

NEPA at 40: International Dimensions

by Nicholas A. Robinson

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Section 102 of the National Environmental Policy Act (NEPA)¹ contains a broad mandate to apply the policies of §101 on an international plane. I explored these concepts initially on assignment as a member of the Legal Advisory Committee to the Council on Environmental Quality (CEQ) in 1969-1971, and published the analysis in 1974,² after that Committee wound up its business.

After several judicial decisions confirmed that NEPA's environmental impact assessment (EIA) provisions in §102(2)(C) applied to actions outside the territorial United States, the CEQ under President Ronald W. Reagan studied and restated the international scope of federal EIA.³

While the scope of NEPA application of EIA under §102(2)(C) abroad has been reaffirmed, most of the international scope of the rest of §102 remains to be examined. Some quiet application of the concepts in §102 of NEPA has made its way into law. For instance, the need for a strategic and more pervasive analysis of transboundary environmental trends is §102(2) (A) and (B) as well as (F) and (G). A decision to embrace a new methodology and tool to assist all agencies, whether local, state, or federal or international, with respect to the Great Lakes Basin between Canada and the United States, has recently launched a new era of employing these hitherto little used NEPA mandates. The 20th Annual Report of the CEQ prepared for President George H.W. Bush scoped out the need for transnational EIA within the Great Lakes Basin.⁴ In November 2008, President George W. Bush signed the Great Lakes Compact, which requires a process for cumulative impact assessment every five years for anthropogenic impacts on the Great Lakes basinwide.

The World Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development, and other regional development banks and institutions, have all implemented innovations in EIA that go beyond the provisions of §102(2)(C) and implicate other provisions of §102. The European Union's strategic EIA Directive also does so.

It is time for the CEQ to revisit the rest of §102, and elaborate guidance and regulations for federal agencies to comply with and use the environmental management mandates in §102(A), (B), (E), (F), (G), and (H). Not only have 40 years elapsed since the CEQ's own Legal Advisory Committee recommended that this be done, but the gathering challenges of mitigating or adapting to the adverse impacts of climate change make the use of all environmental assessment and planning techniques a matter of urgency. The vigor and vision within NEPA §102(2)(C) has made NEPA's EIA a model for comparable laws in over 160 nations, and in several treaties. If a comparable commitment were made to implement the balance of §102, the CEQ would provide the world with a pervasive and enormously effective set of tools to combat climate change and environmental degradation. This latent statutory mandate is needed now more than ever.

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

2. Nicholas A. Robinson, *Extraterritorial Environmental Protection Obligations of the Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT'L L. & POL. 257 (1974).

3. Environmental Effects Abroad of Major Federal Actions, Exec. Order No. 12114, 3 C.F.R. 356 (1980), ADMIN. MAT. 45023.

4. CEQ, 20TH ANNUAL REPORT—THE GREAT LAKES, ch. 8 (1990).