

NEPA UNDER SIEGE

The Political Assault on the National Environmental Policy Act

Robert G. Dreher

Georgetown Environmental Law & Policy Institute

Georgetown University Law Center

About the Author:

Robert G. Dreher is the Deputy Executive Director of the Georgetown Environmental Law & Policy Institute. He served as Deputy General Counsel of the U.S. Environmental Protection Agency from 1996 to 2000. Mr. Dreher has represented citizens groups, tribes and businesses in environmental matters in private practice and as a staff attorney for the Sierra Club Legal Defense Fund (now Earthjustice). He teaches Natural Resources Law at the George Washington University Law School and at Georgetown University Law Center. He is a graduate of Yale Law School.

The Georgetown Environmental Law & Policy Institute conducts research and education on legal and policy issues relating to protection of the environment and conservation of natural resources. The Institute publishes papers and reports by leading academics and practitioners applying rigorous analysis to contemporary environmental and natural resource issues. The views expressed in Institute publications are those of the authors and do not necessarily reflect the views of the Institute's board of advisers or Georgetown University.

Copyright ©2005 Georgetown University.
All rights reserved. No part of this publication may be reproduced in any form without prior consent of the publisher.

NEPA UNDER SIEGE

The Political Assault on the
National Environmental Policy Act



Robert G. Dreher

Georgetown Environmental Law & Policy Institute

Georgetown University Law Center



INTRODUCTION

The National Environmental Policy Act (“NEPA”) — the “Magna Carta” of U.S. environmental policy — is under siege in Washington, D.C. And there is every indication that attacks on NEPA, by some members of Congress and by certain executive branch officials, will become even stronger in the next several years. Unfortunately, the reasons why Congress originally adopted NEPA are so shrouded in history, and attacks on NEPA are occurring on so many fronts, that most members of the public, and even most policy makers, fail to appreciate what is at stake in this debate. This report seeks to help fill this information gap, rebut certain unfounded criticisms of NEPA, and encourage a balanced, reasoned discussion of how NEPA can be adapted to meet the environmental challenges of the 21st Century.

Enacted in 1970, at the beginning of our recognition of the dangers of environmental degradation, NEPA establishes a national policy calling for “productive harmony” between man and nature. The Act also directs federal agencies to take into account, and publicly disclose, the environmental consequences of their proposed actions before taking steps that may significantly affect the quality of the human environment. Apart from improving the substance of agency decisions, NEPA reinforces the democratic system by providing an avenue for citizens to comment upon and influence government decisions that affect their lives and communities.

Today, NEPA’s critics are mounting an unprecedented attack on this bedrock legislation. The most significant proposals would (1) exempt large categories of government activity from the NEPA environmental review process, (2) restrict the substance of environmen-

tal analysis under NEPA, in particular by allowing federal agencies to ignore environmentally superior alternatives to a proposed action, and (3) limit opportunities for the public to comment on and challenge agency decisions. Cumulatively, these and other proposals threaten to kill the NEPA process with a thousand cuts.

The attacks on NEPA are supported by businesses and resource users who see NEPA as an impediment, by their political supporters, and by certain agency officials who object that the Act constrains their discretion. Self-interest aside, the challenges to NEPA are supported by arguments questioning the wisdom and utility of the NEPA environmental review process. NEPA’s implementation can certainly stand improvement, as others have observed before, but the NEPA process is fundamentally sound. NEPA should be improved and strengthened, not destroyed.

The first two sections of this report describe NEPA and explain how it changed government decision-making for the better. The third section provides thumbnail sketches of various current proposals to “reform” NEPA. The fourth section, the heart of the report, describes and responds to various misguided criticisms of NEPA. The final section explains how the NEPA process can be updated and improved.

NEPA IN BRIEF

Congress enacted the National Environmental Policy Act in 1969 by overwhelming bipartisan majorities.¹ The Senate committee report on NEPA stated: “It is the unanimous view of the members of the ... Committee that our Nation’s present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the

growing environmental problems and crises the Nation faces.”² Much of the problem, the Senate committee concluded, lay in the fact that federal agencies lacked clear statutory direction to incorporate environmental values into their decision-making: “One of the major factors contributing to environmental abuse and deterioration is that actions — often actions having irreversible consequences — are undertaken without adequate consideration of, or knowledge about, their impact on the environment.”³ NEPA was acclaimed by ranking Republicans and Democrats in Congress as “landmark legislation” and “the most important and far-reaching environmental and conservation measure ever enacted.”⁴ When President Nixon signed NEPA into law on New Year’s Day, 1970, he hailed the Act as providing the “direction” for the country to “regain a productive harmony between man and nature.”⁵

NEPA has three visionary elements: a far-sighted declaration of national environmental policy, an action-forcing mechanism to ensure that the federal government achieves the Act’s environmental goals, and a broad recognition of the importance of public participation in government decision-making that affects the human environment.

First, the Act declares a national policy for environmental protection:

The Congress, recognizing 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 tech-

nological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal government, ... to use all practicable means and measures, ... in a manner calculated to foster and promote the general welfare, 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.⁶

Congress directed that “to the fullest extent possible” the policies, regulations, and laws of the United States be interpreted and administered in accordance with NEPA’s environmental policies.⁷

Second, NEPA creates an “action-forcing” mechanism to reduce the environmental damage caused by federal actions “undertaken without adequate consideration of, or knowledge about, their impact on the environment.”⁸ The Act directs federal agencies, before proceeding with any “major Federal action,” to prepare a “detailed statement” addressing how such action may affect the environment. The statement, now known as an “environmental impact statement” or “EIS,” must consider and disclose to the public:

- (1) the environmental impact of the proposed action,
- (2) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (3) alternatives to the proposed action,
- (4) the relationship between local short-term uses of

man's environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁹

As this language indicates, the goal of NEPA analysis is to avoid ill-considered agency decisions that sacrifice long-term societal interests for short-term gains or inflict irreversible environmental damage (such as species extinction). In addition to EISs, agencies prepare less-extensive "environmental assessments," or "EAs," under NEPA to help them determine whether proposed actions will have significant impacts warranting preparation of an EIS,¹⁰ and have adopted rules excluding from analysis categories of minor federal actions that have been found not to have significant effects, either individually or cumulatively.¹¹

NEPA gives effect to the common-sense axiom "look before you leap." The Act does not require federal agencies to choose an environmentally-friendly course over a less environmentally-friendly option. But, as a practical matter, the requirement to prepare an EIS ensures that agency decisions will reflect environmental values. As the Supreme Court has observed:

Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precautionary language of ... the Act and the

requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies to respond to the needs of environmental quality.¹²

Analysis of alternatives is the "heart" of an EIS.¹³ Comparing the environmental impacts of an agency plan with the impacts of alternative courses of action defines the relevant issues and provides a clear basis for choosing among options. By considering and, where appropriate, adopting reasonable alternatives that meet agency objectives with less environmental impact, federal agencies can achieve NEPA's environmental protection goals while implementing their primary missions.

NEPA gives effect to the common-sense axiom "look before you leap."

The third visionary element of NEPA is its creation of broad opportunities for members of the public to participate in government decisions that affect their environment. The public can help define the environmental issues that an agency will study in "scoping meetings" at the start of an EIS process, can propose an alternative approach for the agency to evaluate, and can comment on gaps and misunderstandings in the agency's analysis at the draft stage of the EIS. In this context, "the public" includes not only individual citizens, but businesses, charitable organizations, towns and other local governments, tribes, state agencies, and even other federal agencies affected by a proposed action.

Public participation in the NEPA process serves two functions. First, individual citizens and communi-

ties affected by a proposed federal agency action can be a valuable source of information and ideas, improving the quality of environmental analysis in NEPA documents as well as the quality of agency decisions. Second, allowing citizens to communicate and engage with federal decision-makers serves fundamental principles of democratic governance. NEPA reflects the belief that citizens have a right to know, and to be heard, when their government proposes actions that may affect them. For many individuals and communities who understandably perceive federal agencies as remote and insensitive, public participation in the NEPA process creates a valuable crack in the bureaucratic wall.¹⁴

NEPA also established the President's Council on Environmental Quality ("CEQ") within the White House to ensure that environmental values are broadly

NEPA reflects the belief that citizens have a right to know, and to be heard, when their government proposes actions that may affect them.

integrated into national policy-making and to promote implementation of NEPA throughout the federal government. Modeled after the Council of Economic Advisors, CEQ is directed to advise the President on environmental matters, report on environmental trends, and review the extent to which the federal government is achieving the national environmental policy established by the Act.¹⁵

NEPA IN ACTION

In its thirty-five year history, the National Environmental Policy Act has been extraordinarily successful in accomplishing its goals.

First, NEPA has unquestionably improved the quality of federal agency decision-making in terms of its sensitivity to environmental concerns. Examples are legion in which proposed federal actions that would have had serious environmental consequences were dramatically improved, or even in some instances abandoned, as a result of the NEPA process. To cite just a few instances:

- In the early 1990s, mounting problems with obsolete nuclear reactors at its Savannah River site put the Department of Energy under pressure to build enormously expensive new reactors to produce tritium, a key constituent of nuclear warheads. A programmatic EIS allowed DOE to evaluate alternative technologies, including using a particle accelerator or existing commercial reactors, leading ultimately to cancellation of the tritium production reactors. Admiral James Watkins, then Secretary of Energy, testified before the House Armed Services Committee: "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country."¹⁶
- The NEPA process led to improvements in a land management plan for the Los Alamos National Laboratory that averted a potentially serious release of radiation when the sensitive nuclear laboratory was swept by wildfire in May 2000. The laboratory's initial management plan did not address the risk of wildfire, but other federal agencies alerted the Los Alamos staff to that risk in comments on the draft

EIS accompanying the plan. The laboratory prepared a fire contingency plan, cut back trees and underbrush around its buildings, and replaced wooden pallets holding drums of radioactive waste with aluminum. Those preparations turned out to be invaluable when a major wildfire swept Los Alamos the following year, damaging many buildings but not triggering a significant release of radiation.¹⁷

- In 1997, the Federal Energy Regulatory Commission was considering issuance of a license for construction of a major new hydropower dam on the Penobscot River in Maine. The EIS disclosed that the proposed Basin Mills Dam would undermine long-standing federal, state and tribal efforts to restore wild Atlantic salmon populations to the Penobscot River. FERC received strong comments in opposition to the project from federal and state fishery managers and the Penobscot Indian Nation, among others, and concluded that the public interest was best served by denial of the license.
- The Ivory-billed woodpecker, recently rediscovered, to great public celebration, in the swamplands of Arkansas, owes its survival in large part to NEPA. In 1971, shortly after NEPA's enactment, the Army Corps of Engineers advanced a proposal to dredge and channelize the Cache River for flood control, threatening the vast tracts of bottomland hardwood wetlands in the river basin on which the woodpecker and many other species of wildlife depended. Environmentalists challenged the adequacy of the Corps' NEPA analysis in court, pointing out that the Corps had failed to evaluate alternatives to its massive

dredging program that would cause less damage to wetland habitat. The court enjoined the Corps from proceeding until it fully considered alternatives,¹⁸ and public outcry subsequently led to the abandonment of the dredging project and the creation of the national wildlife refuge where the Ivory-billed woodpecker was recently sighted.

The Ivory-billed woodpecker, recently rediscovered, to great public celebration, in the swamplands of Arkansas, owes its survival in large part to NEPA.

- A massive timber sale proposed for the Gifford Pinchot National Forest in Oregon, stalled by controversy over impacts on sensitive forest habitat, was entirely rethought as a result of the NEPA process. A coalition of environmentalists, the timber industry, labor representatives and local citizens worked together to develop a plan to use timber harvesting to restore the forest's natural ecosystem. Instead of clearcuts, the new proposal focuses on thinning dense stands of Douglas fir (the result of previous clearcutting) to recreate a more natural, diverse forest structure, while still yielding 5.2 million board feet of commercial timber. The citizen alternative was adopted by the Forest Service and implemented without appeals or litigation. A local resident involved in the process says: "It's a win, win, win."¹⁹
- In Michigan, communities concerned about the impacts of a proposed new four-lane freeway successfully used the NEPA process to force the state highway agency to consider alternatives for expand-

ing and improving an existing highway, avoiding the largest wetland loss in Michigan's history and saving taxpayers \$1.5 billion. Similarly, a proposed freeway in Kentucky's scenic bluegrass region was redesigned to protect historic, aesthetic and natural values thanks to public input and legal action during the NEPA planning process. The National Trust for Historic Preservation acclaimed the Paris Pike as a project that "celebrates the spirit of place instead of obliterating it."²⁰

These and other similar examples only begin to tell the story of NEPA's success, however. NEPA's most significant effect has been to deter federal agencies from bringing forward proposed projects that could not withstand public examination and debate. Prior to NEPA, federal agencies could embark on massive dam- or road-building projects, for example, without public consultation and with virtually no advance notice. As a result, family farms, valuable habitat, and sometimes whole communities were destroyed without the opportunity for full and fair debate. Today, many similar projects that could not survive such a debate simply never get off the drawing boards.

More broadly, NEPA has had pervasive effects on the conduct and thinking of federal administrative agencies. Congress's directive that federal agencies use an "interdisciplinary approach" in decision-making affecting the environment,²¹ together with the Act's requirement that agencies conduct detailed environmental analyses of major actions, has required federal agencies to add biologists, geologists, landscape architects, archeologists, and environmental planners to

their staffs. These new employees brought new perspectives and sensitivities to agencies that formerly had relatively narrow, mission-oriented cultures. NEPA's requirement that agencies consult with federal and state agencies with special environmental expertise also has helped broaden agency awareness of environmental values.

Equally important, NEPA has succeeded in expanding public engagement in government decision-making, improving the quality of agency decisions and fulfilling principles of democratic governance that are central to our society. Today, citizens take it as a given that major governmental actions that could affect their lives and their communities will be subject to searching public examination and discussion. As CEQ concluded in a report commemorating NEPA's 25th anniversary, "NEPA's most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions."²² CEQ noted that "agencies today are more likely to consider the views of those who live and work in the surrounding community and others during the decision-making process." As a result, "Federal agencies today are better informed about and more responsible for the consequences of their actions than they were before NEPA was passed."²³

The extent and diversity of public participation in government decision-making as a result of NEPA is astonishing. To cite a few typical examples:

- The National Park Service proposed a lake management plan in 2002 for Lake Mead National Recreation Area in Nevada that raised significant issues regarding future recreational use of the lake, includ-

ing what kinds of motorized boats should be allowed and whether the lake should be managed more like an urban park or more for primitive recreation. The Park Service received more than 10,000 comment letters on the draft EIS accompanying the plan. Commenters included 30 businesses, such as local marinas and jet ski manufacturers; 813 organizations, including national environmental groups, local community and boat-owning groups, the local chamber of commerce, the personal watercraft industry association, and many fishing groups; 17 public agencies, including neighboring national parks, state fish and game departments, nearby counties and towns, the Environmental Protection Agency, and the Nevada Department of Cultural Affairs; and 9,153 individual citizens. In response, the Park Service adopted a final plan committing to manage the lake for a range of recreational settings, from primitive to urban, and expanding protections for water quality and the natural environment.²⁴

- A draft EIS issued in 2001 for a contemplated high-speed rail line between Charlotte, N.C. and Washington, D.C. drew between 500 and 600 written comments, raising concerns related to safety, noise, vibration, impact on property values, congestion, historic districts, tourism and access to the rail service. Fourteen government agencies commented, and 18 public meetings were held, drawing at least 650 people.²⁵ Based on the EIS and the comments received, the Federal Railroad Administration and the Federal Highway Administration approved the route for the proposed rail line, with more detailed planning to follow.

In sum, NEPA functions as a critical tool for democratic government decision-making, establishing an orderly, clear framework for involving the public in major decisions affecting their lives and communities.

PROPOSALS TO WEAKEN NEPA

In the last few years, a wide range of proposals have been advanced to weaken the NEPA process. Many of these proposals call for congressional action; others could be implemented by administrative order or rule-making. In some cases — in the 2003 FAA Reauthorization Act, the 2003 Healthy Forests Restoration Act, and the just-enacted “Real ID Act,” for example — Congress has already acted to weaken NEPA. On many other fronts, the future of NEPA is currently being debated. The U.S. Forest Service, in a recent rulemaking governing the forest planning process, has proposed a radical alteration in the role of NEPA analysis in

NEPA functions as a critical tool for democratic government decision-making, establishing an orderly, clear framework for involving the public in major decisions affecting their lives and communities.

management of the public lands. In addition, the Chairman of the House Resources Committee recently appointed a task force, made up of members of the resources committee, to hold hearings on NEPA and to consider the need for omnibus amendments to the Act. The task force is holding hearings across the nation to investigate concerns about the implementation of the Act, with a particular focus on claims that the Act has impeded energy projects and other forms of development.

The task force is scheduled to issue a report in Fall 2005; proposals for amending NEPA may follow.

Not all proposals for reform of the NEPA process would be detrimental. Procedural mechanisms to expedite and coordinate environmental reviews, a long-standing focus of CEQ's regulations, can help make the NEPA process more efficient and less burdensome. "Streamlining" provisions that coordinate the roles of federal, regional, state and local agencies, require concurrent processing of permits and approvals, and establish clear schedules for preparation of environmental review have been included in enacted and proposed

Measures to weaken NEPA have surfaced in an alphabet soup of different bills and administrative rulemakings.

bills for highway, aviation and water resources projects.²⁶ To the extent such provisions aim to achieve greater efficiency, they likely will be beneficial, and should not dilute the effectiveness of the EIS process.

However, other legislative and administrative proposals (including some labeled as "streamlining" measures) are clearly aimed at weakening the substance of environmental reviews under the Act. Measures to weaken NEPA have surfaced in an alphabet soup of different bills and administrative rulemakings, but they fall into three basic categories:

Exemptions from NEPA

First, various measures simply exempt broad categories of federal agency action from NEPA, effectively repealing NEPA as to this type of activity. For example:

- The "Real I.D. Act of 2005," enacted as part of an Emergency Supplemental Appropriations bill on May 11, 2005,²⁷ empowers the Secretary of Homeland Security to construct barriers and roads along the U.S. border without complying with any legal requirements, including NEPA. The bill authorizes the Secretary to waive "all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction" of such barriers and roads, and strips the courts of jurisdiction to hear legal claims (except for alleged constitutional violations) arising from use of this waiver authority. While ostensibly designed to address a specific dispute over a proposed fence along the Mexican border near San Diego, this measure could apply to the construction of any barriers and roads in the general vicinity of U.S. borders.
- Section 390 of the just-enacted energy bill, the "Energy Policy Act of 2005," establishes a "rebuttable presumption" that numerous oil and gas activities, including actions causing surface disturbance of less than 5 acres, new wells in existing oil and gas fields, and new pipelines in previously-approved corridors, are categorically excluded from NEPA review.
- A rider in the 2005 Department of Interior Appropriations bill allows the Secretary of Agriculture to renew grazing permits on millions of acres of national forest land in the next three years without any NEPA review.²⁸
- A Forest Service proposal announced in January 2005 would completely exempt the forest planning

process from NEPA review. Since the enactment of the National Forest Management Act in 1976, forest plans have been the central means for setting management direction for each unit of the 192-million-acre National Forest system. The Forest Service has routinely prepared EISs on forest plans, analyzing the environmental consequences of alternative management strategies. The Forest Service has adopted new planning regulations, however, that characterize forest plans as “vision” documents that identify a desired future condition for a national forest but contain no binding management direction.²⁹ Based on that novel theory, the Forest Service is now proposing to exempt forest plans from NEPA review altogether.³⁰

- Forest Service and Department of Interior regulations, adopted in 2003, categorically exclude certain timber harvesting activities from NEPA review.³¹ CEQ’s NEPA regulations authorize federal agencies to adopt “categorical exclusions” for types of agency actions that “do not individually or cumulatively have a significant effect on the human environment.”³² In this instance, the categorical exclusion device is being used improperly to shield from NEPA review actions that might in fact have substantial environmental impact. For example, these categorical exclusions exempt from NEPA review timber harvesting to reduce wildfire risks on areas up to 1,000 acres, as well as salvage logging and tree cutting to control insects and disease on tracts up to 250 acres. It is patently implausible that timber harvests on this scale will never produce, either individually or cumulatively, significant environmental effects.

Restrictions on the Substance of Environmental Reviews

Another set of proposals limit the scope of environmental analysis under NEPA, often by eliminating or sharply restricting the requirement that a federal agency evaluate alternatives to the agency’s preferred alternative. For example:

- The Healthy Forests Restoration Act,³³ enacted in December 2003, directs the Forest Service and the Bureau of Land Management (“BLM”), in designing thinning projects and small harvests for reducing wildfire risks, to consider only the agency’s preferred alternative and the no-action alternative. If the public or government agencies have advocated other alternatives, the agency must consider one additional alternative, to be chosen by the Secretary in her “sole discretion.” For fuel reduction projects in the “wildlife-urban interface” (areas in close proximity to a human community), the agency may omit consideration of the no-action alternative. And if the projects are within 1½ miles of a human community, alternatives analysis is eliminated altogether.³⁴
- A provision in the House version of the new energy bill would have virtually eliminated alternatives analysis for many types of energy development. Although not included in the bill as passed, Congressman Pombo has vowed to reintroduce the provision in subsequent legislation. The provision would bar federal agencies from considering any alternative (other than no action) when private developers propose to construct “renewable energy” projects such as wind energy farms,

biomass incinerators, geothermal power plants and hydroelectric dams. Thus, agencies could not identify or study the environmental benefits of alternative locations or alternative means of generating energy or reducing energy demand in a particular region. Agencies would even be prohibited from considering public comments unless they addressed the preferred alternative put forward by the developer.

- The terms of some ostensible “streamlining” measures, such as those in the 2003 FAA Reauthorization Act, grant the designated “lead” agency the authority to define unilaterally the scope of the environmental analysis, including the range of alternatives to be considered, not just for its own planning purposes, but for other agencies participating in the planning process as well.³⁵ The pending water resources bill goes so far as to state that the EIS and study report prepared by the Army Corps of Engineers for a water resources project “shall form the record and basis” for all other environmental determinations, permits, licenses or approvals by other federal agencies. This type of measure could undermine the independent legal responsibility of other federal agencies by limiting their ability to conduct an adequate environmental review.

Restrictions on Public Participation and Judicial Review

Finally, several measures impose strict limits on the public’s ability to comment on EISs and to obtain review of the adequacy of EISs in court. For example:

- The 2003 Healthy Forests Restoration Act creates stringent new exhaustion requirements for citizens seeking to challenge the Forest Service’s compliance with NEPA. For so-called “fuel reduction projects,” the Act creates a special administrative appeal process that is open only to persons who submit specific written comments during the NEPA process. In addition, subsequent judicial review is open only to persons who have exhausted the special appeal process and is limited to the issues raised during the appeal process.³⁶
- Provisions in several bills considered this year would impose sharp time limits on the public’s ability to comment or seek judicial review. The just-passed transportation bill limits the time for agency and public comments on draft and final EISs for highway or transit projects to “not more than 60 days.” Comments on other environmental review documents related to transportation projects are due in “no more than 30 days.” Citizens seeking judicial review would be required to file suit within 180 days, superseding the normal 6-year limitations period for suits against the federal government. Provisions in the House version of the energy bill would have required public comments to be filed within 20 days after publication of a draft EA or EIS.

While these various proposed (and in some cases enacted) measures vary widely, they have the common objective of cutting back on, narrowing and constraining environmental reviews under NEPA. Accordingly, they threaten to undermine NEPA’s salutary mandate to federal agencies “to look before you leap,” and to

weaken NEPA's guarantee of democratic participation in federal agency decision-making. What, if any, reasoned arguments support this broad-ranging attack on the foundation of U.S. environmental law?

THE MISTAKEN CRITICISMS OF NEPA

The advocates of "NEPA reform" advance a series of arguments to the effect that the NEPA process is ineffective or counter-productive to the cause of environmental protection and wise resource management. Upon analysis, none of these criticisms justifies the current efforts to gut NEPA. But these arguments demand careful consideration and thoughtful responses. In some instances, these criticisms point to areas in which the NEPA process might be improved, although not in the ways its critics suggest.

The Argument That NEPA Fails to Inform Agency Decision-Making

One criticism is that the NEPA review process, though well-intentioned, is largely a waste of time. Critics contend that the NEPA process is divorced from the actual process of agency decision-making, with agency decisions usually being made well in advance of the initiation of the NEPA process. As a result, they argue, the NEPA process does not actually inform agency decision-making; instead, it is an after-the-fact paperwork exercise, adding useless delay and expense to government programs. Some critics also assert that the environmental analysis in NEPA documents is so poorly conducted or so riddled with uncertainties that it does not provide a reliable basis for agency decision-making.

The complaint that NEPA review is a useless paper exercise, often voiced by current or past agency

officials, partly reflects an understandable resentment by agency personnel toward a law whose explicit purpose is to alter the traditional course of agency decision-making. Before they can begin to pursue a course of action, agency officials must formulate some goal for the agency. From an internal agency perspective, once a goal, even a tentative goal, has been established, compliance with the NEPA process, including consideration of alternatives, may seem like so much wasted effort. But this complaint overlooks the fact that one of the functions of NEPA is to force the

The true test of NEPA's success is not whether agency officials welcome having their decisions publicly scrutinized, but whether the process produces better outcomes.

agency to consider whether, on second or third thought, it should choose an alternative or modified course of action. The true test of NEPA's success is not whether agency officials welcome having their decisions publicly scrutinized, but whether the process produces better outcomes.

At the same time, this criticism does point up a commonly observed deficiency in NEPA implementation. The NEPA regulations published by CEQ emphasize that the NEPA review should be conducted at the earliest possible point, and that NEPA reviews should be integrated with other existing programs and processes.³⁷ Unfortunately, agencies do not consistently heed this guidance. While agency officials are unlikely to overcome entirely their sense that NEPA sometimes operates as an unnecessary impediment to the implementation of decisions already made, early and

effective integration of NEPA into the agency's planning would minimize agency frustrations and facilitate timely consideration of environmental values.

The complaint that NEPA analysis is technically or scientifically deficient is more difficult to assess. The breathtaking variety of federal agency actions subject to NEPA — from building or authorizing construction of highways, dams, pipelines and transmission lines to managing the conflicting demands of recreational users, miners, grazers and timber companies on the public lands — means that very different types of environmental analysis must be brought to bear on different types of federal actions. The challenge in evaluating the effectiveness of NEPA is compounded by the lack of meaningful agency-specific, much less government-wide, programs to track the reliability of NEPA reviews. In addition, there are remarkably few independent studies of whether the NEPA process succeeds in predicting environmental outcomes.³⁸ In debating whether NEPA reviews produce reliable environmental predictions, the reality is that we are woefully under-informed.

Despite this uncertainty, it is clear that the analysis in NEPA documents assists agencies in making better, and more environmentally-sensitive, decisions. As one academic study concluded, EISs may not consistently produce precisely accurate environmental predictions, but they at least provide “sensible assessments” of likely environmental consequences to guide decision makers.³⁹ The numerous NEPA success stories cited above demonstrate that federal agencies are better informed about the environmental consequences of their proposed actions than they would be in the absence of a forward-looking environmental analysis.

NEPA has transformed agency cultures, broadening agencies' narrow mission-orientation to include sensitivity to environmental values. Moreover, as discussed above, the NEPA review process is not simply a technical analysis of environmental impacts; it is also a political process for engaging the public in federal decision-making. NEPA has succeeded in creating a structured

NEPA has transformed agency cultures, broadening agencies' narrow mission-orientation to include sensitivity to environmental values.

framework for making public choices, based on the best available information, about what courses to pursue in an inherently uncertain world. As the Department of Energy's highest environmental official recently affirmed, “NEPA is an essential platform for providing useful information to decisionmakers and the public, supporting good decisionmaking, and thus advancing DOE's mission.”⁴⁰

In any event, the appropriate response to uncertainties regarding the accuracy of the NEPA process is not to jettison environmental analysis, but to attempt to resolve the uncertainties and study how the NEPA process can be improved. Additional studies are needed on the accuracy of EISs, focusing on what methods of environmental analysis produce reliable results and what types of environmental consequences lend themselves to accurate prediction. As discussed below, Congress and the agencies should require agencies to engage in additional post-decision monitoring to improve the reliability of environmental reviews.

At the same time, advances in the science of envi-

ronmental impact analysis already appear to be significantly improving the environmental analysis in NEPA documents. Scientists are making steady progress in improving mapping using geographic information systems (“GIS”) techniques, in expanding computer modeling capabilities, and in developing our understanding of ecological systems and biological functions. These new advances are being integrated into environmental analysis under NEPA on a continuous basis. Additional post-decision monitoring is needed to verify the benefits of these new techniques and to help refine them over time.

The Argument That NEPA is Too Burdensome and Time-Consuming

Another line of attack against NEPA is that the review process is too time-consuming and imposes too great a burden on government and the private sector. In the words of Richard Pombo, Chairman of the House Resources Committee, and other critics, NEPA creates too much “federal red-tape.”

As an initial matter, it bears emphasis that making agency decision-making more deliberate — and creating opportunities for public debate and discussion — was one of the original objectives of NEPA. The Act was adopted out of concern that federal agencies too often acted unilaterally, without taking the time to consider alternatives to their proposed actions and without providing an opportunity for the public to comment. Complaints about the delays produced by NEPA may simply reflect disagreement with NEPA’s goal of fostering more careful, and more open, federal decision-making.

In addition, those objecting to alleged delays and

administrative burdens imposed by NEPA generally fail to acknowledge the great lengths to which federal agencies have already gone to streamline the NEPA process. NEPA requires preparation of an EIS only for actions that “may significantly affect the quality of the human environment.” Under CEQ’s NEPA regulations, federal agencies are authorized to “categorically exclude” from the EIS requirement classes of activity that do not produce significant environmental impacts. Every major federal agency has adopted its own NEPA regulations identifying broad classes of agency activity that it regards as categorically exempt

Complaints about the delays produced by NEPA may simply reflect disagreement with NEPA’s goal of fostering more careful, and more open, federal decision-making.

from NEPA. If it is uncertain whether a proposed action may have a significant effect, the agency is required to prepare a concise, preliminary evaluation of a project’s likely impacts, called an environmental assessment or “EA.” If the EA demonstrates that the proposed action will not have significant effects, the agency issues a “Finding of No Significant Impact” (“FONSI”) and proceeds with the action without further environmental analysis.

This tiering process has succeeded in substantially cutting back on the number of federal actions requiring preparation of EISs. Many thousands of minor government functions are categorically exempted from NEPA analysis each year. CEQ has estimated another 50,000 federal actions are given limited review in EAs each year. As a result of this winnowing process, agencies

prepare only about 500 draft, final and supplemental EISs annually.⁴¹ In the case of federally-funded highway projects, for example, 97% of the projects are dealt with under a categorical exclusion or by preparing an EA; only 3% require preparation of an EIS.⁴²

Finally, the evidence does not support the argument that the NEPA review process causes inordinate delays in decision-making. For example, studies by the Federal Highway Administration (“FHWA”) show that environmental reviews take up only a quarter of the total time devoted to planning and constructing a major highway project, hardly a disproportionate commitment for projects that will make permanent changes to the landscape.⁴³ The significant delays that sometimes occur in highway projects are generally due to other causes, 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.⁴⁴ A comprehensive survey conducted by the Natural Resources Council of America of agency NEPA implementation confirmed that NEPA is not a major cause of project delays:

In *none* of the twelve agencies reviewed during this study did NEPA emerge as the principal cause of excessive delays or costs. Instead, the NEPA process was often viewed as the means by which a wide range of planning and review requirements were integrated. Other administrative and Congressional requirements were sometimes cited as resulting in lengthy delays in decision making, which persons outside the agencies attributed to NEPA.⁴⁵

That is not to say that NEPA’s implementation cannot be improved, or that every environmental review under the Act is well managed. Although CEQ’s regulations emphasize that environmental reviews should be efficient, timely and useful for federal decision-makers, federal agencies sometimes produce EISs that are too lengthy and technical for agency decision-makers or the public to readily understand. NEPA processes are sometimes poorly managed, uncoordinated, and unduly prolonged. As discussed below, better management of the NEPA process, and improved guidance and training for federal agencies, are important in order to make the Act work more effectively. But there is no evidence that NEPA has, as a general matter, imposed burdens and delays on agencies beyond what Congress originally contemplated in enacting NEPA or beyond what is necessary to accomplish NEPA’s environmental-protection goal.

The Argument That NEPA Generates Wasteful Litigation

Critics of NEPA also contend that the Act produces wasteful litigation. But this criticism overlooks the essential role the independent federal judiciary has played, and continues to play, in ensuring that NEPA is actually enforced. This argument also reflects an exaggerated view of the volume of litigation NEPA generates.

In the early years following NEPA’s adoption, the courts played a critical role in ensuring that NEPA was faithfully implemented. NEPA is a concise, broadly-worded statute; it does not define in detail the procedure that federal agencies should follow to comply with its mandate. Many federal agencies were slow to grasp NEPA’s meaning, and treated the Act as

essentially hortatory. The courts therefore played an indispensable role in interpreting the Act, ensuring that agencies complied with its mandate, and articulating reasonable approaches for agencies to meet its requirements. As Justice Thurgood Marshall observed early in NEPA's history, the courts' development of a "common law" enforcing the Act "is the source of NEPA's success."⁴⁶ The principles developed by the federal courts in these early decisions formed the basis for CEQ's regulations, which now provide comprehensive guidance for the NEPA process.

The federal courts today continue to play an important role in ensuring that NEPA's mandate is carried out. When federal agencies' NEPA compliance falls short, litigation brought by aggrieved parties enforces the Act's commands for environmental review and public consultation in the context of particular projects. More broadly, individual NEPA suits send the message to agencies that the courts will police compliance with the law. If citizens did not have the right to go to court to enforce NEPA, it is fair to presume that the Act would quickly become a virtual dead letter.

NEPA's critics also exaggerate the volume of litigation arising from NEPA. Effective enforcement of the law does not require litigation in every case, but merely the potential of a lawsuit if the requirements of NEPA are ignored. Because agency compliance with NEPA is now generally quite good, NEPA actually generates a relatively small volume of litigation. As discussed, federal agencies prepare approximately 50,000 EAs each year, plus another 500 draft, final and supplemental EISs for the much smaller number of "major" federal actions. Aggrieved parties typi-

cally file about 100 NEPA lawsuits per year, representing only 0.2% of the actions generating NEPA documents annually.⁴⁷ Not surprisingly, given the broad range of interests involved in the NEPA process, the types of plaintiffs that bring NEPA lawsuits cover the waterfront, including state agencies, local governments, business groups, individual property owners, and Indian tribes, as well as environmental organizations.

If citizens did not have the right to go to court to enforce NEPA, it is fair to presume that the Act would quickly become a virtual dead letter.

Even the tiny fraction of NEPA actions that give rise to court suits overstates the significance of litigation, because only a few of these suits result in court orders blocking government action. According to data compiled by CEQ,⁴⁸ preliminary injunctive relief was granted in NEPA cases only 21 times in 2001 and 2002, and permanent injunctions were issued only 28 times (often, presumably, in the same case in which preliminary injunctive relief had been granted). The courts ordered a remand of certain issues to the federal agency in 33 cases in those two years. On the other hand, the courts ruled for the defendant agencies 114 times during this period, and dismissed NEPA cases (in some cases after a settlement) in another 139 cases. Given the continuing importance of judicial enforcement in ensuring faithful implementation of NEPA, the complexity of environmental impact analysis and the controversy frequently generated by major government actions, these data are neither surprising nor troubling.

The Argument that NEPA Impedes the Resolution of Environmental Problems

Yet another criticism of the NEPA review process is that it impedes the development of consensus support for solutions to environmental problems. In fact, there is no necessary conflict between the decision-making process established by NEPA and the formation of consensus around particular projects or programs. Properly conducted, the NEPA process can be instrumental in achieving lasting solutions with broad public support. Those who insist on seeing conflict between NEPA and consensus building argue, in effect, for rolling back the most valuable aspects of the NEPA process for no good reason.

According to some critics, conflict between NEPA and so-called “collaborative” decision-making processes is inevitable. Collaborative decision-making is typically understood as an iterative process of consultation among government officials and stakeholder representatives designed to develop a consensus solution for a particular natural resource problem. Expressing a representative viewpoint, Douglas MacDonald, Secretary of Transportation for the State of Washington, recently opined that the NEPA process “creates a context for discussion and problem-solving that maximizes the polarization of opinion, the staking out of positions, and the exclusion of iteration and compromise in problem solving.”⁴⁹ To like effect, the Deputy Chief of the Forest Service has commented:

The requirement that alternatives to proposed actions and their effects be documented in an environmental impact statement and environmental assessment prior

to a decision does not facilitate a collaborative process between agencies or with other interests. ... Documenting and circulating ... alternatives in a draft and final document for public comment fosters an assumption that the decision maker has a range of options to choose from and various interests can weigh in and comment on the alternatives they support. There is no incentive built into the NEPA process to work toward a single solution that accommodates multiple interests.⁵⁰

The Forest Service’s new forest planning regulations reflect this viewpoint, calling the traditional approach of developing and evaluating alternatives in the planning

Properly conducted, the NEPA process can be instrumental in achieving lasting solutions with broad public support.

process “divisive.”⁵¹ Under the new regulations, forest plans will be developed through a “collaborative” process that “encourage[s] people to work together to understand each other and find common solutions.”⁵² Significantly, environmental analysis will apparently play little if any role in that endeavor; the planning regulations state that Forest Service will not provide “in-depth social, economic, or ecological analysis” for options that are discussed in the collaborative process,⁵³ and the Service separately proposed to exempt forest planning from NEPA analysis altogether.⁵⁴

There is unquestionably a serious tension between the NEPA process and the type of “collaborative”

approach advanced by the Forest Service. As discussed, NEPA is based on the principles that information on environmental impacts is important in making rational choices among options and that the public should have broad access to the decision-making process. The Forest Service's approach ignores both principles, threatening to recreate the kind of narrow, environmentally-insensitive decision-making that prevailed prior to NEPA's enactment. By essentially eliminating environmental analysis, the Forest Service's approach leaves agency personnel and other participants in the planning process effectively blind to the potential effects of a proposed management approach. The agency's refusal to identify and evaluate alternatives, in particular, will preclude meaningful evaluation of the potential environmental benefits and trade-offs offered by different management approaches.

Furthermore, the Forest Service's substitution of a vague "collaborative" process for the clearly-defined rights of public involvement under NEPA threatens to limit, and possibly bias, public engagement in the planning process. The Forest Service will itself choose the participants in its collaborative process; it may either deliberately or instinctively select citizens and groups that it views as likely to agree with its views, and exclude those that it anticipates will make reaching "consensus" difficult. Thus, the representativeness and fairness of the agency's collaborative process will frequently be open to question. Citizens outside the collaborative process, meanwhile, will be denied all the procedural rights afforded by NEPA, including the opportunity to participate in scoping sessions, to receive information on the environmental impacts of the agency's proposed action, to propose alternative

NEPA is based on the sound premise that conflicts are best resolved through an inclusive, analytically rigorous process, not an artificially-constrained search for consensus.

approaches, and to offer comments on the accuracy of the agency's environmental analysis.

Ultimately, the Forest Service's approach appears to be based on the notion that by embracing a philosophy of "collaboration," and controlling the range of viewpoints involved in planning, the agency can magically make disputes over management of forest lands disappear. In reality, management of federal lands, like most government actions affecting the environment, inevitably raises conflicts among different values and interests. NEPA is based on the sound premise that these types of conflicts are best resolved through an inclusive, analytically rigorous process, not an artificially-constrained search for consensus.

There are other approaches to "collaborative" decision-making that do allow federal agencies to engage the public broadly in their planning processes without undercutting environmental reviews. There is no necessary conflict between a well-managed NEPA process and an effort to arrive at a conclusion supported by broad public consensus. The scoping process that agencies undertake before beginning preparation of an EIS is explicitly intended to be a collaborative process, albeit an open one, drawing together agency planners, concerned citizens, tribes and other affected governments to define the key environmental issues and alternative approaches that should be studied by the agency. Agencies can

continue that cooperative approach throughout the EIS process, consulting with the public and with other affected interests to build consensus on a preferred alternative, on mitigation measures, and on issues arising during scientific studies in the course of preparing the EIS. Concurrent with or subsequent to the NEPA process, agencies can employ alternative dispute resolution, negotiated rule-making, or other techniques in an attempt to arrive at a conclusion with broad public support.⁵⁵ Such dispute resolution efforts are actually more likely to succeed once disputed issues have been thoroughly aired and narrowed through the NEPA review process.

The recent success in the Gifford Pinchot National Forest in Washington State, described earlier, illustrates the potential for NEPA to help generate solutions with broad public support. In that case, environmentalists, timber companies, local citizens and the Forest Service used the NEPA process as the springboard for negotiating a new management approach for the national forest that reconciled timber harvesting with ecological goals. A local resident involved in the process concluded: “We were able to get timber out in an environmentally responsible way, and we succeeded in avoiding appeals that plague controversial timber sales.”⁵⁶

The Argument that NEPA Ignores the Continuing Impacts of Federal Actions

A final criticism of NEPA is that it includes no mechanism for gathering information about the *ongoing* effects of federal activities and programs or for making adjustments to such activities or programs in light of new information. According to this view, NEPA takes a snapshot approach to environmental analysis

by focusing on discrete decisions to proceed with major federal actions, but essentially ignores the actual consequences of such actions after a decision is reached. In addition, according to the critics, the relatively time consuming, deliberative process demanded by NEPA “makes it hard to make plans adaptive — to use new science, to respond to new issues.”⁵⁷

To address these asserted failings of the NEPA process, critics offer up as alternatives to NEPA the use of environmental management systems (“EMSs”) or “adaptive management” techniques. EMSs are institutional systems, originally intended for use by private business but later adapted for use by government, designed to identify and manage an agency’s environmental obligations on a continuous basis.⁵⁸ Adaptive management is a process of making ongoing adjustments to government programs or activities based on environmental monitoring data. Both approaches focus on ongoing monitoring of environmental impacts and developing responses to environmental problems as they emerge.

Proponents of these approaches as alternatives to the NEPA process confuse the distinct roles played by NEPA and these other approaches to environmental management. NEPA calls for preparation of an EIS when a federal agency arrives at a major decision point — whether or not to build a dam, to open a particular area to resource exploitation, or to adopt a long-range management plan — that may significantly affect the human environment and potentially produce irreversible and irretrievable commitments of resources. NEPA seeks to ensure these major decisions are as sound as possible from an environmental standpoint by requiring, *before* the action takes place, careful consideration of alternatives and extensive public input.

By contrast, an EMS, which focuses on the agency's internal management procedures, is designed to create an orderly and consistent structure to assist an agency in identifying and carrying out existing environmental obligations on an ongoing basis. An EMS does not by itself define an agency's substantive environmental obligations or require forward-looking environmental analysis for major new commitments.⁵⁹ Similarly, adaptive management starts from the premise that some project or program is already in place and seeks to refine the implementation of the program to minimize adverse impacts and to respond to new information. It is not designed to provide federal decision-makers the information they need to assess the likely consequences of undertaking a major new action in the first place. Only NEPA gives agency officials — and the public — critical advance information regarding the likely consequences of undertaking major new action. Thus, EMSs and adaptive management cannot be substituted for the forward-looking environmental analysis of major new actions that NEPA requires.

Nor does NEPA obstruct the use of these other approaches to help federal agencies monitor and control the ongoing effects of federal projects and programs. The contention that NEPA impedes adaptive responses to environmental impacts confuses the type of intensive environmental review necessary when an agency makes a major new decision with the much more limited NEPA analysis appropriate for minor changes in an ongoing federal program. Once a project or program is established, mid-course corrections are unlikely to rise to the level of "major" federal actions requiring preparation of an EIS or a supplemental EIS; the environmental effects of such correc-

In fact, rather than conflict with these approaches, NEPA should complement and support use of EMSs and adaptive management.

tive actions can generally be reviewed in a much more limited environmental assessment. Moreover, the agency can evaluate the effects of a range of potential "adaptive" management actions in its initial EIS or EA, making subsequent environmental analysis unnecessary unless the nature or impacts of the action differ significantly from what the agency anticipated.

In fact, rather than conflict with these approaches, NEPA should complement and support use of EMSs and adaptive management. NEPA reviews help an agency identify which of its activities have significant environmental effects, providing one of the necessary ingredients for a successful agency EMS. NEPA reviews also help satisfy the EMS requirement that agencies adopt procedures for external communication. At the same time, the environmental data collected and maintained through an EMS can provide up-to-date baseline information for preparation of analyses under NEPA, significantly reducing the costs of NEPA compliance. Finally, monitoring data maintained under an agency EMS can help identify which agency actions tend to result in significant environmental impacts and show where mitigation has been successful in reducing impacts below significance, allowing an agency to avoid unnecessary preparation of EISs.

Similarly, there are important potential synergies between NEPA and adaptive management. Environmental analysis under NEPA should provide the foundation for effective use of adaptive management.

Adaptive management cannot proceed on the basis of blind experimentation. An EIS can provide the framework for an adaptive management program by identifying specific environmental goals and assessing the likely environmental impacts of an agency project or

Agencies such as the Federal Aviation Authority are studying how to integrate NEPA with implementation of EMSs and adaptive management and are finding important synergies in the use of these approaches to environmental management.

program. The EIS itself can include a description of the extent to which adaptive measures may mitigate adverse effects, allowing the agency to make a better-informed decision whether to take the action in the first place, how much mitigation to provide, and at what point to adopt additional adaptive measures. Thus, far from being inconsistent with adaptive management, NEPA should be viewed as a necessary prerequisite for its success where agencies are considering major new projects or programs.

For these reasons, the perception that there is a conflict between NEPA and these other approaches to environmental management is not shared by officials at other federal agencies. Agencies such as the Federal Aviation Authority are studying how to integrate NEPA with implementation of EMSs and adaptive management and are finding important synergies in the use of these approaches to environmental management.⁶⁰ CEQ Chairman James Connaughton, who has had extensive experience with EMSs, has stated: “I would love to see a marriage of NEPA and EMS.”⁶¹

The only sense in which NEPA might be said to conflict with the use of EMSs and adaptive management is that all these management approaches require financial investments and, arguably, there are not sufficient resources to pursue all these approaches at optimal levels. But there is no *a priori* reason to view these approaches as competing with NEPA analysis in a kind of bureaucratic zero-sum game. EMSs and adaptive management might just as well be viewed as competing with all other demands on an agency budget. Moreover, there are significant synergies between these various approaches, as discussed above. To the extent an agency nonetheless sees these different approaches as competing for the same resources, the primary emphasis should remain on *ex ante* NEPA reviews rather than *post hoc* analysis using EMSs and adaptive management. Generally speaking, far more can be accomplished for the environment by carefully designing a project or program to avoid adverse effects, rather than by attempting to make corrections after the fact.

A POSITIVE AGENDA FOR IMPROVING NEPA’S IMPLEMENTATION

Although most of the current “reform” agenda described above is misguided and should be rejected, there are in fact important improvements that can and should be made to the NEPA process.

Make Mitigation Promises Mandatory

First, agency promises during the course of the NEPA review process to “mitigate” the adverse effects of federal actions should be made binding commitments. Too frequently, federal agencies advance mitigation

measures to help justify publicly a decision to proceed with a particular action, but then fail to carry through on the mitigation. A mechanism is needed to ensure that promises to engage in mitigation are actually kept.

Successful implementation of mitigation measures goes to the heart of NEPA's basic goal of protecting the environment. Although NEPA does not itself require federal agencies to provide mitigation,⁶² virtually every federal agency decision made under NEPA includes some mitigation designed to avoid, reduce, or compensate for environmental damage that would otherwise occur. Mitigation measures may include, for example, installing fish passage at a new hydropower dam, restoring degraded wetlands to compensate for wetlands destroyed by a new roadway, or adopting traffic-reduction measures to reduce air pollution from a new development. Failure to carry through on such mitigation seriously undermines NEPA's goal of protecting the environment.

Failure to implement mitigation commitments also undermines the integrity of the NEPA review process. NEPA requires that agencies discuss any potential mitigation measures so that the likely environmental consequences of a proposed project can be fairly evaluated.⁶³ Agencies routinely point to proposed mitigation measures in NEPA documents to explain how the adverse effects of a federal agency action have been reduced to an acceptable level. Agencies also rely on mitigation to justify the conclusion that their actions will not have sufficiently significant adverse effects to require an EIS, allowing them to issue a "mitigated FONSI" on the basis of a relatively superficial EA instead. If the proposed mitigation measures invoked in the NEPA process are not in fact implemented, the

integrity of the NEPA review process is subverted and the accuracy of the conclusions reached in the NEPA process are thrown into doubt.

Given the central role of mitigation in the NEPA process, remarkably little systematic attention has been paid to how well agencies follow through on proposed mitigation measures. Nonetheless, very disappointing results have been revealed by the studies that have been conducted, including audits of the U.S. Army Corps of Engineers' wetlands permitting program.⁶⁴ These studies show that mitigation measures promised at the time of the initial agency decision to

To maintain the integrity of their NEPA analyses, federal agencies should revise their NEPA procedures to preclude hollow promises of mitigation.

proceed are often never implemented or implemented ineffectively. The Corps' public goal for wetlands mitigation, for example, is "no net loss," but a recent review by National Research Council scientists concluded that the Corps actually succeeds in offsetting only 20% of the impacts on wetlands under its permit program, resulting in an 80% net loss of wetlands.⁶⁵

To maintain the integrity of their NEPA analyses, federal agencies should revise their NEPA procedures to preclude hollow promises of mitigation. When an agency proposes a mitigation measure as part of the preferred alternative under NEPA, the agency's decision to proceed with the action should include a commitment to proceed with the mitigation as well. Unless the proposed mitigation is required by statute or regulation, agencies should be allowed to rely upon

mitigation in the NEPA process only if the mitigation is made an integral part of the proposed action, it is described in sufficient detail to permit reasonable assessment of future effectiveness, and the agency formally commits to its implementation in the Record of Decision. Where the agency is undertaking the action, it should demonstrate that it has committed sufficient financial resources to carry out the mitigation. Where a private applicant is involved, the applicant should be required to demonstrate that it has sufficient resources to implement the mitigation, and the mitigation requirement should be made a legally enforceable condition of the license or permit.

The feasibility of this proposed reform is confirmed by the fact that the Department of the Army has already shown the way. In 2002, the Army issued new NEPA regulations governing military activities that require officials to demonstrate that any mitigation measures included in a final decision have been funded as an integral part of the project and to commit to monitoring such mitigation. The Army concluded: “The proponent [of an Army project] must implement those identified mitigations, because they are commitments made as part of the Army decision.”⁶⁶ Similarly, where the Army relies on mitigation measures to conclude that an EIS is not needed, such measures “become legally binding and must be accomplished as the project is implemented.”⁶⁷

Require Monitoring of Project Impacts

A second useful reform would be to enhance monitoring of the environmental effects of projects after they are completed. Too often, federal agencies invest significant resources in complex scientific assessments

of the potential consequences of a proposed action without committing sufficient resources to monitoring the project’s actual impacts.⁶⁸

Enhanced monitoring goes hand in glove with the proposal to make promised mitigation measures enforceable commitments. On-the-ground inspection and evaluation to make sure mitigation measures are being implemented successfully are essential to making mitigation commitments real. Just as an agency should be required to show that it has the dedicated resources needed to carry out mitigation, it should also demonstrate that it has the resources to monitor the effectiveness of mitigation measures. Likewise, private entities receiving agency permits should be required to fund and implement monitoring programs to keep track of the effectiveness of agency-mandated mitigation.

Improved monitoring also will provide the basic data necessary to conduct adaptive management, where that technique is potentially useful, and to help implement agency EMSs. Monitoring should reveal where the agency’s actions are having greater impacts than anticipated, allowing the agency, and the public, to assess whether additional mitigation steps are needed. By the same token, monitoring will demonstrate whether projects or programs have produced completely unanticipated environmental effects. Monitoring thus can help ensure that NEPA supports a continuing, flexible, and responsive approach to managing the environmental effects of agency actions.

Finally, as discussed above, improved monitoring will provide the data needed to allow agencies and environmental professionals to assess the accuracy and reliability of environmental reviews and evaluate

new methodologies for environmental impact assessment, improving the NEPA process in the long term.

Improve Management, Training and Funding for Agency NEPA Compliance

Although NEPA has been in effect for 35 years, federal agencies still struggle to carry out its mandate to include environmental values and public views in federal decision-making. As then-Chair of CEQ Kathleen McGinty ruefully noted in a CEQ study of NEPA's effectiveness, "NEPA's implementation at times has fallen short of its goals."⁶⁹ Federal agencies sometimes treat the EIS as an end in itself, rather than as a tool for better decision-making, or strive to create "litigation-proof" documents that cover every conceivable issue, regardless of its importance. In addition, federal agencies with shared legal authority or environmental responsibility often fail to coordinate their review and permitting processes. As a result, the NEPA process sometimes takes too long and costs too much.

CEQ has called repeatedly for agencies to improve their implementation of NEPA to make environmental reviews more focused, more useful to the decision-maker, and less burdensome. CEQ's regulations emphasize that "NEPA's purpose is not to generate paperwork — even excellent paperwork — but to foster excellent action."⁷⁰ The CEQ regulations direct federal agencies to reduce paperwork by limiting the length of EISs, using the scoping process to identify significant issues and writing in plain language,⁷¹ and to reduce delay by integrating the NEPA process into the agencies' early planning, establishing time frames for the analysis and coordinating with other responsible federal, state and local agencies.⁷² While some fed-

eral agencies have heeded CEQ's direction, others have not. Furthermore, some aspects of environmental impact assessment are technically complex and poorly understood by federal agency officials. Cumulative impact analysis, for example, is a difficult and evolving field that often poses challenges for federal agencies engaged in environmental reviews. Integration of NEPA analysis with adaptive management and with newly-developed agency EMSs, as discussed above, is another challenge, requiring creative and careful thinking from federal agencies.

Improving agency implementation of NEPA will require increased attention by agency managers, who must take responsibility for ensuring that environmental reviews are integrated into agency decision processes, coordinated with other affected agencies, and completed in a timely manner. Expanded guidance and training for federal agencies on NEPA implementation is also critically important. A task force of

Without adequate funding and staffing to carry out their NEPA responsibilities, the pressure will inevitably mount on agencies to find ways to short-cut NEPA compliance.

NEPA officials from various federal agencies recently called on CEQ to provide more training and guidance for federal agencies, particularly on difficult technical issues, such as cumulative effects analysis and adaptive management.⁷³ CEQ's ability to meet the critical need for such guidance and training is constrained, unfortunately, by severe funding and staffing limitations.

More generally, there is a serious and mounting shortfall in the financial resources provided to federal

agencies to carry out their NEPA responsibilities. Every recent, authoritative study of NEPA implementation has highlighted the problem of inadequate financial and staff resources.⁷⁴ Unfortunately, the deficiency in agency NEPA funding continues to get worse: a recent survey documents that agency NEPA staffs face increasing workloads, but a majority of agency NEPA offices have nonetheless suffered substantial reductions in both their budgets and staff positions in the past few years.⁷⁵ Staff in the Army Corps of Engineers' Office of Environmental Quality, for example, which oversees all environmental aspects of the Army Corps' civil works program, has been reduced over the last several years from 12 to 3 full time employees ("FTEs"). Similarly, the Department of Energy's headquarters Environmental Office has been reduced over the past decade from 26 FTEs to 14, and its budget cut from \$7 million to \$1.5 million, even as its NEPA workload has increased.⁷⁶ Without adequate funding and staffing to carry out their NEPA responsibilities, the pressure will inevitably mount on agencies to find ways to short-cut NEPA compliance. A meaningful effort to improve NEPA's implementation must include commitments of additional resources so that agencies can carry out their responsibilities under the Act effectively and efficiently.

A meaningful effort to improve NEPA's implementation must include commitments of additional resources so that agencies can carry out their responsibilities under the Act effectively and efficiently.

CONCLUSION

NEPA is justly regarded as the foundation for U.S. environmental protections. In addition to establishing our nation's basic commitment to a policy of environmental protection, NEPA creates a framework for informed and responsive government decision-making based on extensive public input. The assault on the Act that is taking place on Capitol Hill and within some federal agencies threatens to destroy this basic environmental framework. After 35 years, it is worthwhile to consider how NEPA should be improved. Thoughtful improvements in agency practices and renewed commitments of federal resources can make the Act more effective. The goal should be to improve and strengthen this bedrock environmental law, not to undermine and weaken it.

NOTES

1 The House of Representatives adopted NEPA by a vote of 372 to 15. 115 CONG. REC. 19,013 (1969). The Senate passed NEPA by voice vote without recorded dissent. 115 CONG. REC. 26,590 (1969).

2 S. REP. NO. 91-296, at 4 (1969).

3 *Id.* at 9.

4 115 CONG. REC. 40,416, 40,423 (December 20, 1969) (statements of Sens. Jackson and Allott).

5 Richard M. Nixon, *Statement About the National Environmental Policy Act of 1969* (Jan. 1, 1970).

6 Sec. 101(a), 42 U.S.C. § 4331(a).

7 Sec. 102(1), 42 U.S.C. § 4332(1).

8 S. REP. NO. 91-296, at 9 (1969).

9 Sec. 102(2)(C), 42 U.S.C. § 4332(2)(C).

10 40 C.F.R. § 1508.9 (regulations of Council on Environmental Quality).

11 *Id.* § 1508.4.

12 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (internal quotes and citations omitted).

13 40 C.F.R. § 1502.14. NEPA explicitly requires alternatives analysis in EISs. 42 U.S.C. § 4332(2)(C)(iii). To underscore the importance of alternatives analysis, Congress included in NEPA a second, independent command to agencies to “study, develop and describe appropriate alternatives to recommended courses of action in *any* proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E) (emphasis added).

14 Indeed, for many federal agencies the process of broad public involvement established under NEPA is the primary avenue for communicating with and engaging the public regarding their activities and for fulfilling more general requirements in their governing statutes for public participation. *See* PAMELA BALDWIN, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, PUBLIC PARTICIPATION IN THE MANAGEMENT OF FOREST SERVICE AND BUREAU OF LAND MANAGEMENT LANDS: OVERVIEW AND RECENT CHANGES 4 (June 17, 2004) (“The NEPA processes are separate from, but are integrated into, the land management planning processes, and provide important opportunities for public participation in agency activities. In some instances, agencies may not provide for public participation aside from the NEPA context.”).

15 42 U.S.C. §§ 4342, 4344.

16 *Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs before the House Committee on Armed Services*, 102nd Cong. 912 (1992).

17 DEPARTMENT OF ENERGY, NEPA LESSONS LEARNED (June 2000), at <http://www.eh.doe.gov/nepa/lessons.html>.

18 *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).

19 Natalie M. Henry, *Nearly scrapped, controversial timber sale finds support of coalition*, LAND LETTER (March 31, 2005).

20 These and other instances where the NEPA process led to dramatically better highway projects are described in a report issued by environmental organizations involved in transportation planning. *See* SIERRA CLUB & NATURAL RESOURCES DEFENSE COUNCIL, THE ROAD TO BETTER TRANSPORTATION PROJECTS: PUBLIC INVOLVEMENT AND THE NEPA PROCESS (2003), at http://www.sierraclub.org/sprawl/nepa/sprawl_report.pdf.

21 42 U.S.C. § 4332(2)(A) (requiring agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment”).

22 COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 7 (1997).

23 *Id.*

24 National Park Service, Record of Decision on Lake Management Plan/Final EIS, Lake Mead National Recreation Area, at http://nps.gov/lame/lmp_feis_rod.pdf.

25 Executive summary of Final Tier I EIS, *Southeast High Speed Rail Corridor Study* I-6-10 (2002), at <http://www.sehsr.org/reports/FEISesch1.pdf>.

26 *See, e.g.*, 49 U.S.C. § 47171 (Vision 100 — Century of Aviation Reauthorization Act).

27 Pub. L. No. 109-13, Division B, Title I, Sec. 102.

28 Pub. L. 108-447, Div. E, Tit. III, § 339.

29 70 Fed. Reg. 1023 (Jan. 5, 2005). The Forest Service's regulations are being challenged in court. *See Defenders of Wildlife et al. v. Johanns et al.*, No. 04-4512 PJH (N.D. Cal.); *Citizens for Better Forestry et al. v. U.S. Dep't of Agriculture et al.*, No. 05-1144 PJH (N.D. Cal.).

30 70 Fed. Reg. 1062 (Jan. 5, 2005) (proposing categorical exclusion for forest plans).

31 68 Fed. Reg. 33814 (June 5, 2003); 68 Fed. Reg. 44598 (July 29, 2003).

32 40 C.F.R. § 1508.4.

33 Pub. L. No. 108-148 (2003), codified at 16 U.S.C. § 6501 *et seq.*

34 16 U.S.C. § 6514.

35 49 U.S.C. §§ 47171(h), (j), (k).

36 16 U.S.C. §§ 6515, 6516.

37 40 C.F.R. § 1501.2.

38 *See, e.g.*, PAUL J. CULHANE, H. PAUL FRIESEMA & JANICE A. BEECHER, FORECASTS AND ENVIRONMENTAL DECISIONMAKING: THE CONTENT AND PREDICTIVE ACCURACY OF ENVIRONMENTAL IMPACT STATEMENTS (1987).

39 *Id.* at 265 (“Many EIS passages that fail the test of state-of-the-art ideal prediction are, nonetheless, quite sensible assessments that would pass a ‘reasonable person’ test.”).

40 DEPARTMENT OF ENERGY, NEPA LESSONS LEARNED (Mar. 1, 2005), at 1 (interview with John Spitaleri Shaw, Assistant Secretary for Environment, Safety, and Health, Department of Energy), at <http://www.eh.doe.gov/nepa/lessons.html>.

41 CEQ, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1994-95).

42 GAO REPORT NO. 03-534, *Highway Infrastructure: Stakeholders' Views on Time to Conduct Environmental Reviews of Highway Projects* 3-4 (May 2003).

43 U.S. Dep't of Transportation, *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance*, at <http://environment.fwha.dot/strmlng/baseline/index.htm> (concluding that average time to complete an EIS for a transportation project was 3.6 years; the mean time to complete the project was 13.1 years).

44 U.S. Dep't of Transportation, *Reasons for EIS Project Delays*, at <http://environment.fhwa.dot.gov/strmlng/eisdelay.htm>.

45 ROBERT SMYTHE & CAROLINE ISBER, NATURAL RESOURCES COUNCIL OF AMERICA, NEPA IN THE AGENCIES - 2002 1 (October 2002).

46 *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part).

47 CEQ, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1994-95).

-
- 48 See <http://ceq.eh.doe.gov/nepa/NEPA2001LitigationSurvey.pdf>; <http://ceq.eh.doe.gov/nepa/NEPA2002LitigationSurvey.pdf>.
- 49 Letter from Douglas B. MacDonald, Secretary of Transportation, Washington State Dep't of Transportation, to James L. Connaughton, Chairman, Council on Environmental Quality, NEPA Task Force (Sept. 23, 2002), quoted in Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NATURAL RESOURCES JOURNAL 931, 939 (2003).
- 50 Letter from Tom L. Thompson, Deputy Chief for National Forest System, U.S.D.A. Forest Service, to NEPA Task Force (Aug. 28, 2002).
- 51 70 Fed. Reg. 1023, 1027 (2005).
- 52 *Id.* at 1028.
- 53 *Id.*
- 54 70 Fed. Reg. 1062 (2005).
- 55 See REPORT OF THE NATIONAL ENVIRONMENTAL CONFLICT RESOLUTION ADVISORY COMMITTEE (Dec. 2004) (describing approaches to environmental conflict resolution and consensus-based decision-making), at <http://www.ecr.gov/necrac/pdf/NECRACfinal.pdf>.
- 56 Natalie M. Henry, *Nearly scrapped, controversial timber sale finds support of coalition*, LAND LETTER (March 31, 2005).
- 57 DeAnn Zwright, Assistant Director for Planning, USDA Forest Service, *Smokey and the EMS*, THE ENVIRONMENTAL FORUM, July/Aug. 2004, at 34.
- 58 The ISO 14001 standard, an internationally recognized EMS model, requires: (1) an environmental policy with a commitment to continual improvement and compliance with relevant environmental requirements; (2) procedures to identify an organization's environmental impacts and responsibilities; (3) system implementation and operation, including identification of responsibilities, training, documentation and operational controls; (4) checking and corrective actions, including monitoring and measuring performance to meet targets for continual improvement; and (5) management reviews to ensure that the EMS is suited to changing conditions and information. Executive Order 13148, issued by President Clinton in April 2000, requires all federal agencies to develop and implement EMSs for "appropriate facilities."
- 59 The Deputy General Counsel of CEQ has observed: "The ISO 14001 standard was never intended to replace or be implemented outside of the legal and political context that establishes environmental policy. Therefore, an ISO 14001 EMS does not replace NEPA, but rather provides a systematic framework for effectively identifying and meeting NEPA obligations." Edward A. Boling, *Environmental Management Systems and NEPA: A Framework for Productive Harmony*, 35 ELR NEWS & ANALYSIS 10022, 10026 (January 2005).
- 60 See, e.g., FAA, Environmental Management Systems (EMS) and NEPA Adaptive Management, at <http://www.aee.faa.gov/aee-200/1050-1E/Adaptive.htm>.
- 61 James L. Connaughton, *Modernizing the National Environmental Policy Act: Back to the Future*, 12 N.Y.U. ENVTL. L.J. 1, 16 (2003). Prior to becoming Chair of CEQ, Connaughton was one of the lead negotiators for the United States regarding the ISO 14000 standards and focused in his private practice on environmental compliance and implementation of EMSs.
- 62 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).
- 63 *Id.* (discussion of possible mitigation is implicit in NEPA's requirement that an EIS address "any adverse environmental effects which cannot be avoided should the project be implemented"). CEQ's regulations accordingly require agencies to discuss possible mitigation measures in defining the scope of an EIS, in discussing the consequences of a proposed action and its alternatives, and in explaining the ultimate decision. 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c).
- 64 See, e.g., NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001).
-

65 R. Eugene Turner, Ann S. Redmond & Joy B. Zedler, *Count It by Acre or Function — Mitigation Adds Up to Net Loss of Wetlands*, NATIONAL WETLANDS NEWSLETTER (Nov.-Dec. 2001) at 15.

66 Department of the Army, *Environmental Analysis of Army Actions*, Final Rule, 32 C.F.R. § 651.15(b) (2003).

67 *Id.* § 651.15(c).

68 CEQ has long recognized the need for effective post-decisional monitoring. *See, e.g.*, CEQ, SIXTH ANNUAL REPORT ON ENVIRONMENTAL QUALITY 656 (1975) (“Unfortunately, few agencies look back at projects to evaluate their effects, or people’s perceptions of their effects, in order to improve future forecasting and decisionmaking.”); CEQ, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 31 (1997). Unfortunately, the CEQ regulations do not provide clear direction for agencies to commit to such monitoring. *See* 40 C.F.R. § 1505.3 (“Agencies *may* provide for monitoring to assure that their decisions are carried out and *should* do so in important cases.”) (emphases added).

69 CEQ, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS iii (1997).

70 40 C.F.R. § 1500.1(c).

71 *Id.* § 1500.4.

72 *Id.* § 1500.5.

73 NEPA TASK FORCE, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION (2003).

74 *See, e.g.*, GAO REPORT NO. 03-534, *Highway Infrastructure: Stakeholders’ Views on Time to Conduct Environmental Reviews of Highway Projects* 6 (May 2003) (50% of environmental stakeholders and 69% of transportation stakeholders identify the lack of sufficient agency staff as a cause of delays in environmental review of highway projects).

75 ROBERT SMYTHE & CAROLINE ISBER, NEPA IN THE AGENCIES - 2002: A REPORT TO THE NATURAL RESOURCES COUNCIL OF AMERICA (Oct. 2002).

76 *Id.* at 8-9.



Georgetown Environmental Law & Policy Institute Georgetown University Law Center

The Georgetown Environmental Law & Policy Institute conducts research and education on legal and policy issues relating to protection of the environment and conservation of natural resources.

For additional copies please contact:

**Georgetown Environmental Law & Policy Institute
Georgetown University Law Center**

600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850
fax (202) 662-9005
gelpi@law.georgetown.edu

PRINTED ON RECYCLED PAPER