

Bringing NEPA Back to Basics

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Research in Focus

Every year, federal agencies undertake thousands of environmental reviews under the National Environmental Policy Act (NEPA). These reviews add months or years of delay to every noncategorically excluded federal decision. They also add cost and risk for private companies seeking federal permission or funding to execute on projects that are often in the public interest.

It is doubtful that Congress intended for NEPA to have such wide-ranging effects. A plain reading of the relevant section of the NEPA statute suggests that its main intent is good government: an interagency check to ensure that environmental harms are considered in major federal projects and decisions. NEPA implementation has evolved far beyond this limited aim.

It is impossible to achieve many national goals, such as a timely transition to clean energy, under today's NEPA-implementing framework. When every federal decision takes years, transforming the physical world with new, low-carbon infrastructure becomes a dubious proposition.¹ The United States is in dire need of permitting reform for the sake of the environment itself. Many existing reform proposals are inadequate to the task at hand.

What follows are four reform suggestions that would leave intact NEPA's original goals, while meaningfully reducing the burden of NEPA implementation. These proposals are intended to have a significant effect on the capacity of federal agencies to act decisively and will doubtlessly be dismissed by some as too ambitious. On the other hand, they are also intended to hew closely to the requirements of the NEPA statute and represent an effort to interpret the original text of the law in a common-sense manner.

Trust agencies to make responsible findings

Section 102(C) of NEPA applies only to "major" federal actions that "significantly" affect the quality of the human environment.² Under current NEPA practice, the word "major" has been read out of the law in *Minnesota Public Interest Research Group v. Butz*.³ Agencies produce around 100 to 200 final environmental impact statements (EISs) per year for actions that are deemed to have significant environmental impacts.⁴

This number, 100 to 200 reviews annually, seems plausible in terms of what Congress may have intended when it passed NEPA. The statute requires a detailed statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁵ While the "proposals for legislation" clause is mostly moot,⁶ by placing such proposals on even footing with "other major Federal actions," Congress suggests that it expects detailed statements on major federal actions more or less as often as it receives proposals of legislation from federal agencies.

In practice, however, approximately 12,000 substantive environmental reviews are conducted annually.⁷ This is because NEPA-implementing regulations have made formal environmental assessments (EAs) a prerequisite to an agency making a finding of no significant impact (known as a FONSI).⁸ The Council on Environmental Quality (CEQ) appears to have imposed this requirement without discussion or elaboration in its original 1978 NEPA-implementing regulations.⁹ In interpreting the CEQ regulations, the Federal District Court for the District of Columbia held in *Sierra Club v. Watkins* (1991) that an EA is "in effect, a mini-environmental impact statement."¹⁰

Today, these environmental assessments often run hundreds or, when counting appendices, thousands of pages. Therefore, 98 percent of substantive NEPA reviews apply to projects that do not have a significant environmental impact.¹¹ In the vast majority of cases, the fact of nonimpact is known in advance, and the agency goes through the review process only because it is required by the regulations. There is a certain absurdity to the fact that the preponderance of NEPA paperwork is done for projects that are known not to have a significant environmental impact.

For example, in implementing congestion pricing in Manhattan, New York's Metropolitan Transit Authority spent two years waiting on the federal DOT to decide whether it would require an environmental assessment or an environmental impact statement.¹² DOT ultimately decided in March 2021 that only an environmental assessment would be required,¹³ a Kafkaesque

(if welcome) determination since the entire point of conducting the EA is to decide whether an EIS is required. The resulting EA totaled 4,007 pages.¹⁴

Naturally, before an agency decides that an action does not have a significant environmental impact (and therefore that an EIS is not necessary), it will have to assess the action's environmental impact. But this assessment need not be a formal, justiciable document. Agencies make findings all the time. These findings are challengeable in federal court under 5 USC § 706 if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁵ A finding of no significant impact without a formal EA requirement would be no different in this respect than any other finding that federal agencies make today.

For the most part, outside of NEPA practice, the American legal system defers to agency findings. This is by necessity. For the sake of high-quality government, the American people must be able to trust federal agencies to execute the authorities given them by Congress. If federal agencies are not trustworthy, that should be remedied directly with federal personnel policy. However, I would submit that the federal bureaucracy is not in general staffed by subversives eager to undermine federal environmental policy. They deserve the broad deference that Congress intended in 5 USC § 706.

To remedy this deficiency in NEPA practice, Congress should pass a single-sentence reform along the lines of: "Neither an environmental assessment as that term is defined in Volume 40 of the Code of Federal Regulations § 1508.1(h) nor any other process or document shall be a prerequisite for an agency to prepare and issue a finding of no significant impact as that term is defined in Volume 40 of the Code of Federal Regulations § 1508.1(i)."

Inform, but do not involve the public

Section 102(C) of NEPA requires that when developing an EIS, a federal agency should consult with other federal agencies that have jurisdiction or expertise over the relevant environmental impacts.¹⁶ It further requires that all comments from these federal consultations, and any that are received from state and local agencies, be made available to the public alongside the final EIS.¹⁷ There is no statutory requirement to consult with or solicit comments from the public. The NEPA statute, in other words, merely requires *informing* the public, not *involving* the public.

Two months after NEPA's enactment, President Nixon issued Executive Order 11514, which required agencies to provide public hearings on projects with environmental impacts whenever appropriate, among other actions required "to obtain the views of interested parties."¹⁸ This hearing requirement was reaffirmed in CEQ's early guidance¹⁹ and was included in the 1978 NEPA-implementing regulations.²⁰ The regulations created an obligation for agencies to solicit public comment when creating an EIS (§ 1503.1). Criteria for holding a hearing include whenever there is environmental controversy, whether or not the agency believes there is a significant environmental impact. These days hearings are part of the process for many EAs as well as EISs.

The 1978 regulations also invented a process called scoping (§ 1501.9) that adds public involvement and delay. CEQ explained

its rationale in its proposed rulemaking: "to assist agencies in deciding what the central issues are, how long the EIS shall be, and how the responsibility for the EIS will be allocated among the lead agency and cooperating agencies, a new 'scoping' procedure is established. Scoping meetings are to be held as early in the NEPA process as possible—in most cases, shortly after the decision to prepare an EIS—and shall be integrated with other planning."²¹ The scoping process requires inviting affected and interested parties to participate, "including those who might not be in accord with the action."²²

Public involvement adds months or even years to the environmental review process. Even if environmental reviews could be written instantly with artificial intelligence, the public involvement part of the process extends the timeline significantly. The scoping process takes time. Hearings must be announced weeks before they occur, effectively pausing work during that period. Solicitation of comments on drafts can slow down the process even further, as work is halted not only during the comment period, but also during the period in which a federal agency employee is required to read each comment and determine which must be addressed.

The public involvement requirement can also create grounds for litigation. After a judge ruled mostly in favor of the Bureau of Land Management in an initial multi-year NEPA lawsuit against the Thacker Pass lithium mine earlier this year, three tribes, including two who had been plaintiffs, filed a new lawsuit on grounds that they were not adequately consulted.²³

Furthermore, direct public involvement is of questionable value. Romantic notions of participatory democracy do not accord with reality.²⁴ Although public input is often thought to be egalitarian, it can amplify the voices of wealthy project opponents. For example, Cape Wind, a project to build a 454-MW wind farm off the coast of Cape Cod, was abandoned in 2017 after 15 years of NEPA consultations, public comments, and lawsuits with and from the Alliance to Protect Nantucket Sound, a group funded by ultra wealthy local residents.²⁵

Post-NEPA decisions to involve the public in the NEPA process are not necessary to achieve NEPA's goal of informing the public of the government's view of the environmental effects of an agency decision. Furthermore, even without formal public involvement, the public can still make its views known through the press, informal interactions with agency employees, and the ballot box.

To restore NEPA's original intent to inform and not involve the public requires two legislative provisions. One should nullify President Nixon's executive order: "Executive Order 11514 shall have no force or effect." The second should nullify the CEQ and agency-specific NEPA-implementing regulations that provide for public involvement: "Notwithstanding any other provision of law, no environmental review under the National Environmental Policy Act shall require public hearings or the solicitation of public comment."

Disallow most judicial injunctions of agency decisions

The NEPA statute does not create any cause of action against federal agencies. Instead, lawsuits seeking enforcement of NEPA are brought under the Administrative Procedure Act. It is, of course,

necessary and important that agencies comply with the requirements handed down by Congress, and courts play an important role in ensuring that they do.

Unfortunately, however, NEPA lawsuits have at times been weaponized by project opponents. The lawsuits often take issue with some small element of an environmental review that is not germane to the agency's ultimate decision to move forward with the decision. For example, the president of a solar development company sued two offshore wind projects on NEPA grounds, claiming that both projects pose a threat to his personal enjoyment of migratory birds, the endangered North Atlantic right whales, and his company's economic interests.²⁶ Among other complaints, he alleged that the EIS considered neither the impact of the greenhouse gas emissions caused by the wind project nor the warming impact caused by wind turbines redistributing heat in the atmosphere.²⁷

In NEPA jurisprudence, it is most common for a court that finds fault with the environmental document to vacate the federal agency decision. This puts the relevant project on hold until the agency publishes a remedied version of the environmental document and re-decides to move forward. The ability to stall projects in this way, sometimes multiple times, is a major factor behind NEPA delays and the growing page count of NEPA documents, which expand to shield against any possible lawsuit. One can justifiably question whether thousands of pages of environmental reports realistically fulfill NEPA's mandate to inform the public, since the public is unlikely to read such long reports.

Congress could end the weaponization of NEPA by clarifying that the remedy that should be applied by the courts usually should be remand without vacatur. In other words, when courts determine that an environmental document is insufficient in some way, they should usually order the agency to remedy the error in the document, but they should not vacate the agency decision. This approach would allow the project or decision to proceed and reduce the incentive to sue in the first place.

Naturally, this lenience could be exploited by an agency intent on flouting NEPA review, and courts should retain the ability to vacate agency decisions when the error is egregious or intentional. A possible provision that would enact this recommendation could read as follows: "Notwithstanding any other provision of law, no proposed agency action for which an environmental document is required shall be vacated or otherwise limited, delayed, or enjoined unless a court concludes the agency egregiously or willfully erred in following the requirements of the National Environmental Policy Act."

The BUILDER Act proposes a similar limitation on vacating agency decisions, allowing an injunction only when "proposed action will pose a risk of an imminent and substantial environmental harm and there is no other equitable remedy available as a matter of law."²⁸

Establish a national interest exclusion from NEPA

Although NEPA purports to apply to all federal agency actions, Congress has recognized that there are certain actions that are so urgent and important that agencies cannot be expected to

wait for months or years to act. In particular, certain actions under the Stafford Act, which governs the Federal Emergency Management Agency, are completely exempt from the requirements of NEPA.²⁹

However, many other federal actions of similar importance and urgency are not exempt. For example, actions under the Defense Production Act remain subject to NEPA review, as do many other national security priorities. Section 1506.12 of the NEPA-implementing regulations says that in an emergency the agency should consult with CEQ.³⁰ Guidance from CEQ says that in emergencies not covered by the Stafford Act exclusion, NEPA still applies, yet agencies should "not delay immediate actions necessary to secure lives and safety of citizens or to protect valuable resources,"³¹ a not entirely satisfying directive to agencies to break the letter of the law.

To address urgent priorities, Congress should create a process by which the president can designate certain projects or decisions to be overwhelmingly in the national interest and exempt from the requirements of NEPA. This need not apply only to emergencies but could also cover actions that are urgently necessary for global strategic purposes, such as the development of semiconductor fabrication facilities.

A possible provision implementing this recommendation could be: "Federal decisions designated by the President to be matters of the highest national interest shall be exempt from the requirements of the National Environmental Policy Act."

Conclusion

The recommendations above would admittedly represent a significant departure from the current process of implementing NEPA. This departure is necessary. If we are to address the challenges of our time, whether they be climate change or the emergence of strategic adversaries, we must not do it with one hand tied behind our backs.

We can unrestrain ourselves without sacrificing the laudable intent of NEPA, to perform an interagency check to ensure that environmental harms are considered in major federal projects and decisions. By focusing on actions with significant impacts, limiting public involvement and judicial injunctions, and carving out exceptions for actions that are of the highest priority, we can hew closely to NEPA's original intent while reducing its burdens.

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Endnotes

- 1 Examples of clean energy projects that have been delayed by NEPA process and lawsuits include Cape Wind, an offshore wind project that was ultimately abandoned; Vineyard Wind, a second offshore wind project in the same area near Cape Cod; the Thacker Pass lithium mine, which would be the largest lithium mine in the United States; TransWest Express, a transmission line that would connect wind farms in Wyoming with the Las Vegas and Los Angeles electricity markets; and the Dixie Meadows geothermal project in Nevada.
- 2 National Environmental Policy Act, 42 U.S.C. § 4332(C) (1970) [hereinafter *NEPA*].
- 3 *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974).
- 4 Charles P. Nicholson, ed., *2021 Annual NEPA Report of the National Environmental Policy Act Working Group* (National Association of Environmental Professionals, July 2022), https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2021.pdf.
- 5 *NEPA*, *supra* note 1.
- 6 The requirement to do an EIS when proposing legislation is somewhat moot, since NEPA only applies to federal agencies, and usually it is the president (who is not considered a federal agency) who proposes legislation. In any case, the president has an Article II power to propose legislation that Congress cannot constitutionally encumber. “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” U.S. Const. art. II, § 3.
- 7 Council on Environmental Quality, “The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA),” October 2016, https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf.
- 8 Findings of No Significant Impact, 40 C.F.R. § 1501.6 (2021).
- 9 CEQ also states in the NPRM that “Most environmental assessments do not exceed several pages in length,” further evidence of scope creep in NEPA implementation. National Environmental Policy Act—Regulations, 43 Fed. Reg. 25230 (1978).
- 10 *Sierra Club v. Watkins*, 808 F. Supp. 852 (D.D.C. 1991).
- 11 200 (the upper end of the range of EISs annually) divided by 12,200 (the approximate number of EAs and EISs annually) is approximately 1.7 percent, so over 98 percent of substantive reviews under NEPA do not find significant environmental impact.
- 12 Dana Rubinstein, “Why Congestion Pricing Might Be Delayed,” *POLITICO*, February 18, 2020, <https://www.politico.com/states/new-york/city-hall/story/2020/02/14/why-congestion-pricing-might-be-delayed-1261628>.
- 13 Dave Colon, “This Is Happening: Feds Let MTA Do Simpler Environmental Review of Congestion Pricing,” *Streetsblog NYC*, March 30, 2021, <https://nyc.streetsblog.org/2021/03/30/this-is-happening-feds-lets-mta-do-simpler-environmental-review-of-congestion-pricing/>.
- 14 Aidan Mackenzie, Twitter post, “Congestion pricing in NYC is the perfect case study of what’s wrong with NEPA. // This is the 4,007-page environmental assessment that took 3 years to produce even though the state legislature approved congestion pricing in 2019. // Thread (1/13),” Twitter, March 20, 2023, 6:01 PM, <https://twitter.com/AidanRMackenzie/status/1637937332954484739>.
- 15 5 U.S.C. § 706.
- 16 “Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.” *NEPA*.
- 17 “Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public.” *See id.*
- 18 Exec. Order No. 11,514, 35 Fed. Reg. 4247 (1970).
- 19 Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724 (1971).
- 20 National Environmental Policy Act—Regulations, 43 Fed. Reg. 55978 (1978).
- 21 National Environmental Policy Act—Regulations, 43 Fed. Reg. 25230 (1978).
- 22 *See id.*
- 23 Jeniffer Solis, “Three Tribes File New Lawsuit Challenging Thacker Pass Lithium Mine,” *Nevada Current*, February 21, 2023, <https://www.nevadacurrent.com/2023/02/21/three-tribes-file-new-lawsuit-challenging-thacker-pass-lithium-mine/>.
- 24 Jerusalem Demas, “Community Input Is Bad, Actually,” *Atlantic*, April 22, 2022, <https://www.theatlantic.com/ideas/archive/2022/04/local-government-community-input-housing-public-transportation/629625/>.
- 25 Jon Chesto, “R.I.P., Cape Wind,” *The Boston Globe*, December 1, 2017, <https://www.bostonglobe.com/business/talking-points/2017/12/01/cape-wind/qt4FYBPu6ti46LafIVUMIP/story.html>.
- 26 Lisa Prevost, “Conn. Solar Developer Expands Lawsuit against Offshore Wind,” *Energy News Network*, April 1, 2022, <http://energynews.us/2022/04/01/connecticut-solar-developer-expands-lawsuit-against-offshore-wind-projects/>.
- 27 *Allco Renewable Energy Ltd. v. Haaland*, No. 1:21-cv-11171 (D. Mass. Complaint for Declaratory and Injunctive Relief, July 18, 2021), paras 117-135.
- 28 BUILDER Act, H.R. 1, 118th Cong. § 20202 (2023).
- 29 42 U.S.C. § 5159.
- 30 Emergencies, 40 C.F.R. 1506.12 (2021).
- 31 Emergencies and the National Environmental Policy Act Guidance, 85 Fed. Reg. 60137 (2020).