NEPA and Liberty, Now and Forever*

by James M. McElfish Jr.

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The National Environmental Policy Act (NEPA)[1] is as American as it gets. It was invented here, and far from being just an environmental review law (as so many imitators are around the globe), it reflects core ideas about how government should relate to citizens, and citizens to their government.

I. NEPA Is the One Law That Doesn't Presume That Government Has All the Answers

NEPA makes it clear that our government works for us. And sometimes we know better (or a little better) than the many dedicated public servants and experts who, we hope, are doing their best for us.

NEPA and its implementing regulations require the federal government to consider the recommendations and knowledge of citizens, companies, institutions, government entities, and others who have reasonable solutions or alternative approaches that may work better. NEPA requires the government to review, understand, and address environmental issues and alternatives that its own employees or political appointees may have overlooked. It requires the agencies to seek out and encourage public awareness of actions, and engage them in the process.[2]

The NEPA regulations provide, among other things, for public participation in scoping (identifying potential alternatives to the proposed action and environmental issues deserving consideration)[3] and for public review and comment on draft environmental impact statements (DEISs);[4] and they authorize agencies to seek comments on environmental assessments (EAs).[5] Federal agencies are required to respond to all substantive comments, either by making warranted changes in the analysis or by explaining why the comments do not warrant further agency response.[6]

The result of these procedures is that *alternatives* are considered that the government would not have identified on its own, that *data* are discovered that the government would not have otherwise identified, and that *environmental issues* are studied that the government would not have identified or studied. Bad decisions are sometimes avoided and good decisions made even better. Mitigation measures are identified; some of them are even adopted.

This happens more often than you would think. . . .

In numerous cases, NEPA alternatives proposed by towns, tribes, individuals, and others have been selected by federal agencies after completion of the NEPA review in preference to those the agency started with.[7] This includes decisions about land management, roads and infrastructure, use of pesticides, disposal of radionuclides, and management of genetically modified organisms, among others. Early in my own environmental practice, I represented a town concerned about the siting of a new railroad line that was to serve a new electric-generating plant. What became the preferred alternative, the route which was in fact built and is still operating today more than 25 years later, was identified during scoping—not by the federal government nor by the power company's high-priced engineers and consultants—but by an apple farmer who knew the land better than anyone else.

Just this month, the *Bay Journal* revealed that a 1,500-page DEIS prepared by the U.S. Army Corps of Engineers with the assistance of several state agencies, several years in the making, contained mathematical errors that substantially understated the risk profile of introducing non-native oysters into the Chesapeake Bay. The errors were discovered by a citizen commenter, a retired test pilot, who delved into the tables and models used by the lead agency and its cooperators. The errors understated the risk of certain alternatives by several orders of magnitude.[8] Had NEPA not made

* With apologies to Daniel Webster, Reply to Hayne (Jan. 1830) ("Liberty and Union, now and forever...")

1. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
2. 40 C.F.R. §1506.6.
3. 40 C.F.R. §1501.7.
4. 40 C.F.R. §1503.1.
5. 40 C.F.R. §1504(b).
6. 40 C.F.R §1503.4. They must also explain why potential alternatives were eliminated from detailed study. 40 C.F.R. §1502.14(a).
7. *See* Center for the Rocky Mountain West, Reclaiming NEPA's Potential: Can Collaborative Processes Improve Environmental Decisionmaking? (2000), and CEQ, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years (1997); *see also* "The Role of NEPA Alternatives," app. A, Oliver Houck, *The U.S. House of Representatives' Task Force on NEPA: The Professors Speak*, 35 ELR 10911 (Dec. 2005) (list of citizen and non-federally proposed alternatives that produced superior outcomes).
8. Karl Blankenship, *EIS Math Error May Underestimate Risk of* Ariakensis *Introduction: Oyster Gardener Finds Mistake That Others Missed in 1,500-Page Report*, Bay J. (Mar. 2009), *available at* http://www.bayjournal.com/article.cfm?article=3534.

the data available and provided the opportunity for citizen input, what numbers do you suppose decisionmakers would have used?

The NEPA regulations' requirements for providing responses to comments and taking them seriously are backed by court decisions confirming that NEPA is aimed at achieving *informed* decisions.[9] More than 30 years ago, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit observed:

> The harm against which NEPA's impact statement requirement was directed was not solely or even primarily adverse consequences to the environment; such consequences may ensue despite the fullest compliance. Rather NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to environmental consequences of the actions. . . . Thus, the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates.[10]

This makes NEPA accountability somewhat different, and more searching, than that of notice-and-comment rulemaking under the Administrative Procedure Act (APA),[11] which simply requires that the final decision itself not be arbitrary and capricious or otherwise not in accordance with law. There is a duty to explain why certain alternatives are not being considered, and what environmental issues are addressed, that exists independent of whether the ultimate decision can be justified as rational under the statute.

Moreover, the scoping process, in particular, provides far more potential influence to the public than is typical in APA rulemaking, where there is usually one proposal on the table or a very limited set of alternatives, written in such a way so that additional alternatives cannot be readily added because of the need for a final rule to be adequately presaged in the proposed rule.

II. NEPA Puts the Individual on the Same Playing Field as Influential and Well-Connected Institutions

You don't have to be a professional lobbyist or politically connected to have the responsive information you supply considered and seriously addressed (although it helps). You don't even have to be a project proponent or investor. Any person may submit ideas concerning the scope of analysis and alternatives, and comments on DEISs. Importantly, this legal right includes state and local governments and Indian tribes, as well as individuals and institutions. What counts under the regulations is not who filed the comments or proposed the additional issues or alternatives, but whether they raised genuine issues that deserve to be addressed. In practice, public participation provides serious added value, as well as accountability.

NEPA requires the government to explain itself. The federal government must respond to all substantive comments by members of the public on DEISs.[12] Federal agencies can't say "thank you for your comment; now go away." (Or "you're only a farmer." In fact, you might actually know something about where a railroad should go!). For example, if a citizen submits data on fish survival, or children's recreational use of a given water body that raises concerns about a proposed river project, the government has to deal with that information on the merits—making necessary changes in the analysis, or explaining the information on which it is relying to overcome the submitted information.

The public participation is backstopped by judicial review. Standing issues can sometimes make this difficult. But the possibility exists that an issue might be litigated (that an unscoped alternative or a missing fish study might not have been explained as the regulations require). The prospect of litigation can enable federal officials within agencies to convince their vertical hierarchy that a particular study is needed, or that a superficially less attractive alternative deserves a more substantial look. Most of the accountability occurs within the agency, but as a partial product of the duty to treat all substantive comments seriously and the threat of litigation if they are not.

There aren't a lot of NEPA court cases—typically 100 or so per year nationwide in the last decade, even though the NEPA process is applied to 50,000-70,000 government actions each year, not counting tens of thousands of actions covered by categorical exclusions.[13] But the fact that courts are there to make sure that government plays by the rules means that government agencies actually do take public involvement seriously.

This results in better decisions, elimination of (at least) some unnecessary impacts, and arguably fewer dumb projects.

III. Conclusion

Some NEPA critics have argued that involving the public leads to delay or lack of efficiency. Well, maybe, but the Council on Environmental Quality (CEQ) and agencies have come up with ways to make the existing NEPA process move faster, and the public process more interactive. I suspect that most of us want efficient government only if it is accountable, sensible government. Efficiency in support of misguided objectives and worse methods is poor government indeed. As a citizen, I'd rather have a government

9. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351, 19 ELR 20743 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.").
10. Jones v. District of Columbia Redev. Land Agency, 499 F.2d 502, 513, 19 ELR 20743 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 937 (1975). *See generally* Nicholas Yost, NEPA Deskbook (3d. ed. 2003).
11. 5 U.S.C. §§551-559, 701-706, *available in* ELR Stat. Admin. Proc.
12. 40 C.F.R. §§1502.9(b), 1503.4 (requiring consideration of and response to all substantive comments).
13. Environmental Law Institute, Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act (2004). "Categorical exclusions" are defined at 40 C.F.R. §1508.4.

that doesn't think it knows all the answers before it even asks the questions.

A. Improving Our Methods for Public Participation

Improving public participation can only improve the quality of governmental decisionmaking. Among the measures we should see more of are:

"on the ground" public participation involving site visits and/or simulations of site visits using geospatial data.

use of public interactive methods both for scoping and in exploring the details of alternatives under evaluation. There is no reason for the NEPA process to "go dark" after scoping and during the preparation of the DEIS. Such techniques as charettes, wikis, and other tools can improve project alternatives, design, and mitigation. So long as there is open invitation to participate and a record, there should not be a legal obstacle to this kind of engagement.

information management that distinguishes substantive comments from "support/oppose" comments/e-mails.

B. Tracking Government Responsiveness

We also need better public understanding of NEPA as a vehicle for making our government responsive and accountable. Public understanding of the utility of NEPA as a tool of improved decisionmaking, democracy, and American values could be improved by explicit tracking and reporting of the numbers and types of decisions where public input resulted in: (1) addition of a new or revised alternative; (2) a decision not to proceed or to substantially change a proposed action; (3) addition and important advances in understanding a new issue; and (4) use of new/improved methods of engaging with the public in the NEPA process. Federal agencies should track and report these instances in connection with EAs and EISs, with guidance from the CEQ. Such information would add to public and congressional understanding and support of NEPA, greater civic engagement, and a reconnection of citizens and others to the agencies that work on their behalf. The Environmental Law Institute and several other organizations are now seeking to compile instances where the NEPA public participation process produced accountability and better decisions. If you know of such an instance, send it to stephanie@saveourenvironment.org.