

# Toward a Better NEPA Process for Decisionmakers

by Edward A. Boling

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Some extraordinary government officials have used the implementation of the National Environmental Policy Act (NEPA)<sup>1</sup> as a national charter to structure decisions that promote sustainable development and agency governance for protection of the environment.<sup>2</sup> They appreciated that NEPA establishes policy, sets goals (§101), and provides means (§102) and authority (§105) for carrying out the policy. The testimony of Adm. James Watkins, while Secretary of the U.S. Department of Energy, is illustrative: “thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country . . . .”<sup>3</sup> Admiral Watkins and his successor, Hazel O’Leary, used reform of the NEPA process to move that department toward a more transparent problem-solving approach to decisionmaking.

Most recently, in the American Recovery and Reinvestment Act,<sup>4</sup> the U.S. Congress reaffirmed NEPA’s utility in public decisionmaking, finding that:

- (1) NEPA protects public health, safety, and environmental quality by ensuring transparency, accountability, and public involvement in federal actions and in the use of public funds;
- (2) NEPA provides “direction” for the country to “regain a productive harmony between man and nature”; and
- (3) NEPA helps to provide an orderly process for considering federal actions and funding decisions and prevents litigation and delay.

The primary means of translating NEPA’s policy into action is through environmental impact assessment, based upon alternative analysis and interagency coordination, for decisions regarding federal agency actions that may significantly affect the quality of the human environment.<sup>5</sup> Such major federal actions typically involve important decisions with broad ramifications for the economy, society, and agency policy. Agency NEPA processes and decision-specific environmental documents thus provide a substantial opportunity to manage and direct an agency based on a framework for collaboration among federal agencies and those who will bear the environmental, social, and economic impacts of their decisions.

Ultimately, successful NEPA implementation depends on its use by decisionmakers who value analytical rigor, the public evaluation of significant environmental impacts, and use NEPA to structure the management of agency commitments and future decisions. NEPA needs decisionmakers who need its information, who value its public process for validating this information, and who are in a position to demand more analysis, higher quality, and more timely information from agency environmental programs. In its 25-year study of NEPA’s effectiveness, the Council on Environmental Quality (CEQ) found that NEPA’s requirements to consider alternatives and involve the public and other agencies with expertise make it easier to discourage poor proposals, reduce the amount of documentation during implementation, and support innovation.<sup>6</sup> However, the success of any NEPA process depends on whether the lead agency has systematically involved those who will be most affected by a proposal, gathered their ideas, and used their input to modify or add reasonable alternatives for decisionmaking.

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

2. The U.S. Congress, the president, the federal agencies, the federal courts, and the public share responsibility for implementing NEPA so as to achieve the requirements of §101. Section 102(2) contains “action forcing” provisions that provide authority and mandates to translate policy into action.

3. COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 13 (1997) (quoting House Armed Services Committee testimony, 1992), available at <http://www.nepa.gov/nepa/nepa25fn.pdf> [hereinafter NEPA EFFECTIVENESS STUDY].

4. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1609(a), 123 Stat. §116.

5. NEPA §102(2)(C); cf. NEPA §102(2)(E).

6. NEPA EFFECTIVENESS STUDY, *supra* note 3, at 12.

## I. The Missing Link: Direct Connection Between Decisionmakers and NEPA Decisions

NEPA requires that the environmental impact statement (EIS) “accompany the proposal through the existing agency review processes.”<sup>7</sup> Section 102’s requirement that the detailed statement “accompany” a proposal through agency review means more than physical proximity and the physical act of passing papers to reviewing officials.<sup>8</sup> CEQ regulations implementing NEPA’s procedural provisions require each agency to adopt procedures implementing the NEPA regulations (“agency implementing procedures”). These agency procedures are intended to conform the elements of the NEPA process to each agency’s programs and decisionmaking processes. They are also intended to distinguish between those categories of actions that typically involve significant environmental impacts, and require analysis in an EIS, from those that do not involve significant effects and may be categorically excluded from NEPA analysis.<sup>9</sup> Agency implementing procedures (and their revisions to accommodate new authorities and new information regarding the effects of agency actions) present a critical point for management of an agency’s environmental program and related effects. Agency NEPA procedures, however, typically limit this aspect of their procedures to a minimal identification of actions that normally require an EIS and miss the opportunity to functionally integrate their EIS/environmental assessment (EA) program with agency decisions at a strategic and programmatic level.

Where agency NEPA compliance falls short of the drafters’ vision of NEPA, it typically does so in ways that distance the NEPA process from actual agency decisionmaking. While the disconnect with agency decisions takes as many forms as the agency decision processes, their common elements are a reactive and formulaic approach to NEPA compliance that encourages decisionmakers to disregard the information provided.

## II. Reactive NEPA Programs

For some agencies, NEPA compliance programs are an artifact of the way in which NEPA became a driving consideration: through litigation. For environmental lawyers, this is a storied legacy in which a lofty environmental statute—lack-

ing substantive standards capable of judicial enforcement—became the means of calling attention to agency action with significant environmental effects. For agency decisionmakers, the back story on this legacy is the ways in which agencies recovered from these setbacks through compliance governed by assessments of litigation risk. For some, NEPA compliance came to be seen as a means to satisfy agency counsel, and the scope and implementation of those agency NEPA programs are based on their assessment of litigation risk.<sup>10</sup>

## III. Formulaic Coordination

A central focus of NEPA, in §§101 and 102, is coordination between agency programs at all levels of government and with private interests. Formal coordination, through public distribution of documents, is the legal minimum for NEPA compliance. However, it may be alienating and even counterproductive to NEPA’s purposes. Substantive engagement and effective coordination may be seen as costly, time-consuming, even risky where potential litigation issues are embedded in the coordination process. The response from many agencies is to add more formality to the NEPA process through their written restatement and response to comments, indirectly increasing the barriers to substantive coordination of goals, priorities, and mitigation.

## IV. An Engaging NEPA Process

As NEPA enters its 40th year, the central challenge remains that of integrating NEPA implementation within agency decisionmaking practices, authorities, and program realities. Paradoxically, to get ahead of the litigation curve, agencies need to shift focus from preparation for litigation to making decisions that may be litigated. Where agency decisions are made in the context of a comprehensive agency environmental program, their consequences are considered, communicated, and defensible. Where a federal court finds a specific NEPA process to be deficient under the standards of the Administrative Procedure Act (APA), the implications of this process failure must be assessed and addressed by the agency environmental program. An effective environmental program can respond to litigation developments nimbly by providing supplemental analysis as needed. But the larger purpose of such an environmental program is to ensure that, at every agency decision point with environmental consequences, the relevant environmental consequences of this aspect of the agency program are known to the decisionmaker and communicated to the public. As a matter of expert assessment of

7. NEPA §102(2)(C).

8. *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1117-18, 1 ELR 20346 (D.C. Cir. 1971) (“The word ‘accompany’ in Section 102(2)(C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the ‘detailed statement,’ be considered through agency review processes.”). See also 40 C.F.R. §§1500.2(c), 1505.1.

9. 40 C.F.R. §§1501.4, 1507.3.

10. Such assessments of litigation risk should be informed by the relatively low number of NEPA cases actually filed and the high proportion of cases won by federal agencies, as shown consistently by the CEQ Survey of NEPA Litigation, available at <http://www.nepa.gov/nepa/nepanet.htm>.

the environmental consequences of agency decisions, courts must ultimately defer to a well-designed agency environmental program that ensures adequate consideration of the environmental consequences of agency action.

The cornerstone of any agency program for the assessment of effects on the human environment is an effective program to actively involve the public. While public involvement is an essential element of the NEPA process, it is not a procedural requirement of NEPA §102(2)(C). Rather, it is a means of ensuring that agency NEPA compliance meets the substantive purposes of the statute. In this regard, the NEPA process relies on public quality control of agency work, and agencies need to actively support high-quality review of their analyses.

The public involvement requirements of the statute are strikingly spare. A restrictive reading of the statute could have led to implementing regulations that require no more than public availability of final EISs. Section 102(2)(C) references the Freedom of Information Act (FOIA),<sup>11</sup> but the reference is limited to a requirement that agencies make available to the public the final statement that is the result of interagency coordination and appropriate agency comment letters. That cross-reference to FOIA has been interpreted by agencies and the courts as carrying with it the full spectrum of exemptions from FOIA's general requirement of public disclosure, allowing agencies to withhold deliberative interagency communications from the development of a draft or final EIS.<sup>12</sup>

The most common reason for not being more open to public involvement in the development of environmental documents is agency protection of its deliberative process. There is a bit of irony here for those who have seen NEPA documents ignored in the actual process of making decisions. However, under FOIA and the APA, agencies commonly assert deliberative process privilege to avoid disclosure of interagency and intraagency exchanges regarding draft text for an environmental document. With this litigation focus, the larger considerations of the value—to the agency and the public—of open exchange of ideas is overridden by the theoretical protection of deliberative processes from the chilling effects of sunshine.

The CEQ has, of course, interpreted NEPA and its cross-reference to FOIA as requiring greater openness in the development of environmental documents. The requirements of public scoping, public involvement in the development of an EA, public comment on a draft EIS, and public availability of a finding of no significant impact (FONSI) or record of decision (ROD) are all regulatory requirements based on the CEQ's interpretation of the statute. Forward-leaning as they are, they are rooted in the procedures and means of communication available 30 years ago. Since that time, FOIA

has been amended to include provisions for “online reading rooms” for documents that have been sought under FOIA and are of general public interest.<sup>13</sup> As a policy matter, FOIA has also been interpreted to require agencies to limit their assertion of exemptions from disclosure to circumstances where disclosure could cause actual harm.

Building on the public participation ethic of the CEQ regulations, some agencies have undertaken greater public involvement as a means of improving the quality of their environmental documents and their decisionmaking. The U.S. Forest Service even proposed to add to its NEPA procedures a provision for the public distribution of preliminary draft EISs to support collaborative decisionmaking. The proposal was withdrawn in response to critics who saw this as an additional stage in the NEPA process that would “over-complicate the planning process,” “unduly burden the public and other government agencies,” and “unfairly” place those who cannot fully participate at a “disadvantage.”<sup>14</sup> These comments illustrate a view of NEPA as an adversarial process, which may be an accurate reflection of the experience of those offering the comments. They also illustrate the challenges facing those who would remake NEPA processes to include less formal but more effective means of communication between decisionmakers and the affected public.

Why can't agency NEPA documents be developed in the open, with text-level inputs from all interested parties? There is no barrier in the CEQ regulations—so long as the agency ensures the professional and technical adequacy of the product of this development process, i.e., the document issued as the agency's “draft” and “final” environmental document. If so, why can't agency environmental programs build upon this approach by networking their NEPA documents into an online encyclopedia of environmental analysis? The reasons appear to be more technical than legal: it would require additional resources and it is not required to defend any particular decision. NEPA documents are typically posted to a website for the duration of their decisionmaking process, then taken down to make space for further decisionmaking processes. Even documents that have been designed as models for future NEPA documents are vulnerable to this fate because they lack an agency custodian to ensure that they incorporated into—and remain accessible as part of—a durable database.

An example of this problem can be found in an environmental assessment “pilot project” of the prior Administration's Healthy Forests Initiative. At the direction of the president, the CEQ issued guidance on the development of concise, focused environmental assessments for small forest management projects that were typically authorized through a FONSI. The CEQ participated in the drafting of several environmental assessments selected by the land management agencies to serve as examples of the analysis necessary to support routine decisionmaking with clear focus on whether the

11. 5 U.S.C. §552. See also 40 C.F.R. §1506.6(f) (requiring agencies to make EISs, the comments received, and underlying document available to the public pursuant to FOIA).

12. *Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs*, 147 F.3d 708, 710-11 (8th Cir. 1998) (protecting intraagency memorandum commenting on draft EIS and finding that “[a]lthough NEPA contemplates public participation . . . NEPA's statutory language specifically indicates that disclosure to the public is to be in accord with FOIA, which includes Exemption 5”); *Nat'l Wildlife Fed'n v. U.S. Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988) (draft forest plans and preliminary draft EIS protected).

13. 5 U.S.C. §552(a)(2) (“For records created on or after November 1, 1996, . . . each agency shall make such records available, including by computer telecommunications . . .”).

14. 73 Fed. Reg. 43087 (July 24, 2008).

action would “significantly” affect environmental quality. Each of the pilot projects was completed expeditiously and with active involvement of the interested public, posted to a website, and broadly touted.<sup>15</sup> Though they were developed for a broader purpose of guiding land management agency development of thousands of similar documents, they were quickly superseded by new initiatives. This focus on expediency sacrifices opportunities to learn by doing and from what we have done.

As an example of less formal and more effective means for communicating environmental information, I am increasingly impressed by the impact of Wikipedia and Google, particularly Google maps, on decisionmaking. In his application of market theories to uses of the internet, Prof. Cass Sunstein illustrates how wikis amass and deliver high-quality information at relatively little cost.<sup>16</sup> That information is frequently digested into briefing papers by busy staff for busy decisionmakers that become part of the real decisionmaking process that NEPA is intended to inform. When an EIS is used in actual decisionmaking, it is more likely to be one accessed online and made available to the decisionmaker in excerpts in a cut, pasted, and digested form.

In terms of communicating environmental information, narrative descriptions typically lack the communicative power of well-designed maps and graphic displays of quantitative information.<sup>17</sup> NEPA documents typically include maps as a supplement to their narrative statements, but they are often tailored to the particular decision document. As such, they lack context that is readily available to online map-based means of communicating environmental information. Well-designed maps can communicate quantitative and comparative information much more effectively than other graphic and narrative descriptions that form the bulk of most environmental documents produced by federal agencies. For this reason, the CEQ’s NEPA Task Force received numerous comments in favor of the use of spatial data and geographic information systems (GIS) throughout the development of NEPA analyses, their documentation, and when communicating with the public and decisionmakers.<sup>18</sup> The Task Force found that a GIS-enabled understanding of the geographic context of proposed activities “improves planning

by showing the extent of the proposed activities and their associated impacts, promoting more consistent analyses and reviews, and facilitating cumulative effects analysis and monitoring efforts.”<sup>19</sup> The Task Force also found that using GIS in the NEPA process facilitates timely access to information by decisionmakers at all organizational levels.<sup>20</sup>

## V. Focus on the Decision

As would any busy person, most decisionmakers view a voluminous EIS as daunting and a distraction from the essential business of communicating relevant facts and incisive analysis in a timely manner. Given the choice, web-based information that is available on demand tends to fill the gaps in policy processes that do not wait for the development of an EIS. Online, programmatic information—useful in scoping NEPA documents and applied to the rigors of the NEPA process—can help NEPA programs be more responsive to the needs and expectations of decisionmakers. Like Admiral Watkins, decisionmakers may come to value the analytical rigor of the NEPA process on their own, but that comes with time, and many decisionmakers come to office believing that time is a luxury they cannot afford. An essential function of agency NEPA programs is to reach those decisionmakers, to meet their needs and the needs articulated so well in NEPA and the CEQ’s implementing regulations. “Ultimately, of course, it is not better documents but better decisions that count.”<sup>21</sup>

15. For samples of EA Demonstration Projects, see U.S. Forest Service, *Mendocino National Forest*, <http://www.fs.fed.us/r5/mendocino/projects/hfi/pills.php> (last visited June 10, 2009); U.S. Forest Service, *Demonstration Environmental Assessment Projects*, <http://www.fs.fed.us/emc/hfieguide/projects/index.html> (last visited June 10, 2009); U.S. Department of the Interior, Bureau of Land Management, *Fire and Aviation*, [http://www.fire.blm.gov/ea\\_sites/index.htm](http://www.fire.blm.gov/ea_sites/index.htm) (last visited June 10, 2009); Healthy Forests and Rangelands, *National Fire Plan and Forests Initiative*, <http://www.forestsandrangelands.gov/> (last visited June 10, 2009).

16. CASS R. SUNSTEIN, *INFOTOPIA 155-60* (Oxford Univ. Press 2006).

17. See EDWARD R. TUFTS, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* (Graphics Press 2001).

18. The Western Governors’ Association commented that GIS technology is a vital component of successful NEPA processes for land management decisions because these decisions are spatial and stakeholders relate to location. The U.S. Air Force commented that a website developed by Eglin Air Force Base to accomplish interdisciplinary reviews of environmental impact analyses uses GIS to illustrate proposals, provide simultaneous access to operational and environmental information, and increase awareness of mission-critical environmental issues.

19. COUNCIL ON ENVIRONMENTAL QUALITY, *MODERNIZING NEPA IMPLEMENTATION 1.3.2* (2003), available at <http://ceq.hss.doe.gov/ntf/report/index.html>.

20. However, the Task Force noted that geospatial data holdings are widely dispersed and that compiling available data across jurisdictional boundaries is often difficult due to differences in data element definitions, sampling methodologies, spatial and temporal resolution, technology, standards, and lack of adequate metadata.

21. 40 C.F.R. §1500.1(c).