Imperfect Protection

NEPA at 35 Years

Passed by Congress even before the establishment of the U.S. Environmental Protection Agency, the National Environmental Policy Act (NEPA) first gave notice of national concern about the human impact on the air, land, and water. The 1969 passage of NEPA was a turning point for how the federal government considered the environment in its decision-making process. Joseph DiMento, a professor of social ecology and management at the University of California, Irvine, calls NEPA "an environmental Constitution." Ron Bass, a regulatory and legal specialist with the environmental planning and management firm Jones & Stokes, says, "NEPA introduced what was at the time a fairly revolutionary process, whereby the whole government decision-making process was opened up in a way that it was never opened up before. Agencies had to study environmental impacts, they had to disclose them, and they had to let the public in." The legislation also established the three-member Council on Environmental Quality (CEQ) to administer NEPA.

So significant is the law in its change to government behavior that more than 100 other countries have adopted NEPA-like statutes. Fifteen states, the District of Columbia, and Puerto Rico also have

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statutes that mirror—and sometimes fortify—NEPA's requirements at the state level.

Yet, NEPA is far from perfect in its protection of the environment. As the act marks its 35th birthday, critics and proponents alike are taking a look at whether NEPA is actually fulfilling its intended purpose, or whether it's all talk and no action. Among the concerns are the length of time required to assess the environmental impact of a project, the fact that the law doesn't actually require that the environment be protected, and the presence of efforts to relieve agencies of the NEPA requirement to explore alternatives to proposed projects and actions.

Assessing Impacts

In pre-1969 thinking, says Bass, government decisions on whether to pursue proposed projects were based on two factors. "One was the technical, and one was the economic. Could it be built technically? Did we have the money? If so, we built it," he says. With NEPA, environmental factors earned a place at the decision-making table.

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That place at the table translates into agencies preparing a preliminary environmental review of a proposed action—examining, for example, what impact a project such as building a highway, dam, or airport might have on the environment. Agencies must include a statement of such effects along with any proposal for legislation or other major federal action that would significantly affect the quality of the human environment. The statement can take the form of a categorical exclusion, an environmental assessment, or an environmental impact statement (EIS), which NEPA defines as detailing "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action."

EISs are reviewed and analyzed by parties concerned about and affected by the action. An environmental assessment can provide the basis for preparing an EIS, or it can lead to a finding that the proposed action will not have a significant environmental impact, meaning that the agency need not prepare an EIS.

The EIS figures in to much of the discomfort surrounding NEPA. For one thing, review of EISs is highly labor-intensive. In 1996, the most recent year for which there are data, the average EIS was 570 pages long, says Sanjay Narayan, a staff attorney with the Sierra Club. "The law has been treated like a paperwork statute. Agencies disclose and disclose," says Narayan.

In addition, as important as an EIS may be, in and of itself, it may not be enough to protect the environment, notes Thomas Dawson, an assistant attorney general and director of the environmental protection unit of the Wisconsin Department of Justice. "NEPA does not dictate a certain result, namely environmental protection," he says. In Narayan's view, actually protecting the environment comes about only through sheer political will.

Other NEPA critics point to prolonged disputes over EISs as hampering the act's effectiveness. H. Sterling Burnett, a senior fellow with the National Center for Policy Analysis, says that groups or individuals displeased with a NEPA environmental impact analysis can challenge it in court indefinitely. "The law . . . makes it almost impossible for projects to go forward," he says.

George Albright, chief of the Environmental Analysis and Liaison Section of the Wisconsin Department of Natural Resources, agrees with this assertion. "It is an element of the decision-making process that is ripe for misuse," he says.

Yet the evidence for these claims appears to be mixed. A 31 August 2001 letter to congressional leaders on forest-related committees from the General Accounting Office (GAO) reported that in fiscal year 2001 only 1% of 1,671 U.S. Forest Service projects to reduce hazardous fuels (such as brush and small trees) that had accumulated on federal lands had been appealed after the Forest Service completed its environmental analyses. Both environmental groups and private industry were among the challengers.

A more recent GAO report, *Forest Service: Information on Decisions Involving Fuels Reduction Activities*, issued in May 2003, found that in fiscal years 2001 and 2002, 23% of 762 hazardous fuel reduction decisions were appealed under NEPA. The appeals were denied in 133 of the cases. The vast majority of these appeals, 79%, were decided in the 90 days allowed under Forest Service regulations. The Forest Service blamed staff shortages and the likelihood that certain appeals would be settled imminently for the remaining cases going beyond 90 days.

In an August 2000 GAO report, *Results from a Survey of the Nation's 50 Busiest Commercial Service Airports*, a number of airport officials expressed displeasure at the environmental review process required by NEPA. In this survey, officials at 9 of the 50 busiest U.S. airports complained that the NEPA process took too long. They blamed "multiple legal reviews" and accused the Federal Aviation Administration of dragging its feet in reviewing NEPA paperwork.

Horst Greczmiel, associate director for NEPA oversight at the CEQ, notes that it may be up to government agencies to improve the way they manage their NEPA analyses. "Whenever you have a large project, there are going to be practical, operational, and environmental issues," he says. "If senior management is not actively engaged and using a schedule with milestones along the way to reaching a decision, then NEPA is not going to work very well."

A NEPA review must be planned well in advance, says Jon Allan, director of environmental services for land and water management at Consumers Energy, a utility in Jackson, Michigan, and people should be prepared for the amount of time required by such a review. "You have to expect numbers of months of planning and implementation of studies. [The NEPA process] has been well within our time expectations," he says.

Building a Better NEPA

Both friends and critics of NEPA discuss the possibility of changes to the law to make it more effective. One area that may see changes is that of public participation.

"We still hear complaints that [citizen] participation was too little and too late; that decisions were already made before public notification," said geography professor C. Hobson Bryan of the University of Alabama in Tuscaloosa, speaking at a symposium at the 2004 annual meeting of the American Association for the Advancement of Science marking NEPA's 35th anniversary.

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Significantly, one possible remedy to the lack of public comment lies within a recommendation from the NEPA Task Force, which was formed by the CEQ to examine the way the law functions. In its September 2003 final report to the CEQ titled *Modernizing NEPA Implementation*, the task force proposed that the council prepare a citizens' guide to the law with the goal of improving participation by the public.

Many other recommendations made in *Modernizing NEPA Implementation* call for new approaches to making the NEPA process more effective and efficient. The task force recommended improving knowledge of NEPA in federal agencies, and training personnel in NEPA principles. It also proposed making better use of information technology to open communications among NEPA shareholders. Since publication of the report, the CEQ has held four public regional roundtables to gather input on the recommendations and expects to announce which changes it will be advancing later this year.

Because the courts often figure in NEPA, with challenges being made either to decisions not to write EISs or to the adequacy of EISs that are written, some observers and participants in the NEPA process argue for a change in that arena. Federal judges are not environmental experts, says Burnett, and so are not qualified to judge such cases. "Congress should set up a court system that is for NEPA cases," he says, with judges to be appointed based on their scientific expertise.

"Courts don't like science—that, to me, is really the problem," says Narayan, who has litigated under NEPA. "Courts are not willing to say an agency is making the wrong scientific judgment." Narayan agrees with Burnett on the advantages of having a specialized court to deal with NEPA cases, similar in theory to specialized courts dealing with patent cases.

But the bottom line, in the view of some, remains protecting the environment. Tamar Stein, an attorney who works on NEPA cases in Los Angeles, would like to see NEPA changed so that federal agencies would have to assess whether mitigation of an environmental impact is feasible. If mitigation measures are indeed feasible, she says, the petitioning agency should be required to implement them.

According to Narayan, agencies already "almost never claim that their actions are less environmentally protective than they feasibly could be." Moreover, he says that NEPA-like statutes in states such as California, New York, and Minnesota require agencies to make their decisions based on what is most protective of the environment. However, their decisions do not necessarily yield greater protection than the federal one.

For example, Narayan notes a 2003 case in California (*Neighbors of Cavitt Ranch v. Placer County*) concerning the construction of a church, in which a California appeals court refused to assess evidence to determine if adverse environmental effects "had been or could have been mitigated." The court described its goal as only making sure that government decisions took the environmental consequences into account.

One change Dinah Bear, general counsel for the CEQ, would like to see is routine monitoring of the environmental impact of a project after it is completed. There is now no systematic gathering of information after a project is done, she says. Consequently, impact analyses are completed time and again without the benefit of understanding how similar problems have been dealt with and what the impact has been. Full compliance with the administration's direction to agencies to implement environmental management systems would go far in achieving this goal, she says.

Furthermore, the way that environmental analyses are done should be revised, says Bryan. He says both those who prepare the statement and those affected by it should cooperate to determine how an action will reverberate throughout related spheres. "It's not enough to talk about the impacts of timber cuts on soil sedimentation," says Bryan—linkages of sedimentation to water quality, to impacts on aquatic insects, to impacts on the fishery, and to the quality of human life also should be understood and diagrammed.

Bryan also argues that human and societal health tend to get left out of the process. "I suggest we refine the [EIS] model to include what happens to humans as a result of changing the environment," he asserts.

Advocating another change, DiMento urges the centralization of scientific data that can be used in analyzing projects. He says the data used in decisions on individual projects get lost, scattered among individual reports and not easily accessible. DiMento says NEPA's impact would be improved if data gathered on specific projects were incorporated into regional data banks.

Too Much Change?

But there are changes in the wind that have Bear concerned. "There's been one bill that has been passed and several introduced that cut down or eliminate alternatives," she says. That legislation, H.R. 1904, which has passed the House and Senate, limits the alternatives related to reducing hazardous fuels that the Forest Service must consider when approving logging projects. According to the regulations under which NEPA is administered, "all reasonable alternatives" are to be considered, says Bear, but critics of this element of the law charge that such consideration prevents projects from moving forward in a timely manner.

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If agencies don't have to consider alternatives to what they would like to do, they only end up defending their initial choice instead of trying to find different approaches, says Bear: "It's only through that requirement to look at alternatives that better ideas have sometimes been identified." She believes that the issue warrants a credible, objective examination before any further changes are made.

Imperfect though it is, NEPA, with its 35 years of history behind it, certainly appears in the view of critics and supporters alike to be a fixture on the government landscape. Yet, Bear, who has been working with NEPA for more than 20 years, expresses concern about its future. "NEPA is coming in for more criticism and serious potential changes in the past year than I have seen at any time in my career," she says. It is clear that, even after 35 years, NEPA hasn't finished growing yet.

Harvey Black

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