerous and varied. For example, lands within a national forest may provide timber for consumptive use; habitat for wildlife; carbon sequestration; watershed and

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erosion protection; and aesthetic, spiritual, and recreational values, to name a few.¹⁸

At a minimum, the idea of the Legacy Act envisions a statute that defines the public natural resource legacy we wish to preserve and prohibits all actions that will degrade or deplete the defined legacy. These two core objectives of the statute are guideposts that suggest the general contours of the statute. Building on these objectives, I propose the following model to achieve the goals of the statute.¹⁹ A more detailed discussion of its key provisions follows this general description of the statute.

Section 1 – Goals and Policy: The statute should set out the goal of defining and preserving a legacy of public natural resources for present and future generations of Americans. The statement of goals and policy should also describe in affirmative terms the legacy we wish to leave, defined in relation to our existing stock of resources.

Section 2 – Designation of a Legacy Period: The statute should designate a fixed period of years that constitutes the legacy period over which public natural resources must be conserved.²⁰

Section 3 – Prohibited Degradation or Depletion of Legacy Resources: The statute should set forth in clear and enforceable terms the maximum level of degradation or depletion of resources, if any, that will be permitted over the course of the legacy period. This is critical to ensure the enforceability of the statute. The statute should include distinct standards of permissible degradation and depletion for renewable and nonrenewable resources. The statute should in broad terms prohibit actions by any person²¹ that may produce impermissible degradation or depletion of a legacy resource during the legacy period. Section 3 by its terms can effectively only constrain postenactment human conduct. In other words, its prohibitions will not preclude changes that are caused solely by (1) human action taken prior to the date of enactment of the Legacy Act or (2) changes in resources or ecosystems that are not caused by human actions.

Section 4 – Designation of Legacy Resource Stewardship Agencies: The statute should designate an existing federal agency to serve as the resource stewardship agency for each public natural resource.²²

Section 5 – Development of Metrics and Collection of Baseline Data on Resource Quality and Quantity: Each stewardship agency should be charged with developing the implementing regulations that designate appropriate metrics of quality and quantity for the resources for which they are stewards. The statute should both mandate and authorize adequate

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funding for the collection of baseline data on the quality and quantity of all public natural resources employing these metrics.

Section 6 – Promulgation of Rules Defining Maximum Permitted Levels of Degradation and Depletion over the Legacy Period: Each stewardship agency should be required to promulgate rules that translate the substantive prohibition articulated in Section 3 into enforceable standards for each relevant resource, expressed in terms of the metrics developed under Section 5. In addition, each stewardship agency should be directed to identify tipping points for each ecosystem under its stewardship. By “tipping point,” I mean resilience thresholds – thresholds beyond which degradation of resource quality or quantity will cause loss of ecosystem resilience.²³

Section 7 – Stewardship Agency Mandate to Ensure No Impermissible Degradation Will Occur: The statute should limit stewardship agencies’ discretion under existing law by requiring that each stewardship agency ensure that no degradation or depletion in excess of permissible limits will occur during the legacy period. The statute should also specifically mandate that each stewardship agency develop a legacy “plan” to demonstrate how it will ensure that the mandated resource legacy is conserved over the legacy period and conform its actions to the legacy plan.²⁴

Although the Act’s prohibitions constrain only post-Legacy Act human conduct, agencies should be required to monitor, assess, and consider degradation and depletion from all sources in planning and in making decisions that affect legacy resources. The statute should also mandate that each stewardship agency ensure the resilience of relevant ecosystems that encompass legacy resources. Where the duty to prevent degradation or depletion of a specific resource and the duty to ensure resilience of the relevant ecosystem conflict, the duty to maintain resilience should prevail.

Section 8 – Ecosystem Resilience Assessment: Should preenactment human conduct or non-human-induced changes cause significant degradation or depletion to a legacy resource, the agency should be required to perform a resilience assessment to determine whether the ecosystem retains the capacity to persist in light of the degradation or depletion. If the ecosystem can persist, the agency should be required to modify its legacy plan as needed to promote the continued resilience of the system. In cases where the system can no longer persist and has flipped to a new behavior regime, the question of whether to attempt to restore the system or to seek to promote the resilience of the new regime should be addressed by the stewardship agency following public comment. Factors to be considered would

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include the values and services provided by the ecosystem in its prior state and in its current state, the uniqueness of the resources, and the cost of restoring the ecosystem to its prior behavior regime.²⁵

Section 9 – Enforcement: To ensure enforcement, both the stewardship agency and citizens should be granted enforcement authority. A citizen suit provision with fee shifting would be a critical component of the statute.²⁶ This provision should authorize any person to bring an action to enjoin and seek penalties for any action that impermissibly degrades or depletes public natural resources. The statute should also permit citizen suits against any stewardship agency to enforce other agency duties under the statute, including the duty to collect information, the duty to develop or update a legacy plan, and the duty to conform agency actions to the terms of the legacy plan.

Section 10 – Monitoring and Adaptive Learning: The statute should require and authorize funding for ongoing monitoring of legacy resources and the ecosystems of which they form part and should require stewardship agencies to update legacy plans according to a fixed schedule.

Section 11 – Exceptions: The statute should allow for a narrow exception to its prohibition on degradation or depletion in two circumstances: (1) if it can be shown by clear and convincing evidence that foreseeable technological advances or the availability of substitute resources will obviate the need for and value of the resource in question or (2) if impermissible degradation or depletion is clearly in the public interest, no acceptable alternative that will not cause impermissible degradation or depletion exists that will serve the public interest adequately, and the impacts to all services and values to be impaired can and will be mitigated.²⁷

In the following sections, some of the key attributes of the Legacy Act are discussed. In addition to explaining the proposed statute in greater detail, this discussion identifies issues on which further work is needed to permit full development of a statute.

Key Attributes of a Legacy Act

1. Interplay of the Proposed National Environmental Legacy Act and the National Environmental Policy Act²⁸

The Legacy Act follows a general approach first made popular with the National Environmental Policy Act: a single statute that applies across

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the board to decisions affecting a wide range of resources. This approach supplements the resource-by-resource approach that characterizes many of our public natural resource conservation and management laws. Although NEPA has been criticized as generating unnecessary paperwork and inadequate results,²⁹ it has also been recognized as having achieved significant gains.³⁰ The success of NEPA's innovation is demonstrated by its widespread imitation around the world and by some U.S. states.³¹

In addition to sharing with NEPA a scope that encompasses actions affecting a wide variety of federal lands and resources, the Legacy Act also echoes NEPA in its embrace of a policy in favor of preserving resources for future generations. The National Environmental Policy Act is premised on a recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances."³² In its statement of policy, NEPA recognizes "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man."³³ It aspires to create and maintain conditions under which "man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."³⁴ In seeking to carry out this ambition, NEPA adds to the federal government's responsibilities a duty to use its resources "to the end that the Nation may – (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."³⁵ Although NEPA also requires agencies to seek to "attain the widest range of beneficial uses of the environment," this is to be "without degradation, risk to health or safety, or other undesirable and unintended consequences."³⁶ Thus, NEPA can be fairly said to have at its core a legacy ambition – a conscious recognition of a duty we owe as a nation to future generations and a policy that adds to the mandate of federal agencies a duty to take steps to fulfill the role of steward of our natural resources.

From reading these statements of policy, one might think the proposed Legacy Act redundant. In practice, however, it is widely recognized that NEPA has failed to fulfill many of these lofty ambitions.³⁷ Consequently, the Legacy Act's design seeks to achieve these goals through very different means. Thus, the Legacy Act prohibits resource degradation or depletion that exceeds a specified standard. In other words, it contains a clear enforceable standard, not merely a general statement of policy backed by