

Thoughts on NEPA at 40

by Daniel R. Mandelker

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The 40th anniversary of the National Environmental Policy Act's (NEPA's)¹ birth calls forth images of a statute, perhaps framed in innocence, that has profound effects on decisionmaking by federal agencies. Though the legislative history is unclear, there is a strong suggestion that the U.S. Congress believed they were enacting a law that would allow agencies to write their own compliance ticket. This changed with a landmark case soon after NEPA was adopted that made the statute enforceable in federal courts. With that decision, the playing field changed and the statute became enforceable in court.

NEPA now is a major environmental statute that requires a freewheeling and extensive analysis of the environmental impacts of agency actions and programs. If the agency makes a mistake by failing to prepare an impact statement when it should, or if the impact statement it prepares is inadequate, it must start over, often at great cost. Because NEPA compliance has become such a major issue, it is useful to examine how the statute works and some of the problems it has created.

I. The Whole and the Parts

NEPA cases are a glory for the lawyer. Issues abound, because case law and Council on Environmental Quality regulations create a host of requirements that NEPA compliance must satisfy. An impact statement on a major new highway, for example, gets dissected for compliance with NEPA requirements, such as whether all available alternatives and cumulative impacts are identified and adequately considered and whether environmental effects created by the highway are properly described. NEPA litigation can become an endgame in which each party looks for weaknesses in the other side's defenses that it can exploit in order to succeed in the litigation. Each issue has its own importance, but the question is whether the breakdown of a case into its many parts allows a court to consider an action or project in a comprehensive way that identifies the major issues it presents.

The answer to this question is contingent. A NEPA case can be sliced so thin that a synoptic view of the problems it presents does not emerge. In other cases, some of the issues litigated are so critical that they decide the environmental

importance of the action or project under review. An agency may have so neglected its analysis of alternatives, for example, that the correction of this problem becomes the major issue. Still, some amendment to regulations or some change in judicial review of agency decisions to require a comprehensive review of agency actions would provide a more useful examination and balancing of environmental issues. This kind of review could produce an overall evaluation that includes a balancing of issues and priorities.

II. The Mission Agency Syndrome

One of the guiding concerns that led to the adoption of NEPA was the need to correct the sometimes myopic vision of federal mission agencies. A mission agency is an agency that has a limited statutory purpose defined to exclude or not require the consideration of environmental values. This was certainly the case at the time Congress adopted NEPA. A classic example was the provision in the federal highway law that required highway agencies to select the shortest route between two points. No matter that the highway tore up an attractive park or damaged an important historic site. Congress adopted a law just before NEPA to stop these insults in highway and transportation projects, and NEPA was intended to accomplish the same purpose on a broader scale by making environmental values part of all agency decisionmaking. As one court put it, an agency must comply with its own statute, but it must also comply with NEPA.

The question is how successful this restraint of mission agencies has been, and whether this NEPA goal needs to be restated in a different administrative age. In the judicial arena, courts will and do intervene to correct limited agency decisionmaking. They are often prevented in doing so by the restraints that exist on judicial review, but judicial rejection of agency decisions does occur. A related issue is how agencies have responded to NEPA's mandate by improving their consideration of environmental values. This question has been fairly extensively researched and has brought forth mixed answers. Studies suggest a modest influence, not only on agency decisions but on the process through which they are made and the type of personnel brought in to help make them. The addition of environmental specialists is an important outcome.

1. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

The broader question is whether concentration on individual projects of mission agencies is enough. Agency plans and programs provide important blueprints for agency actions, but are less easily brought under judicial review and analysis. A federal statute exempts state and regional transportation plans, and courts have not required a NEPA analysis of regional plans that provide the basis for federal funding. Forest management plans may also escape judicial review. Finally, an early U.S. Supreme Court case made it difficult to get judicial review of agency planning on a regional basis. Bringing NEPA to bear on agency plans should have a high priority on a reform agenda, as they provide the framework and guidelines for future agency action.

III. The Substantive Versus Procedural Debate

Early in NEPA's history there was much discussion of whether NEPA included substantive standards in addition to its requirement that agencies fully disclose the environmental impacts of their actions. Advocates for a substantive view found support in NEPA's statement of policy, which states environmental goals for the nation. Early lower court cases then suggested the possibility that NEPA might be substantively applied, but the Supreme Court later dashed these hopes.

The question is whether a debate over the substantive application of NEPA should be revived, and what its outcome should be. NEPA is a cross-cutting statute. Its requirements apply to every agency in addition to the agency's own legislation. If NEPA were made substantive, the environmental values it contains would be added to the mandates of every agency statute. This is a major departure from the existing system that rewrites federal legislation to include substantive environmental values. Projects and programs that did not conform to the environmental values imported from NEPA would have to be rejected by agencies or face judicial rejection.

Another problem that would arise is to decide what weight NEPA's substantive environmental values should be given. It is unlikely that Congress would give NEPA's environmental values a preemptive effect. Some balancing would have to occur, but in the absence of legislative attention to the particular statutory mandates for each agency, this task would be left to the courts, which are not suited for this role.

Other objections argue against giving NEPA a substantive effect. One is that Congress has written NEPA's environmental values into a large number of statutes that authorize agency programs. This legislative elaboration has been done in the context of agency obligations detailed in their own statutes and related to the specifics of their own programs.

Another objection is that the substantive versus procedural distinction is largely superfluous. A conclusion, for example, that an impact statement does not meet NEPA's procedural disclosure requirements can have just as much impact on an agency's decision as a conclusion that the decision is substantively wrong. Defects in the statement identified by a court can be so overwhelming that an agency could proceed only by correcting or modifying its original decision. The difference is that the agency has the opportunity to go back and try again.

IV. Conclusion

NEPA was a major innovation in requirements for agency decisionmaking that, for the first time, made environmental values a part of every agency decisionmaking process. The very expansiveness of NEPA, and its more effective application to agency projects rather than agency plans and programs, has limited its impact. Changes in regulations, and in the way in which courts approach judicial review under NEPA, can remedy this situation. Making NEPA substantive, however, does not make it more effective as the nation's Magna Carta environmental law.