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COMMENT

**THE BUSH ADMINISTRATION'S ATTACK ON THE ENVIRONMENT;
TARGET: NEPA'S ENVIRONMENTAL IMPACT STATEMENT**

I. INTRODUCTION

The National Environmental Policy Act ("NEPA") was enacted by Congress on January 1, 1970, to "encourage productive and enjoyable harmony between man and his environment;"¹ to prevent or eliminate damage to the environment.² NEPA could not have been enacted at a better time.³ In the 1960s an environmental awakening was brought about in light of horrific events including: toxic smog shutting down entire cities, rivers catching fire because they were so polluted, highways laying waste to inner cities, oil drenching beaches, pesticides becoming more and more toxic, and other frightening predictions.⁴ On April 22, 1970, an estimated twenty million people gathered nationwide to support the first annual Earth Day celebration.⁵ Congress responded to the public's well-justified environmental concerns by enacting NEPA, which is regarded today as the legal cornerstone of environmental protection.⁶ NEPA is the model for environmental laws adopted in almost every jurisdiction across the globe.⁷ Yet, NEPA has caused continuous litigation and debate over its intent and effectiveness since its enactment.⁸ The Bush administration is reviewing this landmark environmental law in an attempt to modernize the law and reduce bureaucratic gridlock, but environmentalists worry about the administration's true intentions.⁹ NEPA does have room for improvement, but additional shortcuts for agencies to escape compliance with NEPA will not make the law more effective.

II. WHAT IS NEPA?

NEPA attempts to impose environmental responsibility on all public officials.¹⁰ The two main purposes of NEPA are to ensure that agencies take a "hard look" at the environmental consequences of a proposed action and to inform other interested groups and individuals, spurring public comment from those with expertise and generating informed decisions.¹¹ NEPA has both substantive and procedural aspects.¹² The substantive

¹ David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 Widener L. Symp. J. 1, 34 (Fall 1998) (quoting 42 U.S.C. § 4321 (2000)).

² *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002).

³ Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. Land Resources & Envtl. L. 245, 247 (2000).

⁴ Oliver A. Houck, *Is That All? A Review of the National Environmental Policy Act, An Agenda for the Future*, By Lynton Keith Caldwell, 11 Duke Envtl. L. & Policy F. 173, 177 (2000).

⁵ Kelly Wittorf, student author, *A Call to Revitalize the Heart of NEPA: The Alternatives Analysis*, 12 U. Fla. J. L. & Pub. Policy 361, 361 (2001).

⁶ Seth Borenstein, *Critics: Bush foiling law on environment The administration insists it only wants to streamline a milestone 1969 measure. Some see a matter of trust*, Phila. Inquirer A01, (Oct. 7, 2002) (available at 2002 WL 100224926).

⁷ Hodas, 3 Widener L. Symp. J. at 34.

⁸ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 362.

⁹ Matthew Daly, *Bush Staff Reviews Landmark Environmental Law*, Bradenton Herald 3, (Aug. 30, 2002) (available at 2002 WL 22152655).

¹⁰ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 362.

¹¹ *Id.*

¹² Houck, 11 Duke Envtl. L. & Policy F. at 178.

principles are set forth in section 101(b).¹³ The mechanisms in which to enforce the substantive principles are in section 102¹⁴ and include the most recognizable aspect of NEPA, the Environmental Impact Statements (“EIS”).¹⁵

The substantive principles of NEPA are aimed at promoting “‘productive harmony’ that balances social, economic, and environmental goals.”¹⁶ It is broken down into six objectives that are imposed on the federal government and requires an EIS for all “major federal actions significantly affecting the quality of the human environment.”¹⁷ The six objectives are:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and wide sharing of life’s amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depleted resources.¹⁸

These objectives are codified into binding law, but the difficulty is that the goals are aspirations rather than precise laws.¹⁹ It is as if Congress has told agencies to “Be Environmental!” and expected this language to be specific enough for the courts to enforce.²⁰ In an effort to deal with this problem, the EIS requirement was put into place to ensure that these six objectives are enforced.²¹

An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.”²² The EIS is often a massive undertaking requiring years to complete.²³ The EIS considers the effects of and alternatives to the proposed action.²⁴ The EIS requires that agencies take a “hard look” at the consequences a project will have on the environment before taking a major action.²⁵ Because the language is so broad and agencies were unsure how to comply with NEPA and were also unwilling to comply with NEPA, Congress formed the Council of Environmental Quality (“CEQ”).²⁶ The CEQ is an agency whose duty is to implement NEPA.²⁷ The CEQ has issued regulations providing guidance for agencies to comply with NEPA.²⁸

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Wittorf, 12 U. Fla. J. L. & Pub. Policy F. at 364. The EIS is a procedural tool for agencies to use in order to comply with the substantive mandates of NEPA. It requires that agencies document: (1) the environmental impacts of the proffered action, (2) unavoidable adverse effects, (3) alternatives, (4) the relationship between short-term uses and maintenance of long-term productivity, and (5) any irreversible commitment of resources. *Id.*

¹⁶ Lindstrom, 20 J. Land Resources & Env'tl. L. at 248.

¹⁷ *Id.*

¹⁸ 42 U.S.C. § 4331(b)(1)-(6) (2000).

¹⁹ Houck, 11 Duke Env'tl. L. & Policy F. at 177-80.

²⁰ *Id.* at 181.

²¹ Lindstrom, 20 J. Land Resources & Env'tl. L. at 249.

²² *Id.* at 248.

²³ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 365 (quoting 42 U.S.C. § 4332(C)).

²⁴ *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1185 (8th Cir. 2001).

²⁵ *Id.*

²⁶ See Wittorf, 12 U. Fla. J. L. & Pub. Policy at 365.

²⁷ *Id.*

One regulation the CEQ has established is for an Environmental Assessment (“EA”) to be conducted for all federal actions in order to determine if an EIS is needed.²⁹ In conducting an EA there are two possible determinations: either a Finding of No Significant Impact (“FONSI”) meaning that an EIS is unnecessary, or conversely, the EA could reveal a significant impact on the environment requiring an EIS to be conducted.³⁰ The EA should briefly provide the agency with sufficient evidence as to whether a FONSI should be made or an EIS should be conducted.³¹ The CEQ has binding guidelines for the agencies to follow, but ultimately the agency itself makes the decision as to whether a FONSI is made or an EIS is conducted.³² Approximately 50,000 EAs lead to findings of no significant impact compared to an estimated 500 EISs produced each year.³³

The CEQ regulations also provide for categorical exclusions of certain types of federal activities.³⁴ “The CEQ regulations define categorical exclusions as ‘a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.’”³⁵ If an action falls within a categorical exclusion, then neither an EA nor an EIS is conducted.³⁶

If an EIS is necessary, there are several requirements that must be addressed in the document including: (1) environmental impacts of the proffered action; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between short-term uses and maintenance of long-term productivity; and (5) any irreversible commitment of resources.³⁷

III. CRITICISM’S OF NEPA

Two of the main criticisms of NEPA are that it does not attain its purpose and that it impedes economic growth.³⁸ Critics should be careful of what criticisms they choose when trashing the law that environmentalist refer to as the Magna Carta of all environmental laws.³⁹ The reason they should choose their words carefully is that to criticize the law for not obtaining its purpose could most likely be solved by means that may be unsatisfactory to some critics, especially the business person, who is looking to maximize profits in the shortest amount of time possible. NEPA could obtain its purpose of reducing environmental harm by having a stricter interpretation of the law, rather than how it is interpreted in the courts today, and by implementing more costly measures such as post-EIS monitoring, and sanctions for failing to comply with the estimates stated in the EIS. These improvements would just be at a higher cost to the business person. Those people with a business interest in a proposed action may have a legitimate complaint that it takes too long to accurately comply with NEPA. Yet, at what costs to our environment are we willing to speed-up NEPA compliance, which in turn may speed up economic growth at the expense of speeding up an environmental downfall?

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Friends of Richards-Gebaur Airport*, 251 F.3d at 1185.

³² *Id.*

³³ Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 Colum. L. Rev. 903, 909-910 (2002).

³⁴ *Friends of Richards-Gebaur Airport*, 251 F.3d at 1185.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 365.

³⁸ *See generally* Houck, 11 Duke Env’tl. L. & Policy F. 173.

³⁹ *Id.*

Criticism 1: NEPA is not effective in obtaining it's goals

One reason NEPA has trouble attaining its purpose of mitigating harsh environmental effects and balancing ecological values with other national interests,⁴⁰ is due to the "arbitrary and capricious" standard of review found in the Administrative Procedure Act section 706(2)(a) and first debated by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁴¹ When a court evaluates whether a decision is "arbitrary and capricious," practically speaking the court "only focuses on the procedural aspects of an agency decision and not the actual outcome or policy derived from the procedures."⁴²

Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Commn.,⁴³ was one of the early NEPA cases that established a high bar for procedural compliance, and, to some degree, substantive compliance with NEPA.⁴⁴ Judge Skelly Wright in *Calvert Cliffs* condemned agency noncompliance with NEPA and asserted that the court had the power to review this compliance or noncompliance by the agencies.⁴⁵ Judge Wright declared that a court probably cannot reverse a substantive decision on the merits unless it is arbitrary and capricious giving clear insufficient weight to environmental values.⁴⁶ However, if the decision was reached procedurally and still failed to properly balance the environmental effects then it is the responsibility of the courts to reverse.⁴⁷ Judge Wright did not have to rule directly on any substantive issues in the case due to the fact that the agency's compliance with NEPA was so procedurally inadequate.⁴⁸ Yet Judge Wright still made clear the connection between NEPA's procedural element, the EIS, and the substantive policy that NEPA attempts to mandate.⁴⁹ This case was both a wake-up call to agencies that they must comply with NEPA and it established a standard for lower courts to follow.⁵⁰ The standard set allowed reversal of agency decisions that were inadequately researched or failed to provide the necessary environmental information in the EIS.⁵¹

In later cases, the Supreme Court undermined substantive NEPA review by its unwillingness to challenge agencies' actual decisions.⁵² In *Kleppe v. Sierra Club*, the Court held that if the minimal EIS procedures are met then the courts only role is to insure that the agency considered the environmental consequences.⁵³ Similarly in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* Justice Rehnquist stated that NEPA's mandate was purely procedural and that NEPA was to "insure a fully informed and well-considered decision, not necessarily a decision the judges . . . would have reached . . ." ⁵⁴ He went on to state that decisions should only be reversed for "substantial procedural or substantive reasons . . . not simply because the court is unhappy with the result reached."⁵⁵ Consequently, courts are "reluctant to

⁴⁰ Lindstrom. 20 J. Land Resources & Envtl. L. at 255.

⁴¹ *Id.* at 256 (citing 401 U.S. 402 (1971)).

⁴² Lindstrom. 20 J. Land Resources & Envtl. L. at 256.

⁴³ 449 F.2d 1109 (D.C. Cir. 1971)

⁴⁴ Lindstrom. 20 J. Land Resources & Envtl. L. at 257.

⁴⁵ *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1115.

⁴⁶ *Id.*

⁴⁷ Lindstrom. 20 J. Land Resources & Envtl. L. at 257.

⁴⁸ Hodas, Widener L. Symp. J. at 38.

⁴⁹ Lindstrom. 20 J. Land Resources & Envtl. L. at 258.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 259.

⁵³ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

⁵⁴ *Vermont Yankee Nuclear Power Corp. v. Natl. Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

⁵⁵ *Id.*

overrule an agency's choice of alternatives on the grounds that it failed to choose the alternative that best met the underlying goals of NEPA."⁵⁶

The criticism that NEPA is not obtaining its purpose may be due to the fact that the "arbitrary and capricious" standard is so high. In addition the interpretation that the Supreme Court has given the standard, does not allow a law that says "Be Environmental" to be enforced. It is ultimately up to the agencies themselves to decide whether to truly consider environmental factors when making decisions, the court cannot make the decision for the agency.

Another problem is that NEPA simply does not require enough of agencies.⁵⁷ The Supreme Court has allowed agencies to reject an environmentally preferable alternative due to the fact that a change of plans would cause delay in the project.⁵⁸ NEPA does not require a "worst-case analysis" which would be used to assess the effects of catastrophes.⁵⁹ Rather, the CEQ regulations merely require that agencies consider "reasonably foreseeable . . . impacts which have catastrophic consequences, even if their probability is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."⁶⁰ In addition, agencies often will assess bits and pieces of a proposed action rather than the cumulative effects in order to have a finding of no significant impact and avoid the lengthy EIS or to simply avoid harsh public comment by not releasing the total consequences at once.⁶¹ Thus, it is said that NEPA represents a narrow document that embodies reflections on decisions that have already been made.⁶²

Another fact that suggests that NEPA does not require enough of agencies is that there is no requirement that agencies measure the actual conduct after the EIS is completed and the project takes effect.⁶³ This lack of post-EIS review and monitoring takes away any possible feedback that is needed to make better estimates and ultimately better decisions in the future.⁶⁴ Consequently, because there is no post-project review of the accuracy of the predictions made in the EIS or the EA, there is no liability for the inaccuracy, which effectively means that there is no accountability.⁶⁵ If no one is to blame for any possible errors, why would agencies put forth the effort to ensure accuracy? Additionally, outside experts are often hired to assess the amount of impact a project will have on the environment.⁶⁶ Outside experts need job security, and are most likely going to provide information that their bosses want to hear. This information would be that the environmental impact is below the threshold level, therefore the impact is not significant and an EIS is not required. Because agencies use their own standards for making environmental predictions, likely hire outside experts that are unwilling to provide bad news to their bosses, the project proponents, and because there is no accountability for any error in predictions, the environmental impact of a project is often underestimated, or inaccurately predicted.

The lack of accountability under NEPA is also recognized as a structural defect of the statute.⁶⁷ Under NEPA "no one is responsible for substantive errors, flaws or inadequacies in EIS evaluations."⁶⁸ Provided that the procedural aspects of NEPA's EIS are followed, there is no consequence to the agency or decision-maker

⁵⁶ Hodas, 3 Widener L. Symp. J. at 38.

⁵⁷ See *id.* at 44.

⁵⁸ Hodas, 3 Widener L. Symp. J. at 44.

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting 40 C.F.R. § 1502.22(b)(4) (1996)).

⁶¹ Lindstrom, 20 J. Land Resources & Envtl. L. at 266: see also Hodas, 3 Widener L. Symp. J. at 35.

⁶² Hodas, 3 Widener L. Symp. J. at 44.

⁶³ *Id.* at 48.

⁶⁴ *Id.*

⁶⁵ *Id.* at 49.

⁶⁶ See *id.*

⁶⁷ Hodas, 3 Widener L. Symp. J. at 45.

⁶⁸ *Id.*

for poor decisions.⁶⁹ In fact, there is not even any type of obligation to follow up or ensure the accuracy of the predictions and determine the actual adverse environmental consequences.⁷⁰ For example, when creating the EIS for the Grand Teton Dam, decision-makers thought that the possibility of the dam collapsing was too remote to inquire about in the EIS.⁷¹ In 1976, when the dam was filled for the first time, it collapsed, killing 11 individuals, leaving 25,000 homeless, and flooding 300 square miles of downstream land.⁷² The resulting cost to the government was about one billion dollars.⁷³ “However, ‘[n]one of Teton’s principal designers and builders were fired.’ Neither the decision-makers nor the project proponents were held accountable for their mistakes.”⁷⁴

Another criticism that prohibits NEPA from attaining its goal is that the EIS comes too late to actually benefit the decision-making of a proposed project.⁷⁵ “‘The moment at which an agency must have a final statement ready is the time at which it makes a recommendation or report on a proposal for federal action,’ even though by then the decision would have been all but finalized”⁷⁶ By this time, the final decision to conduct the project is practically set in stone, and the EIS is too late to make a meaningful impact.⁷⁷ Rational decision-makers probably would only commit the resources to produce an EIS after having committed to a final decision, even though as a legal matter the decision would not have been formally announced yet.⁷⁸ In these cases, EISs are prepared to justify decisions that are already made.⁷⁹ Additionally, some agencies do not allow adequate public involvement to actually benefit from the expertise of those interested, even if the decision has not already been made.⁸⁰

Criticism 2: Impeding Economic Growth

Those with business interests in the proposed federal actions, complain that NEPA has “spawned unreadable, phone book-size reports and a maze of bureaucratic hurdles that lead to costly delays in completing projects.”⁸¹ NEPA has been termed a tool of obstruction, imposing procedural delays, breeding lawsuits, and raising costs.⁸² It also has been blamed for stalling projects, sometimes to death, and causing others never to start.⁸³

Officials at federal agencies complain of the length of time projects take, blaming NEPA for the delay.⁸⁴ For example, Transportation Secretary Norman Mineta said, “it takes an average of ten years to move an airport

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (quoting Marc Reisner, *Cadillac Desert, the American West and its Disappearing Water*, 408 (1993)).

⁷⁵ Hodas, 3 Widener L. Symp. J. at 39-40.

⁷⁶ *Id.*

⁷⁷ *Id.* at 40.

⁷⁸ Karkkainen, 102 Colum. L. Rev. at 924.

⁷⁹ Lindstrom, 20 J. Land Resources & Envtl. L. at 266.

⁸⁰ *Id.*

⁸¹ Zachary Coile, *White House seeds review shortcuts/ Environmentalists fear loss of safeguard*, S.F. Chron. A1, (Sept. 27, 2002) (available in 2002 WL 4031657).

⁸² *Fixing NEPA*, 100 Oil and Gas J. 17 (Oct. 21, 2002) (available in 2002 WL 22230081).

⁸³ Hodas, 3 Widener L. Symp. J. L. at 40.

⁸⁴ Coile, *supra* n. 81.

project from planning to ribbon-cutting and thirteen years to complete a highway because of the required state and federal clearances and resulting lawsuits.⁸⁵

Are These Criticism's Founded?

NEPA may be getting more blame than it deserves.⁸⁶ One study suggests that 92 percent of transportation projects are excluded from conducting environmental assessments or environmental impact statements because they fall within a categorical exclusion.⁸⁷ Additionally, a study by the Federal Highway Administration found that out of projects delayed for over five years, sixty-two percent of those projects were delayed due to lack of money, low priority from the agencies themselves, opposition in local communities, the intricacy of the project,⁸⁸ or changing or expanding the scope of the project.⁸⁹ It is not the environmental laws that are causing the delays.⁹⁰ In fact, only two percent of highway construction projects are required to do the full EIS.⁹¹

As for the criticism that NEPA is driving up cost, causing delays, and causing the production of huge documents of information, this is not the intent of NEPA.⁹² In fact, the CEQ regulations state that “[u]ltimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.”⁹³ The regulations state that NEPA’s purpose is to make decisions “. . . based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”⁹⁴ The problem is that there has not been a proposal that can ensure that both NEPA’s purpose that environmentally conscience decisions are being made, while simultaneously reducing the paperwork, time, and cost of complying with the “Be Environmental” law.

IV. BUSH ADMINISTRATION’S EFFORTS AGAINST THE ENVIRONMENT

Environmentalists are concerned about the task force that was launched by the White House Council on Environmental Quality, which was established to review and improve NEPA.⁹⁵ “The director of the White House task force insists the administration’s goal is to make the environmental law more efficient and effective – not to weaken it.”⁹⁶ Yet environmentalists are not convinced.⁹⁷ They fear that the law’s protections are being weakened and that the public is being shut out of the decision making process.⁹⁸ “The Bush Administration has

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Study was conducted by the Association of American State Highway and Transportation Officials. *Id.*

⁸⁸ *Id.*

⁸⁹ *Highway Environmental Shortcuts Unnecessary and Destructive, Congress Told*, U.S. Newswire, 2002 WL 22072490 (Oct. 8, 2002).

⁹⁰ Coile, *supra* n. 81.

⁹¹ *Id.*

⁹² See generally Lindstrom, 20 J. Land Resources & Env'tl L. at 261.

⁹³ Lindstrom, 20 J. Land Resources & Env'tl. L. at 261 (quoting 40 C.F.R. §1500.1(c)).

⁹⁴ *Id.* The Tenth Circuit Court of Appeals, in *Catron County v. U.S. Fish and Wildlife*, quoted this section of the CEQ regulations to hold the U.S. Fish and Wildlife responsible for complying with all of NEPA’s requirements. 75 F.3d 1429, 1437 (10th Cir. 1996).

⁹⁵ Daly, *supra* n. 9.

⁹⁶ Coile, *supra* n. 81.

⁹⁷ *Id.*

⁹⁸ *Id.*

long signaled an impatience with [NEPA], one of the nation's most comprehensive environmental laws."⁹⁹ Environmentalists are worried due to the Bush Administration's prior stances against the environment.¹⁰⁰ For example:

(1) the Environmental Protection Agency announced changes to the Clean Air Act on November 22, 2002, which allowed out-dated factories, oil refineries and power plants to renovate without having the costly burden of installing modern air-pollution technology.¹⁰¹

(2) On November 27, 2002 the Forest Service declared that EISs were no longer required "for the fifteen year plans that govern logging, mining, ski resorts and grazing on the nation's 155 national forests."¹⁰² This affects 192 million acres of federal forests and grasslands.¹⁰³ Any of this land could be designated for logging or commercial activity without giving any consideration to or allowing public comment about the impact it will have on wildlife, watersheds, recreation, or simply the environmental health of the region and the aesthetic beauty enjoyed by the American people.¹⁰⁴ The administration's stance is that this is designed to reduce wildfires in the Nation's forest, which was recognized as a major problem this past year when 7.1 million acres burned.¹⁰⁵

(3) The administration argued in federal court that NEPA did not apply to military projects outside U.S. territorial waters, but within 200 miles of the shore, and therefore the Navy did not have to conduct EISs for sonar tests that may harm sea life.¹⁰⁶ "Environmentalists argue that the Navy – as well as oil and gas producers and any other commercial activity in 'exclusive economic zones' – should continue to conduct environmental studies to assess impacts on oceans and coastal areas."¹⁰⁷ Since NEPA's enactment it has applied to this area of the ocean and has managed activities such as: "fisheries management, offshore oil and gas leasing, sub-sea pipeline construction, ocean dumping of waste, and other activities that have the potential to harm the health of the oceans."¹⁰⁸ The judge ruled in favor of the environmentalists and against the Bush administration.¹⁰⁹

(4) The administration issued an executive order in September 2002 for the Transportation Department to speed up the environmental impact statement process on unidentified high priority transportation projects including roads, bridges, tunnels, and airports.¹¹⁰

⁹⁹ Gary Polakovic. *The Nation Environmental Review of Navy's Sonar Testing Upheld Court: A judge rejects U.S. effort to exempt a variety of ocean activities, including tests that might harm whales, from far-reaching law*, L.A. Times A28, (Sept. 20, 2002) (available in 2002 WL 2504986).

¹⁰⁰ Daly, *supra* n. 9.

¹⁰¹ Paul Rogers. *Bush fire strategy: Speed up thinning of federal forests Environmental Review To Be Bypassed*, San Jose Mercury News 1, (Dec. 12, 2002) (available in 2002 WL 102441448).

¹⁰² See generally Lindstrom, 20 J. Land Resources & Envtl L. at 261; See also <www.fs.fed.us/>

¹⁰³ Coloradoan Staff. *Proposed forest rules would strip protections*, Fort Collins Coloradoan A6, (Dec. 9, 2002) (available in 2002 WL 102902352).

¹⁰⁴ *Id.*

¹⁰⁵ Scott Lindlaw, *Timber-thinning plan moves ahead*, St. Paul Pioneer Press 7A, (Dec. 12, 2002) (available in 2002 WL 7868610).

¹⁰⁶ Borenstein. *supra* n. 6.

¹⁰⁷ Michael Schmidt, Mary Helen Yarborough & Lira Behrens. *Talk of NEPA changes sets off debate*, Inside Energy/with Fed. Lands 1, (Sept. 23, 2002) (available in 2002 WL 10516356).

¹⁰⁸ *Id.* (quoting a letter written by the Natural Resources Defense Council and other environmental groups dated Sept. 4, 2002 to President Bush).

¹⁰⁹ Borenstein. *supra* n. 6.

¹¹⁰ Coile. *supra* nn. 81, 97; see also Polakovic, *supra* n. 99.

Areas under Review

The NEPA task force was asked to review six different areas of the environmental law.¹¹¹ These areas include: “technology and information management, collaboration among agencies, analytical methods that avoid redundancy, management oriented more to environmental outcomes than to rote compliance, actions that can be excluded from full [*sic*] NEPA regulation, and other areas of potential modernization.”¹¹² These areas may seem reasonable, but environmentalists will not be convinced that this study is actually being used to enhance the environment and improve the law until the results are produced.¹¹³

V. PRAISES OF NEPA

Supporters of NEPA credit the law as working “miracles in changing government behavior, infused agencies with environmental specialists, brought in the views of other agencies and an often-skeptical public, surfaced alternative courses of action, and produced thousands of better decisions - harm-avoiding and harm-mitigating decisions - on the ground.”¹¹⁴ “Involving the public expands the knowledge, values, and experience available to develop paths . . .”¹¹⁵ NEPA supporters believe that by requiring disclosure of information, NEPA compels officials to consider the effect a project will have on the environment; information that they would be ignorant of in the absence of NEPA.¹¹⁶ Admirers also praise the amount of public scrutiny that projects will undergo.¹¹⁷ The public scrutiny allows for some accountability by exposing any elected official’s involvement in the projects.¹¹⁸ The public’s input into a proposed project will make the project more credible, effective, and provide some accountability.¹¹⁹

VI. NEPA IS NOT PERFECT, BUT IT IS BENEFICIAL

Even when NEPA was first enacted, it was not well received by federal agencies and little compliance followed.¹²⁰ The courts had to step in and enforce compliance.¹²¹ Since the first lawsuits began to ensue, agencies have learned that NEPA litigation can cause detrimental delays and be very costly. Therefore, agencies will try anything to avoid going to court. NEPA has become a deterrent.¹²² Rather than working as intended, producing better decisions, NEPA’s EIS requirement creates an incentive for agencies to reduce harsh environmental effects.¹²³ The incentive is that by reducing the environmental harm beneath some threshold level so that a finding of no significant impact can be made, the agency can avoid having to create a lengthy, time-consuming, and costly EIS.¹²⁴ Even if the ultimate goal of the agency is to avoid an EIS, by trying to figure out ways to avoid the EIS process, the agency is thoroughly considering the environmental consequences

¹¹¹ *Fixing NEPA*, 100 Oil and Gas J. 17.

¹¹² *Id.*

¹¹³ *See generally id.*

¹¹⁴ Houck, 11 Duke Envtl. L. & Policy F. at 176.

¹¹⁵ Frances Irwin & Carl Bruch, *Information, Public Participation, and Justice*, 32 Envtl. L. Rep. 10784 (July 2002).

¹¹⁶ Karkkainen, 102 Colum. L. Rev. at 904.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 904-05.

¹¹⁹ Irwin & Bruch, 32 Envtl. L. Rep. 10784.

¹²⁰ Lindstrom, 20 J. Land Resources & Envtl. L. at 254.

¹²¹ *Id.* at 255.

¹²² Karkkainen, 102 Colum. L. Rev. at 903.

¹²³ *Id.*

¹²⁴ *Id.*

of a proffered course of action. This should mean that more informed decisions are being made as opposed to decisions made on impulse. “[I]f mitigated FONSI’s are working as advertised, they should result in superior environmental outcomes as agencies anticipate and avoid adverse environmental impacts by taking environmental consequences into account at an early stage of the decisionmaking process.”¹²⁵ Critics of NEPA might be more pleased with the law if they viewed the FONSI as a quicker means of achieving NEPA’s larger objectives.¹²⁶ The small number of EISs that are produced each year, are “required in that small but important handful of cases which raise such obvious and serious environmental concerns that the agency cannot avoid labeling them ‘significant.’”¹²⁷

There are still problems with relying on the FONSI as an appealing alternative to the EIS.¹²⁸ The FONSI should cause rational decision-makers to attempt to reduce harmful environmental effects in order to avoid spending the time and resources on the EIS.¹²⁹ This is great, but the problem is that there still is no post-monitoring of the accuracy of the predictions of the environmental harm.¹³⁰ Therefore, the agency is able to give a predicted level of harm and there are no consequences to the agency for exceeding their predicted level.¹³¹ There are not even any consequences if the actual harm would have required an EIS.¹³² By this time it is considered too late.

NEPA may work simply due to the fact that it threatens agencies with the possibility of litigation.¹³³ Due to this threat, decision-makers will therefore consider alternatives that otherwise would not be explored, and the agencies will comply with NEPA’s mandate to give notice to the public.¹³⁴ This notice, which is given when the EIS is released, provides a fighting chance for thousands of concerned individuals and community groups.¹³⁵ “Agencies know NEPA is out there, and they fear it.”¹³⁶ The EIS is the most important aspect of NEPA because it mandates that agencies recognize the environmental harm that will be caused due to a specific project, and the agencies fear the scrutiny from the environmental groups, the press, and the reviewing courts.¹³⁷

NEPA is not too much to ask of the federal government. It really is not all that difficult to comply with NEPA. All NEPA asks of an agency is that it consider the environmental impacts of a proposed project and give notice of those impacts to the public.¹³⁸ There are ways to avoid an EIS altogether. As mentioned above, there are many exceptions already carved out of the law, which exclude certain projects from drafting an EIS.¹³⁹ In addition, an agency may make a determination that there is no significant environmental impact caused by the proposed project and also avoid an EIS.¹⁴⁰

¹²⁵ *Id.* at 908.

¹²⁶ *Id.*

¹²⁷ *Id.* at 921.

¹²⁸ *See id.* at 936-37.

¹²⁹ Karkkainen, 102 Colum. L. Rev. at 908.

¹³⁰ *Id.*

¹³¹ *See id.* at 936.

¹³² *See id.*

¹³³ Houck, 11 Duke Env’tl. L. & Policy F. at 188.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 190-91.

¹³⁸ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 362.

¹³⁹ *See e.g. supra* n. 87.

¹⁴⁰ Wittorf, 12 U. Fla. J. L. & Pub. Policy at 365.

It is much easier to point out the problems with NEPA than it is to come up with a solution that will satisfy everyone. It is also much more difficult to find the success stories and measure the benefits of NEPA. However, they are out there.

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