

## PERSPECTIVES FROM THE FIELD

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### Recalling the Value of the National Environmental Policy Act

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Many of the articles in this special issue of *Environmental Practice* cast a critical eye on current implementation of the environmental impact assessment process under the National Environmental Policy Act (NEPA). Informed, constructive criticism is good and healthy and should be undertaken early and often by those who care about the law and our society. Hopefully, through these articles and associated dialogue, ways of improving the implementation of the NEPA process to more effectively achieve the goals of NEPA will be identified. Certainly, both the broad statutory framework and the Council on Environmental Quality (CEQ) implementing regulations allow for flexibility to meet the universal and persistent challenges NEPA was designed to address. Those challenges, while they may be presented in the context of different media mechanisms than were available when NEPA was passed, are frequently the same challenges as faced in 1969. Mining companies still want to mine, states want new or improved highways, national parks must still develop plans for visitors, and airports feel the need to add runways. People still care passionately about wildlife. People still want solitude and all types of recreation opportunities and economic growth and better infrastructure. In short, we want it all!

The national policies set forth in NEPA were the first broad, national environmental policies ever to be enshrined into law by a nation. The protection and management of a nation's physical environment is still a very, very new evolutionary development for the human race, as compared to issues like defense against invaders and promotion of trade, concepts that have defined societies for generations. And the NEPA process, the procedural framework for analyzing impacts that ultimately are weighed and balanced

by decision makers, is often the law that provides the crossbow from which an unwelcome arrow is shot. It is not surprising that it is often under attack.

As we contemplate improving the vehicle for delivering analysis needed for wise decision making, we would do well to remind ourselves that there is much good in the NEPA process that needs to be strengthened, not weakened. The purpose of this essay is simply to remind all of us of why NEPA is still needed and still relevant and why its value must be judged from a number of different perspectives, all respectful of the role of citizens in American society.

### NEPA Provides Information on What an Agency Plans to Do before It Does It

This sounds so utterly mundane. Of course, an agency has to tell the public what it plans to do before it does it, right? Well, no. Yes, there are a few discrete types of actions, such as agency rule making, for which there is a separate statutory requirement for advance notice and public review and comment. But, before NEPA, there was no mandate to agencies to inform the public systematically of what they were doing in advance of doing it and, despite the proliferation of laws since then, there is still no such generally applicable requirement. NEPA provides the best vehicle for advance notification of a proposed federal action.

For those who doubt that a pre-NEPA world could exist again in this day of instant messaging and twitter, I invite you to the United States (US)–Mexico borderlands, where many actions can take place without going through the NEPA process because of the waiver of laws under the REAL ID Act (US Congress, 2005). There, despite the best of intentions, both public land managers and the public have on several occasions discovered that a decision had been made by an agency after construction had commenced. While there has been improved interagency coordination in some sectors, advance notice, both to the

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public and to other government agencies, depends on good will and informal agreements, not the law. It is a stark reminder of the days prior to NEPA, and it is not good.

In the rest of the country, the efficiency with which federal agencies undertake this basic notice function varies. Some agencies provide easily accessible, across-the-board notice of all proposed actions regardless of the level of required NEPA analyses.<sup>1</sup> In other cases, the information is more closely held, requiring more effort on the part of interested citizens.

The inherent role of public notification and at least potential participation in decision making as a result of environmental impact statement (EIS) is one reason that the process has been so influential in countries not under a democratic regime. The introduction of environmental impact assessment was been cited by observers as one of many influences leading to the breakup of the Soviet Union and Communist-led Eastern European regimes. More recently, problems with the environmental impact assessment process for a dam proposed by China that would have a major impact on Burma was cited as a factor in a changing relationship between Burma and China (Osnos, 2012). We should cherish NEPA's requirement that US government agencies alert citizens to and provide access to information about proposed actions when there is still a chance to make a difference.

### **NEPA Provides A Unique Framework for Intra-agency and Interagency Discussion about Proposed Actions That Provides Substantive Information**

It would be nice to think that federal agency personnel have frequent internal discussions about proposed actions and coordinate *sua sponte* with other federal, tribal, state, and local agencies. They generally don't. In my experience, NEPA is one of the few mechanisms for getting agency people in different offices and with different types of expertise to talk to one another. The requirement for public notification and involvement also can influence an agency's internal deliberations and ultimately the shape of a proposed action. The realization that "We're going to have to explain this to the public" may generate not only a better explanation but deeper thinking about what and why is really needed.

Interagency discussion provides a much-needed heads-up about major issues, obstacles, and opportunities. These discussions can and do lead to identification of real improvements that help the environment and that help the

lead agency achieve its mission. They provide information that otherwise would likely not be factored into the decision making. As one Department of Energy (DOE) official stated, "NEPA is an essential platform for providing useful information to decision makers and the public, supporting good decision making, and thus advancing DOE's mission. Without NEPA, we would likely experience significant deficiencies in protecting the environment for future generations."<sup>2</sup> In short, the process provides a structure for intergovernmental communication that otherwise doesn't exist absent a special statutory or presidential mandate for interagency discussions or executive branch policy direction.

### **Through Participation in the NEPA Process, Members of the Public Can and Do Influence Federal Decisions**

Different people may have, of course, different perspectives on what should be termed a success. I consider the NEPA process to be a success if, during compliance with the law, the process influenced both the decision maker and the perspective of those who engaged in the process. A number of articles have been written documenting such successes and, of course, many examples of a successful NEPA process have not been published. Human motivation being what it is, people are more likely to document complaints than compliments.

In reviewing the examples of success that have been documented, several factors stand out in leading observers to call the implementation of NEPA in a particular instance a success. In some instances, internal contributions have affected the outcome in ways that proved highly beneficial.<sup>3</sup> In other situations, new information has been proffered by another agency, incorporated into the decision, and later found to be of high value.<sup>4</sup>

A predominant theme in a number of NEPA success stories is the thoughtful development of comprehensive alternatives developed outside of the lead agency that are then considered by the lead agency. As NEPA practitioners know, CEQ regulations characterize the requirement to analyze reasonable alternatives to achieve the agency's purpose and need as the "heart" of EIS (CEQ, 2012, para. 1). Human beings inevitably race through alternatives analysis in their own minds many times a day; few people make important decisions without real consideration of alternatives, even to the point of jotting down alternatives on a notepad along with pros and cons. Yet, once we decide on a course of action, we tend to resist the "What if we did this

instead?” type of questions that may pop up along the way. Agency representatives, who all happen to be human beings, do the same. Without the requirement to identify and analyze reasonable alternatives, the NEPA process is bereft of its most important contribution to wise decision making. As Dave Freudenthal, then governor of Wyoming, stated in a letter urging an agency to include a grassroots alternative in a draft EIS, “[T]he National Environmental Policy Act is not about what we do or do not like. Rather it is about displaying a true range of alternatives to address the issues raised during the planning process.”<sup>5</sup>

The most exciting development in NEPA implementation over the past few years has been the slow but steadily increasing move on the part of diverse groups of citizens to develop their own alternative for presentation to the agency. It certainly doesn’t happen all the time. It requires an educated, motivated public, as well as an agency that is willing to or is pushed into thinking outside its own box. In cases where this is successful (i.e., the agency publishes the alternative for public review and comments and considers it in its decision making), the alternative has been carefully shaped to meet the agency’s purpose and need, and it presents a reasonable and feasible pathway. Such alternatives have sometimes been presented by a coalition of disparate constituents and sometimes have included a fair amount of analysis regarding impacts for the agency to review. Such work does involve time and some resources, although many people in a community often have knowledge and experience that they are willing to contribute to such an effort, if asked. This development is exciting, not only because it has produced real changes in an agency’s ultimate decision, but because, even more broadly, it demonstrates the NEPA process’s potential for promoting the implementation of democracy. This interactive participation by citizens that results in demonstrable effects on decision making is an important antidote to the cynicism of many who feel that their views no longer matter to their own government.<sup>6</sup>

## **Delay Is Not Always NEPA’S Fault nor Is It Always a Problem**

Speed appears to be the number one criteria by which some critics measure NEPA compliance. More than flawed analysis, ineffective integration into decision making, and even more than cost, the time it takes an agency to complete the NEPA process for a proposed action appears to be foremost on critics’ minds. Indeed, a bill to amend the NEPA process for all proposed projects was filed in the

House of Representatives in 2012 under the rather awkward title of the “Responsibly and Professionally Invigorating Development Act,” presumably to use the resulting acronym: the “RAPID Act.”<sup>7</sup> The emphasis on speed worked: the RAPID Act passed the House in the spring of 2014.<sup>8</sup> Many other bills have been filed over the past few years and in the current session to speed up the NEPA process. Three major pathways to achieving this set forth in these bills are by cutting core analytical requirements out of the law, like the requirement to analyze alternatives;<sup>9</sup> by fining agencies that do not meet a particular deadline;<sup>10</sup> or by legislating an approval as the default if a deadline is not met.<sup>11</sup> Other bills simply exempt types of actions from NEPA.<sup>12</sup>

I know of no one who would question that an element of efficiency in implementing NEPA must be a steady pace of progress in the work of the lead and cooperating agencies and by any contractors or consultants employed by the lead agency. Indeed, reducing delays in the NEPA process has always been a goal of the CEQ’s oversight of the NEPA process. The CEQ regulations implementing NEPA’s procedural provisions contain a number of time-saving measures. Most people understand the saying “time is money,” and both proponents and opponents of a project may be adversely affected by undue delay.

However, why has speed become, in the eyes of many, the ultimate goal of NEPA “reform” (short of rescission)?<sup>13</sup> It certainly isn’t because analysis indicates that the NEPA process is the major cause of delay in project decision making. Indeed, in the one project area that has been the most frequently studied on a systematic basis—highway transportation—report after report has documented that there are other regular and more frequent causes of delay in project decision making. As stated by the Department of Transportation (DOT), “The significant delays that sometimes occur in highway projects are generally due to other causes [i.e., other than NEPA review], such as lack of funding, the low priority assigned to a project by the sponsoring state transportation agency, or significant local disagreements over the merits of the project” (Federal Highway Administration, n.d.)<sup>14</sup> The vast majority—approximately 94%—of highway projects are now categorically excluded, which, under CEQ’s regulations, means no paperwork is required, although some analysis is required under certain circumstances.<sup>15</sup> Yet bills continue to be introduced as though NEPA is the major impediment to rebuilding highways and other infrastructures in the US despite abundant evidence identifying other unrelated issues as the problems that are holding back infrastructure reconstruction and innovation.<sup>16</sup>

This is not to argue that the NEPA process never causes delays. It does and it should. The purpose of the NEPA process, as already discussed, is not to get to “yes” in a slightly more environmentally benign manner. Indeed, it defies common sense to suggest that every proposal ever made by or submitted to an agency deserves approval. All proposals coming within the scope of an agency’s jurisdiction and authority do, of course, deserve a decision. However, the analysis necessary to prepare for a decision that may lead to permanent impacts on a community and landscape may need to take several years. And, notably, most bills seeking to expedite the NEPA process seek to expedite *approval*, not the decision making itself.

Importantly, the project proponent, whether a government agency or a private-sector applicant, is not the only intended beneficiary of the law. The NEPA process is intended to provide all interested and affected persons and organizations the ability to influence the decision. In a number of cases, the most permanently affected party may not be the applicant at all. It may be a rancher whose use and enjoyment of his or her property is forever altered by a energy-development infrastructure. It may be a community in which a significant percentage of residents have located to pursue a professional or personal type of activity that will be seriously impaired by a proposed development. It may be an island that would have its fundamental character irretrievably altered by a major development.

It is easy to look at numbers on a chart and say “this takes too long,” but peoples’ lives are seriously affected by federal agency decision making. These citizens deserve consideration and deference within the context of the NEPA process before their own government makes a decision that affects them. Before coming to conclusions about time, critics would do well to take the time to talk to the people involved and affected by the project. Did these people think it took too long? Or did they feel like the project was rushed through and rubber-stamped because of pressure to “get to yes”?

Sadly, one trend that has had a detrimental effect on both the efficiency and effectiveness of the NEPA process is the diminishment and defunding of internal agency staff skilled in the NEPA process. Over the years, small, interdisciplinary offices established to help guide agency components through the NEPA process have been decimated or abolished. In some cases, agencies have moved almost entirely to contractors for preparation of NEPA documents, and those agencies have little capacity in directing or overseeing the work. In other cases, everyone in an agency is told that they now have to “do NEPA” even without the requisite training to know how to

accomplish the process efficiently. Those who are interested in improving efficiency would do well to study the internal staff capabilities of agencies that are frequently lead agencies for the NEPA process and the additional time that attaches to the NEPA process when an agency must procure and oversee a contractor to do a job because the agency lacks the resources to do the work itself.

## “NEPA Is the Guide Star”

Opponents of NEPA are quick to portray the law as merely a tool in the hands of professional environmentalists who are often mischaracterized as wanting to stop all progress in the Western world. The truth is much more complicated. NEPA is a statute open to and used by all members of society. “I am the antithesis of a tree-hugger,” says a western outfitter involved in developing an alternative to energy development on the Bridger-Teton National Forest to try and avoid serious damage to the Wyoming Range. “The more information I have, the better decision I can make,” says the Forest Supervisor in response (Kelsey, 2012).

Similarly, the Georgia DOT might seem to some like an unlikely venue for fans of NEPA. Yet, in an opinion piece published in the *Atlanta Journal-Constitution* in 2013, Glen Bowman of the Georgia DOT, wrote,

At Georgia’s Department of Transportation—the entity responsible for more earth work in this state than any other—NEPA has a huge impact on planning, designing and building transportation infrastructure. Virtually everything we do begins with “complying with the NEPA process.”... With as many as 700 projects ongoing at anytime, not everyone is always going to be satisfied. But our foremost mission is to help make those 700 project realities; keep motorists safe and moving, and grow that network as Georgia grows. Meeting our transportation needs and protecting our environment are not mutually exclusive objectives.... NEPA’s impact is unquestionable; it remains the nation’s environmental guide star. (paras. 4, 8, 9, 3)

As we continually try to improve the NEPA process, we should keep in mind the elements that come together to make NEPA the guide star today and for the future.

## Notes

1. For example, the Forest Service publishes a Schedule of Proposed Actions for individual national forests that includes all proposed actions and provides links to applicable NEPA documents (for example, see Tongass National Forest projects, <http://www.fs.usda.gov/projects/tongass/landmanagement/projects>). The Department of Energy’s Office of NEPA

- Policy and Compliance website (<http://energy.gov/nepa/office-nepa-policy-and-compliance>) provides information on all NEPA documents, including categorical exclusion determinations, as well as information about geospatial and document management systems, recent Department of Energy (DOE) NEPA experiences and other information.
2. Interview with John Spitaleri Shaw (2005), Assistant Secretary for Environment, Safety and Health, DOE.
  3. It was, according to Admiral James Watkins, internal discussion triggered by the need to comply with NEPA and identify alternatives that led him to say, “Thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country” (House Armed Services Committee, 1992, p. 15).
  4. For example, the DOE credited the Forest Service with providing advice during the scoping process for an installation plan that helped to minimize damage to the Los Alamos Laboratory during the Cerro Grande fire in 2000 (US Department of Energy, 2000).
  5. See “Range of Alternatives” in the letter from Dave Freudenthal, governor of Wyoming, to the Bureau of Land Management, March 15, 2005 (Freudenthal, 2005).
  6. For an excellent discussion of alternatives developed by citizens and analyzed and adopted by agencies, see O’Brien (2004). For a decision holding an agency responsible for considering a citizen-developed alternative, see US District Court, D. Colorado (2012).
  7. See discussion of this and other bills intended to expedite the NEPA process in Bear (2013).
  8. The Responsibly and Professionally Invigorating Development (RAPID) Act (HR 2641; US Congress, 2014) authorizes a project sponsor, upon the request of a lead agency, to prepare the EIS for its own project. It also, among other provisions, prohibits supplemental EISs unless ordered by a federal court, limits the opportunity for judicial review, and provides that an agency may not reverse an approval created by its failure to meet mandated deadlines. Amendments to eliminate the provision that deems as approved any project for which deadlines in the bill are not met, to exempt from the bill proposed nuclear facilities that would be sited in designated earthquake fault zones, and to ensure that nothing in the bill limits public participation in decision making failed.
  9. See the Energy Production and Project Delivery Act of 2013 (HR 1881; US Congress, 2013–14b), which eliminates the no-action alternative under NEPA and allows analysis of only one leasing alternative.
  10. The Moving Ahead for Progress in the 21st Century Act (HR 4348; US Congress, 2012) transportation reauthorization bill, now signed into law, mandates a schedule of fines for agencies that don’t meet a particular schedule.
  11. See, for example, the Natural Gas Pipeline Permitting Reform Act (HR 1900; US Congress, 2013–14c).
  12. The National Strategic and Critical Minerals Production Act of 2013 (HR 761; US Congress, 2013–14a) adds a twist to this. Under the bill, lead agencies would have the discretion to simply declare that a proposed mining permit would not be a major federal action under NEPA. If the agency decided that NEPA should apply, all reviews would have to be completed within 30 months. See also the North American Energy Infrastructure Act (HR 3301; US Congress, 2013–14d), which requires approvals of covered projects such as oil or gas pipelines and declares all such approves to be exempt from NEPA.
  13. The Heritage Foundation has advocated for NEPA’s repeal for several years. See <http://opportunity.heritage.org/conserve-the-environment-through-responsible-stewardship>.
  14. See also Congressional Research Service reports on the issue, including Luther (2012) [“Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope” (“Summary,” para. 4)] and Luther (2007). The US General Accounting Office has published reports with analysis (USGAO, 1994, 2002, 2003).
  15. Agency procedures must provide for extraordinary circumstances in which a normally excluded action will require some level of analysis: “The vast majority of highway projects are processed as CEs.... Based on data collected in 2009, FHWA [Federal Highway Administration] estimates that approximately 96 percent of highway projects were processed as CEs” (USGAO, 2012), p. 3). Categorical exclusions (CEs) are defined at 40 CFR 1508.4 (CEQ, 2010).
  16. For example, see the remarks in the most recent Congressional Research Service report cited in note 14 (Luther, 2012).

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