

PERSPECTIVE

NEPA—Where are we?
Where are we going?

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Good morning! It's a pleasure to look out and see so many environmentally friendly faces. It's always a challenge to speak to a knowledgeable audience, but it's also a pleasure to share some time with so many who have shared the opportunities and challenges of the last thirty years. I have spent three decades working in varying degrees and ways with the National Environmental Policy Act—NEPA. From the review standpoint I've served as an associate reviewer of environmental impacts statements—EISs—for water resource impacts; I've headed the overall program for environmental review at both the regional and headquarters levels; and I've been involved in USEPA's own compliance with NEPA at both the regional and headquarters levels. The first EIS I ever reviewed was for the sports complex in the Hackensack Meadows! All this is to say that I believe I have reasonable credentials to opine upon NEPA, and today I'd like to talk about the success of NEPA, USEPA's role in the "309" review process under NEPA, and future direction in NEPA implementation.

Introduction

NEPA—and I'd ask you to bear with me for awhile here for I know you are all quite experienced and knowledgeable—NEPA was passed in 1969 and signed into law on January 1, 1970. It was an excellent way to begin a decade of exponential increases in environmental legislation. NEPA ensured that federal decision makers, who routinely considered economic considerations and technical feasibility in their decisions, would also consider the environmental consequences of their decisions. NEPA also opened the decision-making process to the public. Now the decision makers would

understand the impacts, and the public would also understand the impacts and know that the decision-maker did, too. The surprising thing is that NEPA makes only one reference to the public; it says that the "detailed statement"—the EIS—must be made available to the public. The Council on Environmental Quality, and the courts, have interpreted that requirement broadly, and the opening-up of the federal decision-making process to the public has become one of the most important aspects of NEPA.

Of course, the courts have also opined that NEPA is "only" a procedural statute, and not substantive. But I believe that the inevitable result of understanding the consequences of our actions, and knowing that the world knows that we understand them, can only have a positive effect on decisions that are made. And Title I of NEPA—the declaration of national environmental policy—remains the driving force for substantive environmental protection. It's worth reminding ourselves of just what that policy is:

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 technological 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, in cooperation with State and local governments, and other concerned public and private organizations, 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.

NEPA set a tough but worthwhile agenda for the federal government. The Council on Environmental Quality—CEQ—was created to oversee its implementation. And all federal agencies were expected to share their expertise in ensuring that federal decision making would not cause unintended

adverse impacts to the environment. I would remind you that, when NEPA was passed, the Environmental Protection Agency—EPA—did not exist. Once we were created, however, the Congress decided that perhaps there should be a special role for USEPA since we had both jurisdiction and expertise in environmental issues. And when the Department of Transportation refused to release USEPA's comments on the EIS for the supersonic transport, certain members of Congress decided that it was time to create a specific, legislated role for USEPA in the NEPA process. The Clean Air Act was before Congress for consideration at the time, and thus was born section 309 of the Clean Air Act. Section 309 does not limit USEPA's review authority to air quality, which many find confusing, but the Clean Air Act was a convenient vehicle for the provision.

Section 309 requires that USEPA review and comment in writing on all EISs (among other things), and that it make these comments available to the public. It requires the Administrator to refer to CEQ any legislation (proposed by a federal agency), action, or regulation that is unsatisfactory from the standpoint of public health or welfare or environmental quality. It is an important requirement and one that USEPA takes seriously. And while the statutory mandate is for USEPA to get involved far along in the process—e.g., when a draft EIS has been published—experience shows that we can be far more effective at lower administrative cost if we can get involved early in the environmental review process. Consequently we try to work closely with federal agencies as much as we can and to the degree that resources allow.

What has Happened since 1970

Between 1970 and the end of 1999, USEPA reviewed 29,282 EISs. The annual number of EISs filed has decreased from the 2000 filed in 1972 and is running more or less steadily at around 500 a year, 55–60% draft or draft supplemental documents, and 40–45% final EISs. A survey by CEQ a number of years ago suggests that there are perhaps 50,000 environmental assessments—EAs—published each year, but we believe that the number is probably much higher.

Since EAs are not filed centrally no one knows. And certainly there are a greater number of activities undertaken each year by the federal government that are categorically excluded from NEPA because of an expectation that they will not singly or cumulatively create a significant impact. So—while there are those who believe that the EIS requirement of NEPA is a major burden—in fact only a very small proportion of federal actions are analyzed through the EIS process. And I would submit that the projects that do undergo the EIS process are those whose impacts are potentially so severe that, in fact, it is only reasonable to review them thoroughly before a decision is made.

Federal agencies reviewing EISs, and USEPA under its 309 authority, can refer to CEQ those projects that present substantial environmental concerns. Since 1970 there have been only 26 referrals to CEQ; 16 of those were made by USEPA. CEQ continues to play an important mediation role, however, since there have been countless “informal” referrals to CEQ when agencies disagree on how the process is being implemented. NEPA litigation remains alive and well, with about 120 new cases per year in the last 5 years.

At least 16 states, the District of Columbia, and Puerto Rico have developed “mini-NEPAs” as have some municipalities. American Indian tribes are also beginning to develop mini-NEPAs for tribal decisions. Internationally NEPA has served as a prototype for over 100 countries and multinational institutions. And many of these systems have gone farther than ours, applying environmental impact assessment requirements to private sector projects.

The emphasis in project reviews has been moving from direct impacts only, to direct and indirect impacts, and now to direct, indirect, and cumulative impacts. While all have required analysis under the CEQ regulations, it should be noted that we are still struggling with how best to define the scope of and analyze indirect and cumulative effects. An interagency effort led by CEQ has resulted in a cumulative effects handbook, available on the Internet, and USEPA has issued guidance for its review-

ers on what to look for in cumulative effects analyses (also available on the Internet). There has been some movement from looking only at projects to looking more at programs, and policies. This allows a better look earlier at what we’re doing, and is efficient since we can then tier reviews to the project level. But it’s also still rather difficult to accomplish, and there’s interest worldwide on how best to do “strategic” environmental impact assessment.

The 1997 CEQ Effectiveness Study identified five elements of the NEPA process that are critical to its effective and efficient implementation: (1) strategic planning, (2) public information and input, (3) interagency coordination, (4) an interdisciplinary place-based approach to decision making, and (4) science-based and flexible management approaches once projects are approved. Let’s run through them in the light of year 2000.

Strategic Planning. The criticism was that NEPA often occurs too late in the decision-making process to be meaningful and, therefore, the NEPA document becomes a justification document rather than a fundamental tool for the decision-maker. Early use of the NEPA process—whether an EIS or an EA—leads to better decisions, especially where real alternatives have been considered, and leads to better results. Early use of the NEPA process also gives the decision-maker an opportunity to build trust with the affected public. This not only promotes better decisions but also acknowledges the responsibility of government officials to the citizens of this land.

Under TEA-21—the Transportation Equity Act for the 21st Century—the Federal Highway Administration and the Federal Transit Administration are issuing revised regulations, ensuring that the planning regulations and the NEPA regulations will be considered together and enabling earlier consideration of NEPA in the overall process where practicable.

Public Information and Input. As mentioned earlier, while NEPA’s statutory language does not elaborate on a public role in the process, public information and input are critical to successful government deci-

sion making. It is particularly important to move towards actual public *participation* as opposed to “consultation” and “information.” Giving the public a real opportunity to participate in the process builds trust, elicits information that may not otherwise be available, and forges partnerships to more effectively meet a community’s needs. This is a particularly important element in ensuring environmental justice—ensuring that a project does not result in a disproportionate adverse impact to a minority or low-income population. Special efforts are being made to identify such populations, to analyze whether disproportionate adverse effects may occur, and to communicate clearly with these populations and include them in the assessment process.

Interagency Coordination. Any particular federal action may require the involvement of a number of federal agencies. For example, a highway project might trigger reviews by the US Fish & Wildlife Service and/or the National Marine Fisheries Service for potential impacts on endangered or threatened species, the US Army Corps of Engineers for a permit to fill waters of the US, the US Forest Service or Bureau of Land Management if federal lands are to be crossed, the Advisory Council on Historic Preservation if historic properties are likely to be affected, and USEPA for its review of the NEPA documentation under NEPA and section 309. And those are just the federal agencies! These agencies and potentially others may have jurisdiction or simply have knowledge and expertise that can strengthen the environmental analysis and consequently the ultimate decision. The need for streamlining is obvious.

In my opinion streamlining is not rocket science. It also isn’t “shortcutting” legitimate environmental requirements. It is all about getting the appropriate entities together early in the process to determine the proper scope of review and ensure that all relevant information is available as the alternatives analysis is underway. It’s also about making sure that federal requirements are approached concurrently, and not sequentially. Of course, both early involvement and concurrent review require the active participation of knowledgeable staff, an investment that we cannot always

make due to limited resources. But we do what we can.

Increasingly, and especially for highway projects, the federal agencies are making sure that the NEPA analysis and the analysis for a Clean Water Act section 404 permit for placement of fill material in waters of the US occur at the same time. In this way we ensure that a later 404 review doesn't end up with an approved alternative that was not analyzed in the NEPA process. Also, the recently promulgated regulations to implement the National Historic Preservation Act allow applicants to comply through the NEPA process rather than a separate process. These approaches both ensure that you don't have to go back to square one at the end of the analysis! Further, where multiple federal approvals are required for a project, resulting in a NEPA compliance obligation for each federal agency, agencies working together can produce one analysis that then supports multiple (agency-specific) decision documents.

It's worth noting that TEA-21 has a section that specifically addresses streamlining of project reviews. The statute also allows its funds to be used to support the review activities of "affected" federal agencies, e.g., USEPA, the Corps of Engineers, and the Fish & Wildlife Service, thus addressing the resource constraints that often hinder our early involvement in the NEPA process.

Interdisciplinary Place-based Approach to Decision Making. Such an approach can, and likely will, result in better decisions that both meet the needs of the community and minimize adverse impacts to the environment. An integrated perspective comes from using information and expertise from many (relevant!) fields and sources, including state, tribal and local agencies. Indeed, CEQ recently issued guidance to federal agencies encouraging them to more fully utilize non-federal agencies in the NEPA process through their participation as cooperating agencies. At the request of CEQ, USEPA has modified its tracking procedures to ensure that such participation will be documented. Progress is also being made in the use of computerized and shared data systems, use of the Internet both for analysis and for information shar-

ing, and use of geographic information systems.

Science-based and Flexible Management Approaches. Agencies need to monitor actual impacts that occur during and following project implementation. Doing this allows them to verify the accuracy of their predictions and to ensure that mitigation measures are effective. This is one of the weakest areas in NEPA implementation, not from a lack of interest but from resource constraints. Progress is being made, however, especially by the land management agencies as they are depending more and more on adaptive management to allow use of the lands while providing appropriate protection to the resources at risk.

What Next?

Internationally. A number of initiatives are occurring on the international front that certainly were not anticipated 20-some years ago! We've gone in directions that clearly were not foreseen in Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," when it was issued in January 1979.

The November 1999 Executive Order 13141, "Environmental Review of Trade Agreements," requires the US to factor environmental considerations into the development of its trade negotiating objectives. It requires an environmental review of comprehensive multi-lateral trade rounds, bi- or multi-lateral free trade agreements, and major new trade liberalization agreements in natural resource sectors. These reviews must be written; they must be done early enough in the process to inform decision makers; and they must include a public process.

The Side Agreement to the North American Free Trade Agreement, a trade agreement which created the world's largest trading bloc—the United States, Canada, and Mexico—allows entities to refer to the North American Commission for Environmental Cooperation allegations that member governments have failed to effectively enforce an environmental law. A referral was made that alleged a failure on the part of the Mexican government to evaluate in an environmental impact assessment a pro-

posed pier in Cozumel. While the submission was pending the Mexican government met with the three public interest groups that had filed the complaint. Following the meeting, perhaps because of the meeting or perhaps for other reasons, the Mexican government created a marine protected area in the area surrounding the proposed project.

The United States, Canada, and Mexico are currently negotiating a trilateral agreement on transboundary environmental impact assessment. This agreement will set forth a process for how the countries will address projects that originate in one country but may have impacts across the border in another country. Such an agreement has already been developed in Europe under the auspices of the United Nations Economic Commission for Europe (UNECE), known as the Espoo Convention since it was finally agreed to at a meeting in Espoo, Finland. Both the US and Canada have signed that convention, but the US has not ratified and, in any event, the convention is limited to members of the UNECE and thus is not available for signature and ratification by Mexico. Both agreements, however, share the challenge of how to handle proposed projects that are not subject to federal review, since NEPA only applies to federal actions, and for this reason negotiations for a North American agreement are going slowly.

Along the US-Mexico border a number of wastewater treatment and drinking water treatment facilities are being funded through the Border Environment Cooperation Commission and the North American Development Bank. Environmental impact assessment is occurring under US and Mexican law, addressing the impacts of projects in the US as they may affect the environment within the US and as they may affect the environment across the border in Mexico. Projects in Mexico are analyzed to address their impacts on the environment in Mexico and any impacts that they may have across the border in the United States.

And last, but not least, the Antarctic Science, Tourism, and Conservation Act of 1996 directs USEPA to develop a regulatory system that provides for the assessment of

environmental impacts of non-governmental activities in Antarctica. USEPA's regulations under this act also provide for coordination of the review of information regarding the environmental impact assessments received from the other Parties under the Protocol on Environmental Protection of the Antarctic Treaty of 1959.

Domestically. There are any number of new stresses, controversies, and opportunities on the domestic front in terms of NEPA.

Our population continues to increase, and the development attendant to this increase is not proportional—that is, development is occurring at an even greater pace than the population increase. The woes of urban sprawl are widely proclaimed, and this pressure is particularly evident in the congestion on our transportation networks (and the complaints that additional highways only lead to more sprawl). TEA-21 will provide \$218 billion for transportation—an enormous investment! Planning will be critical, as will the considerations of alternatives.

Increasing population also places a considerable stress on our natural resources. Ever larger populations of people are visiting our national parks and national forests. This leads to overuse of the resource. On lands managed by the Forest Service and the Bureau of Land Management this also sets up conflicts between recreational use of the resource and the more traditional commodity uses—timber, grazing, and mining. And even within the recreational use category there are conflicts between what I call “quiet” recreation and the noisier forms of recreation represented by off-road vehicles, including snowmobiles.

The water wars continue. And from the over-allocated Colorado River to the Platte River to the Missouri River to the Columbia and Snake Rivers there continue to be conflicts about water withdrawals to meet the drinking water needs of urban areas versus the irrigation needs of agricultural areas, the need for hydropower generation, the need for navigation, and last (unfortunately last but not in my opinion least) the

needs of the numerous species other than *Homo sapiens* that depend on stream flows for their existence.

The effects on human quality of life, the loss of habitat, the creation of additional threatened and endangered species, and then the ever-escalating controversies over additional development are extremely difficult to resolve. What kind of country will we leave to future generations?

How can we Meet these Challenges?

I believe NEPA gives us the tools to address these challenges—if we are willing to commit the resources: the people, the dollars, and the intent. Especially the intent. It doesn't have to cost the world to do it well, but it does take a serious commitment to do so.

We need to move environmental impact assessment up into the planning process where we still have real alternatives. Too often decisions are made early in the process, and especially before there is meaningful public review, that foreclose reasonable options once a particular project is under review.

We need to keep an open mind. Too often we jump to a conclusion on how best to address a problem, making up our minds and rejecting the consideration of other alternatives that may not only be more effective at solving our problem but that may also be more protective of the environment.

We need to honestly and openly consult with all stakeholders. It's not just a matter of building trust, although that is important. We need to understand that we can actually learn from stakeholders—including but not limited to developers, businessmen, farmers, environmentalists, academics, and representatives of federal, state, tribal, and local government.

We need to do it right the first time. Shortcuts don't work. Time and time again we've seen the courts direct federal agencies that “didn't have time to do an EIS” or that “didn't have time to do a critical analysis” to do the EIS or do the analysis. And then it takes twice as long.

We need to streamline the process. We need early involvement and we need concurrent reviews where there are multiple requirements. And intent is also a factor here. We have to make the commitment to recognize that there are legitimate conflicting missions, and we have to work together to meet the needs of society as best we can.

I would like to quickly share with you two innovative and creative approaches of which I am aware that show how the NEPA process continues to evolve to meet our needs. The Bonneville Power Administration (BPA) is an entity that is subject to NEPA but also must compete in the marketplace as a power generation agency. It must be able to move quickly. In order to do so in compliance with NEPA, BPA has developed an EIS from which multiple Records of Decision can be tiered, depending upon which decisions must be made. By fully analyzing the options in the EIS, and developing appropriate mitigation, BPA is positioned for a quick response.

Another possible approach under consideration by the Department of Army is the use of programmatic EAs that can lead to multiple Findings of No Significant Impact. These EAs could be used for projects that would possibly qualify for a categorical exclusion except that the individual circumstances need to be looked at and mitigation needs to be assured. This is an approach that can streamline the review process, and is certainly better than trying to move forward with questionable categorical exclusions.

I'm not even going to try to get into the new opportunities and challenges presented by the Internet!

Conclusion

We're facing new, critical challenges that must be met if we are to meet society's overall needs while protecting the environment—which is certainly a vital societal need. And we're developing new tools to meet these challenges. The challenge of how to analyze indirect effects and cumulative effects, and how to effectively limit and/or otherwise mitigate these effects, is immediate. I would expect that there are a

number of you here who will add substantively to meeting these challenges.

A review of where we've been, where we are, and where we're going that will be presented to your annual meeting in 2025 should be most illuminating! Getting there successfully will take hard work and commitment. I suspect it will also be intensely interesting.

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