NEPA Is Our Most Imitated Law, and for Good Reasons

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The National Environmental Policy Act has changed the way we think, a truly magnificent achievement. NEPA's "action forcing" provisions have become routine — we examine environmental impacts before undertaking an action, we examine whether there are alternative means of accomplishing goals that minimize those impacts, and we see whether there are means of mitigating remaining impacts.

NEPA was and is a pioneering statute. About half the states followed its example and adopted laws patterned on the federal act. Environmental impact assessment provisions have been adopted worldwide in at least 80 countries and international organizations such as the European Union and the World Bank. NEPA is, I believe, the most imitated law in American history.

NEPA has had a further but equally important effect — involving the public. Scoping invites citizens into the NEPA process at an early stage, with the agency soliciting all affected or interested persons to contribute their thoughts on what should be studied in the environmental impact statement. Then there is the comment process. Any member of the public may comment on a draft EIS and again on a final EIS.

Importantly, the agency must respond to those comments, subject to judicial review. I can think of no other instance where federal agencies are required to explain themselves by responding to individual members of the public. The agency need not agree with the comment, but it must treat it seriously and discuss it appropriately. This public involvement has two aspects: first, as is appropriate in a democracy, the public is informed about and made part of decisionmaking, and second, the agency is enabled to become the beneficiary of the good ideas and informed analysis which citizens may have to offer.

In addition, NEPA, by its focus on the environment as a whole, encourages multidisciplinary thinking and cooperation. While statues such as the Clean Air Act or the National Historic Preservation Act or the Endangered Species Act focus on a single medium or a single attribute to be protected, NEPA integrates them all and demands the inclusion of the full range of environmental considerations such that informed trade offs may be made. Holistic thinking leads to wise decisionmaking, which is precisely what the NEPA process fosters.

Let me now turn to two areas where implementation of the statute has fallen short of its potential. First, the issue of "procedural" as opposed to "substantive" impact of the law. Early on in NEPA's existence , the Supreme Court announced in *Vermont Yankee* that NEPA's implementation was to be considered "essentially procedural," which is to say the Court found no mandate to act in an environmentally sensitive manner. The expectation was that if NEPA's procedures were followed, more environmentally sensitive decisions would follow.

And this has been largely true. Following the law's procedures *does* provide the data, the analysis, and the opportunity for greater sensitivity to the environment that has marked NEPA's success. (I should add that the common use of "mitigated FONSIs," whereby no EIS is prepared in exchange for an enforceable commitment to eliminate or reduce environmental impacts, does have a substantive bite.) But, more could be done. Starting with a statute patterned upon NEPA, but which was narrower, the California Environmental Quality Act, that state's Supreme Court held in the *Friends of the Mammoth* case that the statute imposed an affirmative, judicially enforceable obligation to choose alternatives and otherwise to take actions to minimize adverse environmental impacts. In brief, California put muscle in its EIA legislation — giving it a "substantive" effect. That ruling reinforced environmental protection in a way which the U.S. Supreme Court failed to do.

Second is the sluggish implementation of the act, which frustrates developers and other applicants and which creates unnecessary ill will toward the statute. NEPA's implementation can be made more efficient, reducing the time and expense it takes to comply with the act's procedures. Early on, the White House Council on Environmental Quality publicly stated that EISs should not take over a year to prepare, but agencies seem largely incapable — or unwilling — to take the actions necessary to move the NEPA process expeditiously.

It can be done. For instance, in dealing with the approval of renewable energy projects then Secretary of the Interior Ken Salazar showed that expeditious completion of the NEPA process was possible. Agencies can be both environmentally sensitive and act efficiently. When the NEPA Regulations were adopted, timeliness was the single issue of greatest interest to the business community, led by the U.S. Chamber of Commerce. In response, the NEPA Regulations provide that time limits must be set when an applicant requests them. But the provision remains underutilized. Streamlining NEPA's application without undercutting the statute's environmental goals remains an ongoing challenge.

NEPA remains, however, America's most far-reaching environmental law. The statute has changed the way we think and act in approaching environmental issues. That is a real accomplishment.

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