



## NEPA at 50

*After a challenging start, the National Environmental Policy Act got its first set of binding regulations in 1979. The multi-stakeholder consultation we used produced nearly universal buy-in, a procedure that today would benefit those who seek to improve the law's flaws*



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In the half century since its enactment, the National Environmental Policy Act has not only changed how the government considers the environment in its decisionmaking — and derivatively how those who deal with government shape their proposals — but it has also changed how the public views the environmental impacts of large projects, both governmental and private. We expect to see and assess effects before decisions are made. We expect to see and evaluate alternative means of accomplishing goals. We expect measures to be presented mitigating the harmful impacts of approved proposals. These are ground-shaking accomplishments which have changed the ways in which Americans interact with their environment.

NEPA originated in Congress through its lead authors, Democrats Henry Jackson of Washington in the Senate and John Dingell of Michigan in the House. Its most noted provision, the Environmental Impact Statement, was the brainchild of Lynton Caldwell, an Indiana University professor serving on Jackson's staff. In a floor statement, Jackson termed NEPA the most important and far-reaching environmental and conservation measure ever enacted. The statute was passed by Congress on December 22, 1969, and signed into law by President Nixon on January 1, 1970, as his first official act of the new decade.

The Senate committee in reporting out the bill that would become NEPA had concluded — unanimously — that the country's knowledge, policies,

and institutions were not adequate to deal with the growing environmental crises the nation faced. Finding that America had “overdrawn its bank account in life-sustaining natural elements,” Congress in Section 101 acted to establish a national policy to guide federal activities impacting the environment and in Section 102 created *action-forcing* devices to ensure that policy was implemented. Toward that end, Section 102 (1) directs that the policies, regulations, and laws of the United States “shall be interpreted and administered in accordance with the policies of Section 101.” Then Section 102 (2) establishes the now-familiar Environmental Impact Statement and Environmental Assessment. In Jackson's description on the floor, Congress was enacting a “standard of excellence,” and if there were to be “exceptions to that rule and policy. . . , they will have to be justified in light of the public scrutiny required by Section 102.”

These are the mechanisms Congress created to ensure a change in national direction with respect to environmental protection — to codify a requirement to “look before you leap environmentally.” The wisdom of that direction led half of the American states to separately adopt provisions modeled on NEPA. Furthermore, NEPA has been the paradigm for over 100 other countries and multinational institutions to adopt similar provisions. Good ideas are contagious; I believe NEPA is the most imitated American law in history.

NEPA also created the Council on Environmen-

Quality to advise the president on environmental matters. Early on, at the instigation of the first CEQ chair, Russell Train, President Nixon issued an executive order directing the council to adopt guidelines to aid in the interpretation of NEPA's EIS requirement. This assignment of responsibility for the law's oversight was not a foregone conclusion. Many had assumed that the Office of Management and Budget would perform its accustomed task of interagency coordination of new laws, but Train headed off such a development. One can only imagine how different a course NEPA's interpretation and implementation would have taken if OMB rather than CEQ were assigned the oversight responsibility.

Train's CEQ moved rapidly to issue interim guidelines interpreting the new statute. Established in May 1970, they were expansive, directing agencies to include within the "actions" requiring EISs all reports on legislation and policies, as well as on projects, both those directly undertaken by the government as well as those supported by federal funding or permits or other entitlements for use. With the benefit of experience and developing case law, these interim guidelines were replaced by further guidelines in 1971 and 1973, which remained in effect until the Carter administration. The guidelines, while not binding and restricted to the EIS requirement, did much to shape the development of the statute itself in an environmentally sensitive manner.

Although Section 309 of the Clean Air Act directs EPA to comment on other agencies' EISs, it is important to note that NEPA itself has no enforcement mechanism — CEQ, a small White House agency, is not staffed to fulfill that role. Lawyers in private practice, nascent environmental groups, and government worked along with the judiciary to fill the void. NEPA and later its regulations imposed procedural requirements. An EIS must be prepared before an "action" may be taken. Procedure is familiar ground for judges. A certain step is a condition precedent to implementing a proposal. That resonates with jurists. At the behest of lawyers, the courts rapidly acted to ensure EISs were prepared when the law so required. They thereafter ruled that NEPA documents must

also be scientifically adequate in their study of the impacts of a project and must present a full range of alternatives to the proposal. NEPA jurisprudence developed into a sophisticated body of law, generally supportive of the foundational statute's requirements.

While it was the lower courts which for the most part embraced a robust application of the new law, the Supreme Court has consistently embraced a more crabbed interpretation. Early on, in *Vermont Yankee*, the Court characterized NEPA as "essentially procedural," circumscribing the authors' expectations and ignoring section 102(1). By way of contrast, the California Supreme Court, implementing that state's NEPA analogue in *Friends of Mammoth v. Mono County*, found the law to be "substantive" — going beyond procedure to require the selection of an environmentally preferable alternative and mitigation for unavoidable impacts.

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Already in those first few years, there developed, particularly within the business community, a sense that NEPA compliance was taking too long and generating too much paperwork. These perceptions, based in some reality, had the potential to undermine the law. Fresh from legislatively revamping the

California Environmental Quality Act, President Carter's first CEQ chair, Charles Warren, and his general counsel, your author, worked with council members and the experienced CEQ career staff to propose to the president that he issue an executive order modifying that of six years earlier issued by President Nixon. Carter thus directed CEQ to issue mandatory regulations to replace the permissive guidelines. And, while the guidelines were restricted to the EIS subsection of NEPA, the new regulations were to address all the action-forcing provisions. As directed by the president, and as detailed below, CEQ issued the new regulations first in draft and then in final form (effective July 30, 1979), stating they were designed with three principal aims: "To reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the

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## The NEPA Rules Versus the Federal Courts

To a significant degree, NEPA's record of impact on federal environmental policy over the last half century is the product of judicial interpretation of the statute — and most notably, judicial application of the implementing regulations. The Supreme Court said of these rules in 1979 that they deserve “substantial deference” in interpreting the specific requirements of the law — a position that has made the regulations extraordinarily influential.

From the beginning, litigation shaped the application of NEPA by federal agencies. Skelly Wright's 1971 opinion for the D.C. Circuit in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission* made it clear that agencies' duties to consider and evaluate environmental issues were enforceable, and that NEPA's procedural duties must be complied with to the fullest extent possible where not actually in conflict with other authority.

Early federal court decisions informed NEPA practice and the Council on Environmental Quality's 1971 and 1973 guidelines. But it was the CEQ's “uniform, mandatory regulations,” effective in 1979, that came to define NEPA to practitioners.

The rules not only built upon the existing litigation history, but also introduced innovations. They established new procedures (categorical exclusions, scoping, environmental assessments, Findings of No Significant Impact, or FONSI), defined entirely new terms (tiering) and redefined old ones (significant), and set standards for public notice and participation.

The courts enforced these rules, with the consequence that a stable body of decisions shapes everyone's expectations about what the venerable law requires. A statute that is relatively short and forward-

looking is in great part understood through its court-enforced rules.

Most of what we understand about NEPA is based on careful reading of court opinions applying CEQ's regulations. Key elements of these rules are the importance of identifying and evaluating “reasonable alternatives” to a proposed action, public participation opportunities (including the duty of agencies to respond to comments in a final Environmental Impact Statement), and identification of mitigation measures (including when mitigation can result in a finding obviating the need to prepare an Environmental Impact Statement).

The result is that we're pretty good at identifying environmental impacts, implementing public participation requirements, and creating mitigating measures that can support a FONSI.

For all the dissatisfaction with NEPA in specific cases related to outcomes of agency decisions, the courts have made the process work clearly. As applied by the courts enforcing the regulations, NEPA has served as a lodestar — not ensuring that a navigator will end up precisely where he or she intended when setting out, but ensuring that the voyage will be understood, safer, and informed by recognition of shoals, reefs, and storms.

Many commentators have noted that, despite the volume of influential NEPA cases in courts of appeal, the Supreme Court has backed the federal government's position in every case it has heard. While some have lamented this as the Court's apparent antipathy to environmental causes, Professor Richard Lazarus in a 2012 article in the *Georgetown Law Journal* argues that this record also reflects strategic con-

cessions by the solicitor general in these cases (and in case selection), and that important principles have been sustained and advanced even here. These include recognition of the “hard look” doctrine in *Kleppe v. Sierra Club* (1976), deference to the CEQ regulations in *Andrus v. Sierra Club* (1979), even recognition that an agency must identify mitigation measures in an EIS (albeit avoiding discussion of how much discussion is adequate) in *Robertson v. Methow Valley Citizens Council* (1989). If the potential judicially enforceable reach of NEPA has been narrowed in *Vermont Yankee* (1978) to “procedural” grounds only, these grounds have remained important to public accountability.

At ELI's event recognizing NEPA's 40th anniversary, the late Representative John Dingell (one of NEPA's sponsors in the House) observed that while he had not expected the law to result in litigation and was initially displeased, he had since come to believe that the courts have been key to the success of the statute in making agencies accountable to its goals.

Some very foresighted regulation-writing, coupled with a comprehensive body of serious judicial opinions applying the regulations, has made NEPA's 50 years possible. It persists not as a moribund relic, but as a foundation for reasoned policymaking even in new endeavors that present new challenges.

In this respect, judicial review has been the making of NEPA.



James McElfish

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national policy to protect and enhance the quality of the human environment.” The streamlining proposals were, in the apt words of CEQ member (and later chair) Gus Speth to “remove the barnacles” from implementation of the law.

Although the Trump CEQ is in the process of considering changes, those regulations have remained in effect with only one substantive amendment to one section in the forty years — under seven presidents — since their promulgation. This unparalleled longevity is not accidental. The regulations have lasted because they addressed the needs of every stakeholder group in America. That in turn resulted from CEQ’s massive outreach to all concerned between 1977 and 1979.

The council started with public hearings, soliciting the participation of all interested in the NEPA process. At CEQ’s request the U.S. Chamber of Commerce coordinated the presentations of American business. The AFL-CIO was asked to do the same for labor. The Natural Resources Defense Council, joined by the National Wildlife Federation and the Sierra Club, did so for the environmental community. The National Conference of State Legislatures, later joined by the National Governors Association, did so for states. Local governments, the scientific community, and the public generally were similarly involved.

At Chairman Warren’s direction, CEQ then prepared a detailed questionnaire based on the hearings and on written comments. The document did not reflect CEQ’s predilections but rather the spectrum of views of those who testified and commented, including both their identification of perceived problems and suggestions for solutions. The questionnaire was distributed as widely as possible and resulted in hundreds of responses representing the full range of participants in the NEPA process.

At CEQ HQ, I then tabulated the responses, summarizing on large accounting worksheets the comments on each subsection, keying back to the original comment for detail. (I have kept those sheets.) In doing so I looked particularly for common ground among those of different perspectives. For instance, if environmentalists and business agreed on a particular provision, that consensus

was important. CEQ then met with every federal agency to benefit from their experience in implementing NEPA.

With the assistance of others at CEQ, I then drafted proposed regulations, which the council approved and placed into interagency review. Anticipating their resistance — since it was agency behavior the regulations were designed to alter — we wanted to involve the public in their review at an early stage, in part to shape agency comments and also to prevent officials from sandbagging our proposals in secret. But — public review is supposed to follow interagency review, and we were barred from altering that process. We also knew that if we leaked the draft regulations to the public, we would be quizzed by the White House as to whether we had done so and had to be able to say we had not.

But we also knew that early public involvement — from environmentalists to business to states — was essential. How to achieve public participation without exposing ourselves to charges of leaking? We knew that one reporter from the trade press had a source within one of the departments who leaked to her. We narrowed the source down to one of four agency officials. On the day the regulations were placed in the mail for interagency review, we arranged to have the copies for the four potential sources hand-carried to each of them so as to meet the reporter’s weekly deadline, which was the day agency review began. Sure enough, the full text of the draft regulations appeared the next day in BNA’s *Environment Reporter*. The result was immediate public support from all those to whom we had listened to over the preceding months.

**D**uring the six months of tortuous interagency review, CEQ met with every critic in and out of government on any part of the proposed regulations of concern to them. We asked Hill staff to forward any complaints to us. We met with any person who wrote a critical article. In each case we discussed the critic’s views and either followed their suggestion or explained why we could not. Exemplifying

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CEQ persistence, a member of the council's legal staff was assigned to liaise with the trade association representing rural electric power generators, a powerful interest in much of the country. His presence at every meeting the group held resulted in the association's creating a T-shirt for him, recognizing his omnipresence at their deliberations.

By way of further example, in dealing with states, CEQ met with four different committees of the National Governors Association. But a fifth committee took a critical position and enlisted the support of the then NGA chair, the governor of Georgia. Since that was the president's home state and his staff had many connections with the current governor's staff, this caused immediate concern to us at CEQ. We wrote to the governor and asked for a meeting. He replied that he had no time to come to Washington. "Oh, no," we replied, "We'll come to you." This unexpected offer drew a positive response. I immediately flew to Atlanta and spent hours with the governor and with the heads of his environmental and transportation departments. By the end of the day, we had reached full agreement on proposals that addressed the states' needs, which I was able to present and commend to the full council, which agreed.

Again, I tabulated all the responses, searching for common ground consistent with the legislative direction. As a result of public and agency input, we at CEQ amended 74 of the 92 proposed sections, making a total of 340 amendments to the regulations.

The resulting public response to the final regulations was everything we had hoped for and had worked to achieve. Every major interest group supported the new regulations. The U.S. Chamber of Commerce "congratulated" the council, declaring the regulations "a significant improvement over prior EIS guidelines." NRDC "welcomed" the regulations as an "important improvement" on the guidelines. The NWF found the process "much better" for citizens, which would result in "better decisions as well." The NGA commended the council for "a job well done." Even before their effective date the Supreme Court in *Andrus v. Sierra Club* relied on the regulations, terming them mandatory rules applicable to all agencies.

The lesson to be learned from this experience is to listen to everybody who is interested and either adopt their suggestions or explain why it is not possible to do so. That means *everybody* — those who mistrust you as well as those whose trust you have. At best they will be satisfied with the action you have taken, and at minimum they will know they have been heard and their proposals fairly considered. The two-year process was laborious, but worth it. Witness the almost total lack of amendment in four decades since.

**W**hat do these regulations provide? In short, buoyed by the Carter executive order's mandate to address all the procedural provisions of NEPA (not just the EIS), the regulations begin with early planning and then proceed to the Environmental Assessment and the decision whether or not to prepare an EIS.

The first step is to determine whether the proposal is Categorically Excluded, which means it falls within a group of actions found never to have environmental impacts (such as personnel decisions). If not excluded, an EA is prepared to aid in determining whether an EIS is required. An EA is followed by either a Finding of No Significant Impact, which ends the NEPA process, or by a decision to prepare an EIS. Bear in mind that the government prepares some 40,000 EAs each year and only 450 EISs (both draft and final). So — statistically — EAs represent by far the most common means of NEPA compliance.

If a decision is made to prepare an EIS, the agency places a Notice of Intent in the Federal Register and initiates a "scoping" process that involves a public invitation and usually a hearing to determine what those interested in the proposal believe should be analyzed in an EIS. (Scoping, incidentally, is a concept which CEQ borrowed from Massachusetts' practice under that state's NEPA analogue.) By way of good legal advice, if somebody believes a plausible issue worth studying, the agency is well-advised to study it. Including one more issue in the document is far easier (and faster) than

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omitting it and having to go through the process again.

The EIS covers the basic analyses of environmental impacts, alternatives to the proposal, the purpose and need for the proposal, as well as the existing conditions that could be affected by the proposal. There are other provisions as well, covering the issue of “who prepares” the document (conflict of interest); how other agencies are to cooperate with the lead agency in preparing the EIS (rather than reserving their input for later in the process); tiering, whereby an EIS on a specific project may incorporate rather than repeat relevant analyses from an EIS of larger scope, such as a document covering a larger geographic area of which the current project is only a part; interdisciplinary preparation; a requirement to use “plain language” (i.e., no scientific or technical gobbledegook which even informed citizens don’t understand); what to do in case of incomplete or unavailable information; and provisions for working with a state which has its own EIS requirement to prepare a common document.

The draft EIS is then circulated for public and agency comment, after which the agency is bound to respond to each such comment subject to the potential scrutiny of judicial review. NEPA recognizes that the public has much to offer. I can think of no other instance in which government agencies are made to explain their actions to individual citizens as a prior condition of taking those actions. In some cases, when significant changes in the proposal have occurred or significant new information developed or the initial analysis was so inadequate as to preclude meaningful review, the agency must prepare a supplemental EIS.

The NEPA process then concludes with a Record of Decision in which the agency explains how the environmental impacts set out in the NEPA process have been factored into the decision, as well as covering the mitigation and the follow up measures the agency has imposed.

I will note here that it was this provision — the ROD — which drew the most support from the environmental community, which viewed it, accurately, as the means of ensuring that the impacts and alternatives analyzed in the EIS in fact played a role in the agency’s final decision.

As the ROD was the focus of environmentalists’ interest, the provisions relating to delay and paperwork were the measures of greatest interest to the business community. That group focused particularly on the “time limits” provision, which provides that an agency “shall set time limits if an applicant for the proposed action requests them.” It has been the failure to implement that section which has resulted in the continuing unhappiness on the part of the business community with the pace and resulting cost of the NEPA process.

The Carter CEQ also provided in the regulations themselves that EISs “shall normally be less than 150 pages” and the proposals of unusual complexity, less than 300 pages. It must be emphasized that the page counts did not include appendices, so the EIS could remain a concise, readable document which decisionmakers and the public could and would read, while supporting data would still be available for those who wanted greater detail.

The Carter CEQ met with all federal agencies in the 10 EPA regions to explain the new regulations. In order to share those explanations with the public, the council assembled the most asked questions along with CEQ’s answers and published them in the Federal Register. That document became our most used guidance document, the “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations.” In it CEQ asserted that “even large complex energy projects would require only about 12 months for the completion of the entire EIS process.” For EAs the council advised “the NEPA process should take no more than three months.”

It is clear that both the council’s mandatory direction with respect to time limits and to length and its guidance with respect to timing have, with exceptions, not been followed.

**W**hat has been responsible for the delays in NEPA process? Lawyers are in part responsible, insisting on the inclusion of peripheral discussions, arguing that if an issue is covered, no matter how tangential, plaintiffs cannot complain of its absence. In adopting the regulations

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CEQ had asserted “that the only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter.” But few EISs adhere to CEQ’s mandatory limits.

The issue of delay — the time it takes to complete the EIS process, from NOI to ROD — continues to bedevil the administration of NEPA. And the often legitimate complaints of those adversely affected by that delay often take the form of attacking the statute itself rather than its administration. I believe it incumbent on those who believe NEPA to be an immense contributor of America’s environmental protection — a group which includes me — to address the issue of delay in order to preserve NEPA’s integrity. As we did 40 years ago, today we must listen to those who have legitimate grievances and address those concerns in order that we may preserve the protections at the heart of NEPA — the analysis of environmental impact of federal actions (without exemptions); the examination of all reasonable alternatives to proposed actions; public input; and judicial review.

There are multiple reasons for delays in the NEPA process, including lack of deadlines; lack of determination to reduce delay on the part of those implementing the act; lack of resources (if agency personnel are not there, they cannot do their job in a timely fashion); overreaction to fear of litigation (in a typical recent year 99.97 percent of NEPA actions were completed without injunctive relief); lack of early cooperation by “cooperating agencies” in the NEPA process; and, in some cases, legitimately complex issues that take time to address and resolve.

When CEQ adopted the regulations, the council considered but did not adopt a “one shoe fits all” universal deadline because this same law covered everything from a trans-Alaska pipeline to an interstate highway interchange. CEQ instead opted for the requirement that time limits “shall” be set at the request of the proponent of a federal action. But that provision clearly has not worked, presumably because applicants do not want to alienate the very agency which will be passing on its proposal by demanding time limits.

Let me suggest a mechanism which I believe will

address the issue of delay. CEQ could adopt several presumptive time limits — say 9, 12, and 15 months — within which agencies must complete the entire EIS process. With the input of all those affected during the scoping process, the lead agency must choose which of the CEQ limits to adopt, and it must be bound by those limits. While some flexibility for unforeseen developments (approved by CEQ) would be appropriate, a predictable time limit will do much to address the issue of delay and thereby diminish the attacks on NEPA, strengthening the act into the future.

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Where are we at the conclusion of 50 years’ experience with NEPA? First, the statute has been an enormous success in reshaping the way the government (and derivatively, its citizens) deals with and protects the environment.

And NEPA continues to maintain broad support. A former House Resources Committee chair who was a critic of most environmental laws, Republican Richard Pombo of California, told me that he had discovered that attacking NEPA was like attacking the U.S. Constitution. Good!

Second, while the courts have done a superb job in assuring that NEPA’s procedures are followed, the Supreme Court has shrunk from implementing NEPA’s framers’ expectations for a substantive requirement that agency decisionmaking adhere to the congressionally determined national environmental policy of protection and enhancement, in the absence of a specific overriding consideration of other national policy.

And finally, the tensions between the detailed examination of environmental impacts and the time it takes to complete the required analyses have bedeviled NEPA throughout its half century. There is no reason, however, why mechanisms — accompanied by direction from above — cannot successfully reduce superfluous and counterproductive delay.

Let me conclude by expressing the hope — and trust — that after another 50 years NEPA will continue to thrive, as America’s most pervasive environmental law celebrates its first century, a true success story. **TEF**