How'd We Get Divorced?: The Curious Case of NEPA and Planning

by Oliver A. Houck

Oliver A. Houck is Professor of Law, Tulane University. The research assistance of Diana Csank and Claire Yancey, Tulane Law School 2010, is acknowledged with gratitude.

> The battle for the quality of the American environment is a battle against neglect, mismanagement, poor planning, and a piecemeal approach to problems of natural resources. It is a battle that will have to be fought on every level of government . . . we must re-examine all existing Federal programs with the aim of coordinating them . . . . We cannot afford a policy that promises much but delivers little.
>
> —President Richard M. Nixon, l968[1]

If the framers of the National Environmental Policy Act (NEPA),[2] the expert witnesses and agency personnel who testified on its behalf, the staffers who massaged and drafted it, the legislators who enacted it, and the president of the United States who signed it were to see NEPA today, in what regard would they be the most surprised and disappointed? One would be the relegation of §101's principles to the scrap bin, and another would certainly be the extent to which §102 would be driven forward by litigation. The biggest surprise, however, might be the separation of environmental considerations from federal planning, which, per the legislative history, was the whole problem in the first place.

Forty years later, many federal agencies and programs have stuck with the notion of environmental planning and struggle to make it work. But not the biggest. Two federal actors whose projects more than any others generated the public anger and call for environmental reform that led to NEPA in the first place have managed to escape it. One is the Federal Highway Administration (FHwA) (nee Bureau of Roads), which by the l960s had converted a modest network of inter-city civil defense highways into the largest construction program in the world, funded by its own trust and impervious to opposition.[3] "Highways," editorialized the *New York Times* in 1966, "march—imperially, relentlessly, inexorably—across stream, meadow and woodland" and "as neighborhoods are sliced in two and cemeteries are relocated, neither the quick nor the dead are safe."[4] Years before the advent of NEPA, these were the first environmental lawsuits, based on slender legal threads, and the literature of the time speaks volumes of the frustration behind them: The Pavers and the Paved, Superhighway-Superhoax, Road to Ruin, The End of the Road. Small wonder, then, that following NEPA's passage, federal highway projects took a major hit.[5]

Another NEPA trigger was national forest management, which following the Second World War had been transformed from Gifford Pinchot's principles of sustained yield to a maximum-board-foot machine based on widescale clearcutting.[6] The pushback here was equally widescale and deeply felt. Well before NEPA, the lawsuits started coming in based on multiple use, the Organic Act of 1897, and other theories, few of them successful (although one, spectacularly so).[7] A district court in Alaska approved, as multiple use, a proposal to "liquidate" 99.4% of the Tongass national forest, the largest timber inventory in the United States.[8] Then came NEPA, followed by a forest management act based on, of all novel ideas, planning.[9] Plans are one thing, however, and changes in behavior another. Small wonder, then, that the clearcutting continued and would be contested tooth-and-nail in the NEPA process.

1. Statement of President Richard M. Nixon on October 19, 1968, *reprinted in Bills to Authorize the Secretary of the Interior to Conduct Investigations, Studies, Surveys, and Research Relating to the Nation's Ecological Systems, Natural Resources, and Environmental Quality, and to Establish a Council on Environmental Quality*: *Hearing on S. 1075, S. 237, and S. 1752 Before the Comm. on Interior and Insular Affairs* U.S. Sen., 91st Cong., 1st Sess. 105-07 (1969) [hereinafter *Hearing of 1969*].
2. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
3. For a discussion of the origins of the federal-aid highway program, rising opposition to it, and the literature that followed, see *Atlanta Coalition*, *in* Oliver A. Houck, *More Unfinished Stories:* Lucas*,* Atlanta Coalition*, &* Palia/Sweet Home, 75 U. Colo. L. Rev. 331, 368-77 (2004), and sources cited therein.
4. Editorial, N.Y. Times, Nov. 20, 1966.
5. Between 1966 and 1969, 14 lawsuits were filed challenging federal aid highways. In 1970, following the enactment of NEPA, the total rose to 17 lawsuits, to 27 the following year, and to 48 the next. Richard A. Liroff, A National Policy for the Environment: NEPA and Its Aftermath 34 (1976). With NEPA, people pushed aside by the highways finally had the means to push back.
6. Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 Tul. L. Rev. 2279, 2292-96 (1996).
7. The spectacular exception was *West Virginia Division of Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975), which found clearcutting to be a violation of the forest Organic Act of 1897, providing momentum for a new law.
8. Sierra Club v. Hardin, 325 F. Supp. 99, 1 ELR 20161 (D. Alaska 1971).
9. National Forest Management Act (NFMA) of 1976, 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16. Prescriptive planning provisions are found in §1604 of the Act.

Small wonder, too, that over the years these two agencies, the FHwA and the U.S. Forest Service (USFS), have generated continuing controversy, the greatest number of environmental impact statements (EISs), and the greatest number of lawsuits.[10] Small wonder, again, that these two agencies have led the way in trying to evade their NEPA responsibilities. In the case of the USFS, by divorcing them from planning and reducing NEPA to the smallest, last, and least effective step in the forest program, individual timber sales. In the case of the highway department, also by separating NEPA from planning, and then from the FHwA entirely.

This brief Article explores this phenomenon, starting with what NEPA intended with regard to environmental considerations and planning, then documenting by way of example the experience of the FHwA (a colleague in this symposium will treat the USFS), and then reflecting on the underlying practical and legal difficulties in attaining NEPA's intended goal.

I. NEPA and Planning

Planning was not incidental to NEPA. It was seen by all involved in the enactment of the statute to be what was going wrong, and needed fixing. In their own words:

> I am convinced that conservation and development are compatible. They should go hand in hand. To accomplish this goal, *we must build environmental values into the development process. From the beginning*.
>
> —Secretary of the Interior, Walter Hickel, 1968[11]

> It is apparent that many of our failures at environmental management have followed from *insufficient, faulty, or misguided planning*. As science reveals the interrelatedness of things, the need for environmental planning becomes evident."[12]
>
> As to the utility of an operational environmental concept, its greatest value could be in its tendency to force a *comprehensive consideration of development goals*.[13]
>
> —Prof. Lynton Caldwell, 1964, 1965

> Our present governmental institutions are not designed to deal in a *comprehensive* manner with problems involving the quality of our surroundings [their responsibilities and functions] are extremely fractionated.[14]
>
> Many of our approaches and programs have involved merely a cosmetic approach—"clean up, paint up, fix-up." The conditions we are dealing with, however, are not cured by cosmetology. *Many will require major surgery*.[15]
>
> —Sen. Henry Jackson, April l969

> Traditional national policies and programs were not designed to achieve these conditions. But they were not designed to avoid them either. And, as a result, they were not avoided in the past. They are not being avoided today. . . . These problems must be faced while they are still of manageable proportions and *while alternative solutions are still available.*
>
> —Senate Report, National Environmental Policy Act of l969[16]

The principal players in the enactment of NEPA were not concerned with planning in the abstract. They were concerned with forests. Sen. Henry S. Reuss (D-Wis.) complained of reports unconnected to real world planning that were left to "gather dust on the shelves," such as "the alarming report on the Nation's forests seven years ago."[17] Fellow Sen. Gaylord Nelson (D-Wis.) was a bit more blunt, decrying "the destruction of our forests,"[18] echoed by President Richard M. Nixon who, in his first environmental message, told the nation that, "we must improve our forestry practices."[19]

And they were concerned with highways. Senator Reuss testified that he had seen "beautiful outdoor areas dwindle and turned into asphalt highways and acres of shopping centers," the "planning and thought behind them . . . dreadful".[20] Sen. Richard Ottinger (D-N.Y.) complained that federal roads were funded "without regard to their effect on the environment,"[21] echoed by Sen. Joseph Tydings (D-Md.) who said that "[r]oads have been built and housing 'renewed' with little sensitivity and a remarkable forgetfulness that we are dealing with human beings."[22] Former Secretary of the Interior Stewart Udall observed that, "ladies spend as much for hair dye as we are spending for urban mass transportation systems."[23]

Even the U.S. Department of Transportation (DOT) saw it. Assistant Secretary Dorm Braman told the U.S. Senate

10. A 1997 (and as of this Article, the latest) CEQ report to Congress identified 498 EISs filed in that year, of which 86 were by the USFS and 75 by the FHwA. The next highest number was 19, by the Bureau of Land Management. Of 102 NEPA lawsuits filed against federal agencies that year, the U.S. Department of Agriculture (with which the USFS resides) was the lead defendant in 30, and the U.S. Department of Transportation (DOT) (FHwA) in 14. All seven at management agencies within the U.S. Department of the Interior (DOI) accounted for 29. Council on Environmental Quality, "The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years" 355-58 (Jan. 1997), *available at* http://ceq.eh.doe.gov/nepa/nepa25fn.pdf.
11. *Hearing of 1969*, *supra* note 1, at 75 (statement of Walter J. Hickel, Sec'y of the Interior) (emphasis added).
12. Lynton K. Caldwell, *Planned Control of the Biophysical Environment*, CAG Occasional Paper (1964), *reprinted in* Lynton K. Caldwell, Environment as a Focus for Public Policy 45 (ed. R. Bartlett & J. Gladden, Texas A&M Univ. Press, 1995) (emphasis added).
13. Lynton K. Caldwell, *The Environmental Factor in Development Planning*, Thai J. Pub. Admin. (1965), *reprinted in* Caldwell, Environment as a Focus for Public Policy, *id.* at 73 (emphasis added).
14. *Hearing of 1969*, *supra* note 1, at 24 (statement of Sen. Henry Jackson) (emphasis added).
15. *Id.* at 27 (statement of Sen. Henry Jackson) (emphasis added).
16. S. Rep. No. 91-296, 91st Cong., 1st Sess., at 5 (1969) (emphasis added).
17. *Hearing of 1969, supra* note 1, at 66 (statement of Rep. Henry S. Reuss).
18. *Id.* at 59 (statement of Sen. Gaylord Nelson).
19. Statement of President Richard M. Nixon, *supra* note 1.
20. *Hearing of 1969, supra* note 1, at 66 (statement of Rep. Henry S. Reuss).
21. *House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the Comm. on Interior and Insular Affairs U.S. Sen. and the Comm. on Science and Astronautics U.S. House of Reps*. 90th Cong. 2d Sess. 61 (1968) (statement of Sen. Richard Ottinger).
22. *Hearing of 1969, supra* note 1, at 138 (statement of Sen. Joe Tydings).
23. *Id.* at 141 (statement of Stewart Udall, former Sec'y of the Interior).

Committee that the actions of his agency had "created as much controversy and concern as any other area of the State and Federal operations".[24] Secretary John Anthony Volpe went one step farther to assure a NEPA oversight hearing in l970 that his agency considered NEPA's "federal actions" to include "the entire range of departmental activity," and went on to say:

> The National Environmental Policy Act of l969 is a potent force in the Department of Transportation, not as a tool to stop all new transportation projects because of environmental considerations, but as a source of broad guidance to encourage *fundamental changes in procedures to ensure that environmental considerations and a study of alternatives become an integral part of transportation planning at the earliest instance.*[25]

The Senate Report accompanying the bill that became NEPA listed as "increasing evidence" of the inadequacy of federal environmental policies:

> "faltering and poorly designed transportation systems"
>
> "haphazard urban and suburban growth"
>
> "the loss of valuable open spaces"
>
> "the degradation of unique ecosystems"
>
> "needless deforestation"[26]

Two points stand out here. The first is that the U.S. Congress perceived that the environmental crisis stemmed from poor planning, which NEPA was to address. A second is that highways and forestry were front and center as programs most in need of the NEPA remedy.

There was a third point. The reform would not come easily. As Sen.Henry Jackson (D-Wash.) remarked: "Each agency will want to water down their own problem, and they will want to hold onto what they have."[27] Council on Environmental Quality (CEQ) Chair Russell Train likewise noted "a temptation in some committees of Congress to tailor separate and special environmental impact analyses for programs they are interested in".[28] This was already apparently happening, he said, with the highway program and the U.S. Army Corps of Engineers (the Corps) (both of which took the initial position that NEPA did not apply to them at all). Train and Senator Jackson were, of course, prophetic. The heavy hitters were looking for a way out.

II. The Divorce

The first blow to the highway program came with early decisions that applied NEPA to federal-aid projects, although built by the states and approved years before.[29] This meant literally hundreds of ongoing projects, each a piece of a larger project, divided into annual work schemes designed to keep the maximum number going and funded. If NEPA statements were to be written for each of them, the FHwA would be hard-pressed to keep pace. Thus began a rolling drumbeat of discontent from highway planners, the construction industry, and other beneficiaries to the effect that the NEPA process only added delays, costs, and red tape (which was certainly true, but of course no less true for all federal programs).[30] Which prompted the first escape, an amendment to §102 delegating NEPA responsibility to state highway agencies so long as the federal agency approved the impact statements.[31] The agencies in line for the largest sums of money their states would receive from the federal government, would now evaluate their own impacts.

Still, there remained the possibility that NEPA would attach to, and provide an opportunity to influence, federal-state highway planning. The planning process rolled out in three stages.[32] Stage one was "systems planning, funded by the federal government and developed in accordance with federal criteria," leading to a "regional development plan." The second was a transportation implementation plan in which projects were plucked from the plan and placed on a priority list. The third was the selection of a project from the short list, for imminent construction. Without a doubt, the logical point for NEPA to attach was the first, the regional plan, during which the major modes of transit and general corridors were considered and decided upon. Reviewing courts were taking NEPA quite seriously when it came to highways and seemed poised to reach this conclusion.[33] The U.S. Court of Appeals for the Eighth Circuit had written:

> Since a major highway system is an ongoing, continuing octopus of concrete and asphalt ribbons covering continuously more and more of the available land area of a state, yet necessary in significant respects to meet the transportation needs of our country, *the highway problem and how it is to be considered and implemented under NEPA requires special consideration*.[34]

Then came *Atlanta Coalition*.[35]

---

24. *Id.* at 77 (statement of J.D. Braman, U.S. DOT, Asst. Sec'y for Urban Systems and Env't).
25. *Federal Agency Compliance With Section 102(2)(C) and Section 103 of [NEPA]: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries House of Reps.*, 91st Cong., 2d Sess. 122 (1970) (statement of John Volpe) (emphasis added).
26. Senate Report, *supra* note 16.
27. *Hearing of 1969, supra* note 1, at 120 (statement of Sen. Henry Jackson).
28. *Federal Agency Compliance With NEPA*, *supra* note 25, at 5 (statement of Russell Train).
29. Ronald C. Peterson & Robert M. Kennan Jr., *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 Envtl. L. Rep. 501 (1972).
30. Liroff, *supra* note 5, at 191-94. Their allies in Congress gathered to discuss ways of relieving highways from the NEPA process. *Id*. at 193-94.
31. 42 U.S.C. §4332(D) (2008). A tribute to the power of the highway lobby is that of all the attempts to amend NEPA over the years, only this one succeeded.
32. *See* Peterson & Kennan, *supra* note 29; *see also* Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333, 1337-39, 9 ELR 20590 (Ga. 1979).
33. Indian Lookout Alliance v. Volpe, 484 F.2d 11, 15, 3 ELR 20739 (8th Cir. 1973); Citizens for Mass Transit Against Freeways v. Brinegar, 357 F. Supp. 1269, 1278, 3 ELR 20747 (Ariz. Apr. 5, 1973).
34. *Indian Lookout Alliance*, 484 F.2d at 15 (emphasis added).
35. *See Atlanta Coalition*, *supra* note 32.

In the early l970s, a group of neighborhood associations requested an impact statement for a massive suite of transportation projects running through downtown Atlanta in as many as 16 lanes. The plaintiffs were not interested in the EIS for any one of the highways; they wanted an EIS on the plan that justified them. The U.S. Court of Appeals for the Fifth Circuit saw exactly what was going on, and fainted. It found that federal funding was the sine qua non of the state highway program from initial planning to the laying of concrete, and that the development plan represented transportation decisions that became as a practical matter all out immutable. Then, it found a way to avoid NEPA. The Atlanta system, and it was undeniably major and would undeniably be funded by the federal government, would not be federal until the state applied for construction money. Another panel, another circuit, and a different result was more than possible. But history went the other way, and so in one fortunate and hypertechnical stroke, the FHwA had won a divorce from the very thing Congress intended when it passed NEPA, and for a program it had very much intended to change.

When the dust following *Atlanta Coalition* had settled, state agencies were writing the impact statements with loose oversight from Washington, D.C. They were, further, writing them not on plans or programs, and not even on full federal aid highways, but rather on individual pieces of highways that fit into their annual construction schedules. One example, of thousands: an EIS in Louisiana on Interstate 10 improvements from Carrolton Avenue to Bonnabel, less than three miles away.[36] This piecemealing was allowed by another FHwA sleight of hand called "logical termini."[37] A highway segment, no matter how small and no matter how connected it was to other segments and to the system as a whole, could be broken out for separate NEPA treatment, as long as the entrances and the exits from this piece would carry cars somewhere.[38] Logical termini did not have to be very logical. They only had to be facially plausible.[39] A Vermont decision approved segmenting a highway segment because it would save drivers using it seven seconds of time during rush hour.[40] At which point, not only had NEPA been divorced from planning, it had been relegated to the latest, smallest, and most foreordained step in the process.

There was more to come. Congress, quite pleased by this turn of events that allowed major monies to pour unchecked into their home districts, would take no chances of a future Administration reversing the *Atlanta Coalition* precedent. In l998, it passed highway legislation stating that, "any decision by the Secretary concerning a plan or program . . . shall not be considered a Federal action subject to review under the National Environmental Policy Act of l969."[41] The CEQ had tried to persuade congressional staff that earlier NEPA involvement was in everyone's interest, but to no avail. Logic was on one side. Unencumbered money was on the other.

There was more to come still. In 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA),[42] under which grandiose (and rather misleading) title it repromulgated the above language and added some specials, including the delegation of the entire NEPA process sans federal oversight to select states, as a kind of pilot project for the future. Texas, among others, is rejoicing in the prospect of self-approving the Trans-Texas Corridor, the largest construction project in the history of the state.[43]

Then came a final touch. Despite CEQ regulations requiring that private EIS preparers affirm that they have no financial interest in the projects they were evaluating[44]—for rather obvious reasons—Congress relieved them of this burden for the highway program.[45] At which point, the EISs were being written by the most self-interested parties possible and not on plans, nor even on highways, but on small pieces of highways long predetermined. At which point, NEPA had been turned upside down. No wonder state officials continue to complain that the EIS is of little value. The charge is increasingly true. Just as they had wanted.

III. Reflections on NEPA and Planning

February 19, 1991

Michael R. Deland, Chairman
Executive Office of the President
Council on Environmental Quality
Washington, D.C. 20500

Dear Michael,

With regret, I must decline your kind invitation to attend the NEPA workshop next month. But were I able to attend, I'd say this:

NEPA is missing the point. It is producing lots of little statements on highway segments, timber sales, and other foregone conclusions; it isn't even present, much less effective, when the major decisions on a national energy policy and a national transportation policy are made. On the most pivotal development questions of our time, NEPA comes in late in the fourth quarter, in time to help tidy up . . . As I see it, CEQ's challenge is not, per your invitation, to make NEPA a "succinct review for a single project." It is rather to make NEPA work for legislative proposals and for programs that all but conclusively determine what the subsequent projects will be.

I hope these thoughts are useful to you.

Sincerely,
Oliver A. Houck

36. Louisiana Department of Transportation and Development, July, 1992 (on file with author).
37. *See* 23 C.F.R. §771.111(f) ("logical termini").
38. *See* Macht v. Skinner, 715 F. Supp. 1131, 1135, 21 ELR 20004 (D.C. 1989), *aff'd*, 889 F.2d 291 (D.C. Cir. 1989); Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1382-83, 3 ELR 20667 (D. Md., June 22, 1973); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 1132, 1 ELR 20629 (N.D. Ga. 1971); Piedmont Heights Civic Club v. Moreland, 637 F.2d 430, 441, 11 ELR 20257 (5th Cir. 1981).
39. *See* Save Barton Creek Ass'n v. Fed. Highway Admin., 950 F.2d 1129, 1139, 22 ELR 20529 (5th Cir. 1992) (unless "simply illogical when viewed in isolation").
40. Senville v. Peters, 327 F. Supp. 2d 335, 355 (D. Vt. May 24, 2004).
41. TEA-21, Pub. L. No. 105-178 §1204 (1998).
42. SAFETEA-LU, Pub. L. 109-59 §6003 (2005).
43. Bina Reddy, *The Hard Road: NEPA Review of the Trans-Texas Corridor After SEP-15 and SAFETEA-LV §6005*, 38 Tex. Envtl. L.J. 125 (2008).
44. 40 C.F.R. §1506.5(c) (1978).
45. TEA-21, *supra* note 41, at §1205(b).

So it was in 1991, so it is today. Not uniformly. Some agencies like the National Park Service and the U.S. Department of Energy have applied NEPA conscientiously to planning decisions. Others like the Bureau of Land Management wax and wane on the issue, applying NEPA to range management plans but, in recent years, attempting to avoid NEPA altogether for the wholesale leasing of onshore oil and gas. On a parallel track, since *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*[46] federal agencies have also been required to write impact statements on broader "programs," but what is a program may lie with the beholder. In *Kleppe v. Sierra Club*[47] the U.S. Department of the Interior (DOI) announced a Northern Great Plains Resources Program to assess the options and impacts of coal development in the region, exactly the stuff of NEPA, but when a lawsuit was brought requesting an EIS, the DOI took the sign off the door, sent the Great Plains team back to its day jobs, and informed the court that there was no program at all. The court accepted the representation.

It is difficult to look at this picture with confidence that it constitutes precedent for NEPA and planning against a future administration hostile to the process, and it is impossible to regard the future with comfort as the FHwA and, if it continues on its present course, the USFS slip the net. The environmental impacts of these two agencies are among the largest on the landscape, bar none, save in some regions the water resources program of the Corps, which by and large does not do planning-level EISs because, driven by local projects and local sponsors, it does not plan at all.[48] It remains to be seen who will determine federal policy in the years ahead.

The picture is also clouded by legal arguments that have recently gained traction with the U.S. Department of Justice and some reviewing courts. One such argument is that no plan is an "action" under §102, it is simply a set of ideas, inchoate, and so the process does not apply.[49] Correlatively a challenge to a plan for failure to comply with NEPA is not ripe for review, because all plans, even if quite "choate," can be changed in the future.[50] In the same vein, it is argued that while a plan is an action, it is not "final" under the Administrative Procedure Act[51] because there will be further steps to implement it,[52] and, for the same reason, a court may find no "case or controversy," putting the issue beyond the power of Congress to remedy.[53] Courts hostile to NEPA, and no court in the land has been more hostile to this statute than the U.S. Supreme Court (a record of 20-some cases decided adversely to the application of the statute and zero in favor is rather hard to beat),[54] have opined on each of these issues, further solidifying the divorce of NEPA from planning.[55]

The legal arguments rest on a false premise. Development and management plans, as even the *Atlanta Coalition* court recognized, are far more than musings out loud, and more still than a smorgasbord from which agencies later pick and choose. The highway department, the forest service, and other agencies would not bother to plan, and Congress would not bother to require them to, if plans did not represent a critical step in their decisionmaking. Congress knew that when it enacted NEPA. They said so. For purposes of NEPA, plans are *the* action Congress had in mind.

Which raises the final question, why so much pain and strain to avoid what Congress intended? One answer heard from USFS employees is to preserve "flexibility" in planning, although no reason occurs that an EIS cannot be written on a flexible plan. A more frequently heard complaint is the time and expense of "doing NEPA" during planning, but it is not apparent, given the availability of "tiering,"[56] that the FHwA and USFS are actually saving either time or money. It seems likely that these agencies end up writing as many or more EISs, late in the game, to a blocked-out and ready-to-fight public, as they would by doing an EIS on the big decision—the plan—from which point the rest would be easy.

Why would they not do this? The answer may lie more in the human heart than the human mind. The problem with putting NEPA into planning is that it puts other peoples' noses into your business. It is that simple. These people—and environmentalists are not all that polite as a breed—ask embarrassing questions, propose unwanted alternatives, go to the press, make things difficult, even change outcomes. Which would be terrible. If you build highways or harvest trees, and this is what you have been educated to do and have done all your life, why in the world would you let outsiders in who are simply going to challenge it? You cannot, of course, keep them out forever. But you can keep them away from the real decisionmaking, the plan, and delay them until, when an EIS finally comes out on a highway segment or a timber sale, meaningful participation is too little and too late.

46. Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 3 ELR 20525 (D.C. Cir. 1973).
47. Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976).
48. Ironically, after Hurricane Katrina revealed the problem of project-by-project Corps planning, the Corps is developing a comprehensive coastal plan for the state of Louisiana that is facing resistance from state and local interests, and the Louisiana congressional delegation, who do not want this planning to interfere with particular projects that they favor. "Corps Releases Storm Study, But No Plan," Times Picayune, Mar. 6, 2009. Take home: people like projects, not planning.
49. Norton v. S. Utah Wilderness Alliance (SUWA), 542 U.S. 55, 55-56, 34 ELR 20034 (2004).
50. *Kleppe*, *supra* note 47.
51. 5 U.S.C. §§ 551-559, 701-706, *available in* ELR STAT. ADMIN. PROC.
52. Pub. Citizen v. U.S. Trade Rep., 5 F.3d 549 (D.C. Cir. 1993).
53. Summers v. Earth Island Inst., No. 07- 463, 2009 WL 509325, at **5-7 (Mar. 3, 2009). *See also* the "no case or controversy" standing cases, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 20 ELR 20962 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992).
54. *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703 (2000); *see also* Richard L. Revesz, *Environmental Restoration, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997) and Oliver A. Houck, *Standing on the Wrong Foot*, 58 Syracuse L. Rev. 1 (2007).
55. One irony of this record is that while other nations including such megations as the European Union and China, have come to embrace planning-level impact assessment, the United States is running the other way. *See* E.U. Dir. 2001/42, June 27, 2001(strategic planning), and O'Melveny & Myers, "Obligatory Environmental Impact Assessment," *China Law and Policy*, Dec. 10, 2002.
56. 40 C.F.R. §1502.20 (1978).

One of the great puzzlements of §102(2)(C) of NEPA is why a provision that is at first blush so patently sane—look before you leap—is so difficult to institutionalize. The difficulty is not just money, and not just delay, although the costs can in some cases be significant. It is also that the very questions NEPA raises threaten change. Planning is where changes occur.[57]

Beyond the institutional impacts, however, lie the human ones. NEPA is so difficult because its few demands are so counterintuitive, so contrary to normal human behavior: think long term, reveal your defects, expose your risks, consider other ways of doing things than the one you have in mind, let others in on these considerations, which after all are your responsibility, not theirs, and about which you may (but less often than you think) know more than they do, and then actually agree that another way is better. These are a very hard ask. For all of these reasons, attaching NEPA to planning, the heart of all decisionmaking, remains as stiff a challenge today as it was in 1969. When this very idea gave rise to a process that is so magnificent in its ambition and so unfulfilled.

57. It is not just the FHwA and the USFS that are threatened, but the Congress as well. As Richard Liroff quotes a Senate staffer in his seminal book on early NEPA: "If Congress had perceived what the law would do, it would not have passed. They would have seen it as screwing public works." Liroff, *supra* note 5, at 35.