National Environmental Policy Act (NEPA)

ELI Summer School – June 15, 2021

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National Environmental Policy Act and Regulations

- 42 U.S.C. 4321 et seq (statute), signed into law Jan. 1, 1970

- 40 C.F.R. Parts 1500-1508 (regulations)

- Council on Environmental Quality regulations adopted 1978 – have defined NEPA practice and litigation for the last 42 years.

- Trump Administration adopted complete replacement of regulations effective Sept. 14, 2020; federal agencies required to overhaul their own NEPA regulations to conform by Sept. 14, 2021.

Legislative Context

First statute of the "environmental decade" of the 1970s.

- Clean Air Act 1970

- Clean Water Act 1972

- Endangered Species Act 1973

- Safe Drinking Water Act 1974

- Resource Conservation and Recovery Act 1976

- Toxic Substances Control Act 1976

- Surface Mining Control and Reclamation Act 1977

Background Rationale for NEPA

Senator Henry M. Jackson (Washington) – April 16, 1969

"I introduced this measure because it is my view that our present knowledge, our established policies, and our existing institutions are not adequate to deal with the growing environmental problems and crises the nation faces …"

"As a nation we have failed to design and implement a national environmental policy which would enable us to weigh alternatives, and to anticipate the undesirable side effects which often result from our ongoing policies, programs and actions."

What does NEPA do?

- Declares a national policy
- Establishes an action forcing mechanism to ensure federal agencies consider alternatives and impacts of their actions
- Provides for public accountability and participation
- Creates a Council on Environmental Quality in the executive office of the President
- Required an annual report on the status of the environment (subsequently discontinued)

What does NEPA direct?

NEPA Section 102, 42 USC 4332 –

"The Congress authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be <u>interpreted and administered</u> in accordance with the <u>policies</u> set forth in this Act."

[See Section 101 for the policies—they look a lot like what later became known as "sustainable development," including concepts of intergenerational equity]

What does NEPA direct?

NEPA Section 102, 42 USC 4332(2) "All agencies of the Federal Government shall --

(C) include in every recommendation or report for legislation <u>and other major Federal actions significantly affecting the quality of the human environment</u>, a <u>detailed statement by the responsible official</u>" on…

- the <u>environmental impact</u> of the proposed action,
- any adverse environmental effects which <u>cannot be avoided</u> should the proposal be implemented,
- <u>alternatives to the proposed action</u>,
- the relationship between local short-term uses and long term productivity of the environment, and
- any irreversible and irretrievable commitments of resources shouldthe proposal be implemented

(E) Study, develop, and describe appropriate alternatives to recommended courses of action

Agency roles

- NEPA directly applies to every federal agency. Each agency administers its own compliance in accordance with CEQ regulations and its own NEPA procedures, regulations, and guidelines.

- Council on Environmental Quality issued government-wide Guidelines/Regulations under Presidential Executive Order. CEQ also reviews and approves federal agency NEPA procedures and regulations, approves agency "categorical exclusions" from EIS requirements, issues guidance documents, conducts dispute resolution, provides advice to federal agencies.

- Environmental Protection Agency (EPA) under a provision enacted as part of the Clean Air Act in 1970 reviews all Environmental Impact Statements(EISs), files notices of availability of EISs, rates EISs, maintains list of EISs.

Role of courts

- Federal courts enforce agency compliance with procedural requirements of NEPA and NEPA regulations under the Administrative Procedure Act.

- Federal courts do not enforce substantive compliance with the policies of NEPA.

- Federal courts in the 1970s identified their approach to review as taking a "hard look" at agency compliance with NEPA procedures.

- Supreme Court has said that NEPA does not require a particular decisional outcome by agencies. It does not bar unwise decisions, only uninformed decisions.

Key Supreme Court NEPA decisions

- Kleppe v. Sierra Club, 427 U.S. 390 (1976) (proposal for action; reference to "hard look")
- Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (NEPA's "mandate to the agencies is essentially procedural")
- Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) ("the only role for a court is to insure the agency has considered the environmental consequences")
- Andrus v. Sierra Club, 442 U.S. 347 (1979)(1978 CEQ regs entitled to "substantial deference" by the courts)
- Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1988)(while agencies must consider mitigation, need not develop or implement full mitigation plan)

CEQ Regulations

- Guidelines as early as 1970, revised 1971, 1973

- Detailed regulations in 1978 based substantially on court decisions, agency practices, and developments in environmental planning techniques. Consensus document, endorsed by environmental groups and business groups.

- Most of what we think of as "NEPA" requirements actually appears in the regulations – scoping, public participation, cumulative impacts, etc.

Types of NEPA documents

- Categorical Exclusion (CATEX) – where an agency has determined (in advance, in its adopted procedures) that a listed type of action does not normally have a significant effect on the human environment. But still some review may be required to determine if there are "extraordinary circumstances".

- Environmental Assessment (EA) – a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS, aids in any agency's compliance with NEPA when no EIS is necessary. Leads to Finding of No Significant Impact (FONSI) or to decision to prepare EIS.

- Environmental Impact Statement (EIS) – the detailed statement, including consideration of alternatives, impacts, mitigation. Required for major federal actions significantly affecting the human environment. Leads to Record of Decision (ROD) reflecting the federal decision.

Key EA and EIS elements

- Scoping (required for EIS, often used for EA)
- Identification of alternatives to the proposed action (both)
- Public participation – agency duty to deal with public comments (EIS has draft and final EIS reflecting disposition of public comments; EA may have draft and final, and may receive public comments even if issued as final)
- Mitigation – identified in each (not directly enforceable in EIS – but must be identified). If used in EA to bring impacts below the level of significance, this is "mitigated FONSI" Interesting enforceability issue there.

Key issues

- Cumulative impacts and indirect impacts
- Alternatives not within authority of lead agency
- Expansion of CATEXs – including legislative CATEXs
- Public participation
- Environmental Justice (EJ)
- Climate change impacts

New NEPA Rule – 85 Fed. Reg. 43357 (July 16, 2020)

- Completely overhauls 1978 regulations; issued pursuant to Trump Administration EO 13807 "infrastructure" order but applies to all of NEPA decisionmaking.

- Applies to agency actions after September 14, 2021.

- Expressly preempts all existing agency NEPA regulations, guidance, and procedures and will require all agencies to conform within 12 months of final regulations.

- Eliminates consideration of cumulative impacts, indirect impacts, consideration of alternatives and impacts not within jurisdiction of lead agency, removes significance definitions. Creates new presumptions; seems to overrule federal court decisions reliant on existing regulations.

- Currently being litigated in numerous federal courts, with likely differing outcomes.