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Alan J. Gilbert

Ronald M. Eddy

Frank D. Durand

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## A BUSINESS PERSPECTIVE ON 20 YEARS OF ACTIVITY UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

*Alan J. Gilbert*  
*Ronald M. Eddy*  
*Frank D. Durand\**

### I. INTRODUCTION

The National Environmental Policy Act of 1969<sup>1</sup> is landmark legislation. Like all statutes of wide and lasting import, NEPA has changed dramatically in the 20 years since its enactment. That evolution has substantially affected the way in which people do business in the United States. The purpose of this article is briefly to trace those changes from the perspective of the business community.

It is our thesis that NEPA's effects on the business community also have shifted dramatically in the past 20 years. As is often the case with statutes later recognized as working fundamental changes, when first introduced NEPA was virtually ignored. It was so abstract and vague as to prompt no immediate significant action by the government or the business community.

But within a few years after enactment, judicial activism transformed the statute into the most significant piece of environmental legislation in the federal arsenal. For the business person, this transformation resulted in confusion, delay, and frustration. Businessmen not

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\* Messrs. Gilbert and Eddy are partners at the Denver, Colorado law firm of Sherman & Howard. Mr. Durand is an associate of the firm.

1. 42 U.S.C. §§ 4321-4370a (1982 & Supp. V 1987). The Act contains three principal sections: a statement of national environmental policy, *Id.* § 4331, provisions for implementation of the policy by government agencies primarily through the environmental impact statement process, *id.* §§ 4332-35, and provisions establishing the advisory Council on Environmental Quality ("CEQ") in the executive office of the President. *Id.* §§ 4341-4347. By far the most important specific mandate of NEPA is for government agencies to prepare an environmental impact statement ("EIS") for all "... major Federal actions significantly affecting the quality of the human environment . . . ." *Id.* § 4332(C).

only had to evaluate the economic and practical viability of a proposed project but also, to the extent possible, had to consider whether that project would be delayed, or in some cases rejected as a practical matter, by an often unpredictable judicial review process.

Private enterprise values predictability above all other characteristics in environmental law. When a business person can plan for the future with a high degree of confidence, decisions can be made whether to pursue an opportunity prior to the investment of substantial capital. Since most industrial and commercial activity affected by NEPA revolves around development of one sort or another, the confusion and delays resulting from unpredictable judicial interpretation of the statute undercut many such an investment-backed expectation.

Fortunately, through administrative and executive action the impact of NEPA was again transformed in the mid-1970s. As the NEPA review process became ingrained in the federal bureaucracy, much of the uncertainty associated with NEPA abated. Beginning in 1978, with the codification of rules implementing controversial portions of the statute, the impacts of NEPA on the business community became much more predictable. The statute also moved closer to its principal goal: the injection of environmental considerations into virtually all major governmental activities.

Today NEPA is well integrated into the actions of government agencies and the business community. The statute now seldom interferes with non-controversial developmental activities, a testament to its successful codification of environmental values. In contrast, however, the uncertainty prevalent throughout the early years of NEPA continues to affect large, politically controversial projects. In that limited area the statute continues to engender confusion, delay, and frustration from the business person's perspective.

## II. NEPA — THE EARLY YEARS

In the 20 years since NEPA was enacted, courts, administrative agencies, public interest environmental groups, and businesses have struggled to make sense of the statute's abstractions in a practical way. Judge Friendly referred to NEPA during its infancy as "a relatively new statute so broad, yet opaque, that it will take even longer than usual fully to comprehend its import."<sup>2</sup> The business person would hardly dispute the accuracy of this prophesy.

In the months immediately following the passage of NEPA, neither the federal government nor the business community paid it much attention. Indeed, the text of NEPA so abounds with high-sounding and abstract environmental goals that it is understandable a first reaction would be to question its enforceability at all. For example, NEPA's declaration of purpose states that the intent of the Act is:

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2. *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D.N.Y. 1972).

To declare a national policy which will encourage productive enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the nation . . . .<sup>3</sup>

As a result of its broad statement of principles without specific mandates, few federal agencies actively pursued implementation of NEPA's broad mandates early on. In sum, government agencies were unimpressed with NEPA's generalities.

The breadth of NEPA's goals are not the only reason federal agencies were slow to respond to the Act directives. NEPA was written to change the way every agency reviewed projects within its jurisdiction. Understandably, bureaucracies construed its mission-changing mandate narrowly to dampen the impact of the statute. As noted by early commentators, "few federal agencies welcome[d] the passage of NEPA."<sup>4</sup>

The ambiguities of NEPA and the reluctance of government agencies to take the lead in the search for sensible interpretations of the statute combined to spawn early litigation. The case-by-case nature of the litigation process led, in turn, to substantial confusion within the business community as piecemeal judicial interpretation disrupted ongoing government programs and accompanying private investments. As an example, judicial interpretation of NEPA in 1970 halted construction of the Trans-Alaska pipeline, a project with broad public support and high visibility within the business community, for a period of time.<sup>5</sup>

The substantial impact of NEPA on private sector investments began with the District of Columbia Circuit Court of Appeals decision in the seminal case of *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*<sup>6</sup> In *Calvert Cliffs'*, NEPA received its first comprehensive judicial analysis by a circuit court, an analysis more frequently cited, analyzed, and relied upon than any other NEPA decision.<sup>7</sup> Judge Wright wrote expansively in *Calvert Cliffs'* to insert broad, practical content into the abstractions of the statute. Environmental

3. 42 U.S.C. § 4321 (1982).

4. F. ANDERSON, *THE NATIONAL ENVIRONMENTAL POLICY ACT, FEDERAL ENVIRONMENTAL LAW* 238, 244 (E. Dolgin and T. Guilbert, Environmental Law Institute 1974).

5. The District Court for the District of Columbia preliminarily enjoined the Secretary of the Interior from approving an application for necessary land use permits by the private companies building the pipeline. *Wilderness Society v. Hickel*, 325 F. Supp. 422, 424 (D.D.C. 1970). The extent of the court's justification for this preliminary injunction was a statement that "[i]t appears that the [Secretary of the Interior] has not fully complied with the requirements of the National Environmental Policy Act of 1969 with respect to said application . . ." *Id.* at 424. A permanent injunction was ordered by the court in *Wilderness Society v. Morton*, 479 F.2d 842, 893 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973). Congress later passed the Trans-Alaska Pipeline Act, 43 U.S.C. §§ 1651-1655 (1982 & Supp. V 1987), to change this court mandate and allow the project to proceed.

6. 449 F.2d 1109 (D.C. Cir. 1971).

7. ANDERSON, *supra* note 4, at 297.

law, the missions of government agencies, and the expectations of the business community have not since been the same.

*Calvert Cliffs'* involved a challenge to rules implemented by the Atomic Energy Commission to govern its consideration of environmental matters.<sup>8</sup> The Commission maintained in these rules that NEPA's mandate was vague at best, leaving the agency considerable latitude to develop procedures to assure NEPA compliance.<sup>9</sup> The Commission argued, for example, that neither its organic statute nor NEPA required that it give independent consideration to environmental matters. It therefore chose not to conduct its own review of various environmental impacts arising from projects within its purview, opting instead to defer to the findings of other federal and state environmental agencies that those projects complied with environmental standards promulgated under normal environmental statutes.<sup>10</sup>

The D. C. Circuit Court of Appeals emphatically rejected the Atomic Energy Commission's position, criticizing its "crabbed" interpretation of NEPA's mandate.<sup>11</sup> The Court began by noting that the Act "makes environmental protection a part of the mandate of every federal agency and department."<sup>12</sup> With this in mind, it went on to state that "[p]erhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to *consider* environmental issues just as they consider other matters within their mandates."<sup>13</sup>

The Court proceeded to discuss the extensive and independent nature of the environmental impacts which must be considered by each federal agency. Agencies were required to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."<sup>14</sup> The Court noted that environmental factors must be balanced against benefits, technical, economic, and otherwise, that the project evaluated is likely to yield, and that such a substantive decision is a matter of agency discretion; nevertheless, that discretion is accorded only after an agency has prepared NEPA's detailed statement of the

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8. 449 F.2d at 1111-12.

9. The Atomic Energy Commission indicated its balancing of NEPA's evaluative mandates in the preamble to the regulations at issue in *Calvert Cliffs'*:

The commission expressly recognizes the positive necessity for expediting the decision-making process and avoiding undue delays in order to provide adequate electric power on reasonable schedules while at the same time protecting the quality of the environment. It expects that its responsibilities under the National Environmental Policy Act of 1969, as set out below, . . . will be carried out in a manner consistent with this policy in the overall public interest.

35 Fed. Reg. 18,472 (1970).

10. *Calvert Cliffs'*, 449 F.2d at 1122-23.

11. *Id.* at 1117.

12. *Id.* at 1112.

13. *Id.* (emphasis in original).

14. *Id.* at 1113 (quoting 42 U.S.C. § 4332(2)(b) (1970)).

project's environmental cost, impacts, and available alternatives.<sup>15</sup> Judge Wright noted that mere preparation of such an environmental impact statement does not constitute compliance with NEPA. Rather, the detailed statement must be utilized in agency decision-making concerning the ultimate fate of the project under review.<sup>16</sup>

With these holdings, *Calvert Cliffs'* firmly established NEPA as a substantial force to be reckoned with by the business community. Private and public activities previously sanctioned by government agencies operating under narrow organic act constraints — the routing of highways,<sup>17</sup> construction of dams,<sup>18</sup> movement of military bases,<sup>19</sup> and large construction projects,<sup>20</sup> to name a few — were now subject to close environmental scrutiny. The government and the private sector were left to begin the struggle to define the rules to guide their conduct in the future.

*Calvert Cliffs'* led to an explosion of litigation,<sup>21</sup> the growth of a large and well-paid consulting and legal community devoted to ever more voluminous and boilerplate environmental impact statements,<sup>22</sup> long delays as cases wound their way through the courts,<sup>23</sup> and, often, injunctions which delayed projects for years. The business community suffered as our understanding of NEPA changed: before *Calvert Cliffs'* NEPA was a statute so vague as to be ineffectual; after *Calvert Cliffs'*, NEPA emerged as an environmental mandate with dramatic practical effect.

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15. *Id.* at 1114.

16. *Id.*

17. *See, e.g.,* Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1972) (involving the construction of a 26-mile highway through the Santa Fe National Forest), *cert. granted sub nom.*, 406 U.S. 944 (1974), *vacated and remanded*, 409 U.S. 1021 (1972).

18. *See, e.g.,* Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) (involving construction of a dam on the Cossatot River in Arkansas), *cert. denied*, 412 U.S. 931 (1973).

19. *See, e.g.,* Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976) (involving the Army's decision to close a military base and transfer personnel elsewhere), *cert. denied*, 429 U.S. 1061 (1977).

20. *See, e.g.,* Boston Water Front Residents Association v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (involving an urban renewal program requiring a \$30 million grant of federal funds).

21. *See*, text accompanying note 24, *infra*. Contrast the torrent of judicial decisions under NEPA to the dearth of litigation under the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1986). Both statutes speak — in similar terms — to nationwide policy. Yet judicial activism under NEPA led to profound changes in environmental law, while an absence of judicial activism under the Mining and Minerals Policy Act has left it an abstract statement of policy, and little more.

22. CEQ recognized this phenomenon and addressed it directly in its 1978 regulations, discussed *infra* in text accompanying note 52. In the regulations' statement of purpose, CEQ stated that "NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." 40 C.F.R. § 1500.1 (1988).

23. *See, e.g.,* Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989), discussed *infra*, note 28.

## III. THE JUDICIAL YEARS

The years which followed the *Calvert Cliffs*' decision were marked by continued uncertainty as to how NEPA was to be implemented. The businessman often found himself trapped in a judicial and administrative quagmire. As a result of *Calvert Cliffs*', projects were consistently challenged on the basis of failure to comply with NEPA. Further, although administrative agencies struggled to incorporate NEPA into their environmental review processes, the approaches taken by the various administrative agencies were often different and sometimes inconsistent.

This confusion is nowhere better reflected than in statistics concerning the number of NEPA-based lawsuits filed in the federal courts following *Calvert Cliffs*'. In the two-month period from December 1971 to January 1972, 15 NEPA lawsuits were filed.<sup>24</sup> That number rose to 30 for the two-month period from April to May 1972.<sup>25</sup> The following two-month period, June to July 1972, saw the number of NEPA-based lawsuits in the courts jump dramatically to 80.<sup>26</sup>

The resulting confusion surrounding NEPA compliance led to long delays in completion of projects. Such delays were sometimes due to the inefficiencies experienced by administrative agencies as they completed their environmental analyses as part of the planning process.<sup>27</sup> Delays more often resulted as NEPA challenges worked their way through the courts and, in many instances, were remanded to agencies for further action. Investments by the business community suffered as a result. For example, the Bureau of Land Management first proposed the sale of oil and gas leases in the Beaufort Sea north of Alaska to private drillers in 1974. Adverse effects on marine life by the sale were identified soon thereafter, and litigation under NEPA ensued. This litigation was not resolved, and oil drilling activities could not commence, until 1980.<sup>28</sup>

NEPA became an ideal tool with which to challenge commercial and industrial projects. In order to do so, however, environmental plaintiffs frequently called upon the courts to decide whether a proposed project had enough federal involvement to constitute a "major federal action" which significantly affects the human environment, the trigger for the environmental impact statement requirement.<sup>29</sup> The courts

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24. Liroff, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 NAT. RES. J. 315, 319 (1981).

25. *Id.*

26. *Id.*

27. COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL REPORT 635 (1975).

28. *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980). Another example of extreme delay resulting in the NEPA process involves the construction of the H-3 defense interstate highway on the Island of Oahu, Hawaii. Opponents of the highway initially filed a challenge to the adequacy of the EIS prepared for the project in federal district court in July, 1972. The litigation surrounding the highway has continued through the 1980s. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989).

29. 42 U.S.C. § 4332(C) (1982).

expansively determined when an environmental impact statement was required under NEPA. As that list grew, more and more business people were affected by the Act.

Among those projects for which the courts have found sufficient federal involvement for an EIS to be required are a Federal Housing Administration loan for the construction of a golf course and a park,<sup>30</sup> a Department of Housing and Urban Development decision to change the status of an urban renewal area from an industrial park project to a neighborhood development program,<sup>31</sup> a Department of Housing and Urban Development loan for the construction of a high-rise apartment building in Portland, Oregon,<sup>32</sup> Forest Service supervision of logging activities in national forest areas,<sup>33</sup> and a Forest Service acquisition of privately owned land in exchange for government land in and near Yellowstone National Park which would be used for recreational development.<sup>34</sup> Among the projects to which the EIS requirement does not apply for lack of sufficient federal involvement are Forest Service approval of exploratory mining activities entailing construction of a bridge, road repair, drilling, and storage of rock extracted from a site,<sup>35</sup> issuance of a permit from the Federal Power Commission for an addition to a liquid natural gas facility on a privately-owned parcel in the New Jersey meadowlands,<sup>36</sup> a Soil Conservation Service project to deepen the natural channel of the Big Creek Slough for a length of over 10 miles,<sup>37</sup> a Rural Electrification Administration loan for construction of power lines across 12 miles of residential woodlands, swamp, and farm land,<sup>38</sup> and the Department of the Interior's restrictions on motor vehicle travel in the Back Bay National Wildlife Refuge.<sup>39</sup>

The business person also faced a great deal of analytical uncertainty in the early years of judicial NEPA analysis. NEPA precedent was difficult to reconcile, to say the least, and solid direction was therefore hard to find. The case-by-case nature of judicial decision-making left bureaucrats and business persons to negotiate very uncertain terrain. For example, two federal district courts reached different conclusions as to whether NEPA applied to Agency inaction having environmental consequences. An Alaska district court issued an opinion that federal government acquiescence to a State program allowing the killing

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30. *Texas Comm. on Natural Resources v. United States*, 430 F.2d 1315 (5th Cir. 1970).

31. *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973).

32. *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Or. 1971).

33. *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974).

34. *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir. 1973).

35. *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377 (9th Cir. 1978).

36. *Transcontinental Gas Pipeline Co. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358 (3d Cir. 1972), *cert. denied*, 409 U.S. 1118 (1973).

37. *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974).

38. *Mowry v. Central Electric Power Cooperative*, 3 *Envtl. L. Rep.* 20,843 (*Envtl. L. Inst.*) (1973).

39. *Coupland v. Morton*, 5 *Envtl. L. Rep.* 20,504 (*Envtl. L. Inst.*) 1975), *aff'd per curiam*, 5 *Envtl. L. Rep.* 20,507 (*Envtl. L. Inst.*) (1975).



of wolves on federal lands in Alaska was not a major federal action significantly affecting the delicate forest environment; and a district court in the District of Columbia held just the opposite.<sup>40</sup> Similarly, the Court of Appeals for the Fourth Circuit held that a partially privately funded project to be carried out by private contractors which was underway at the time of NEPA's enactment would not have required an EIS had it achieved a sufficient degree of completion; the Court of Appeals for the Sixth Circuit held just the opposite for a water development project, the purpose of which was to stimulate economic growth in several Tennessee counties.<sup>41</sup>

Despite these uncertainties, this period of judicial activism certainly fostered great respect among the business community for NEPA's mandates. Government agencies began to accept their roles as executors of NEPA's commands. Agencies and the business community began to live with the Act, as environmental impact statements were written, staffs were built up, and bureaucracies accepted and accommodated significantly new environmental ground rules.<sup>42</sup>

By 1984, over 70 federal agencies had implemented their own NEPA procedures.<sup>43</sup> While this is persuasive evidence that NEPA was being adopted by the bureaucracy, predictability still suffered as procedures varied greatly from agency to agency.<sup>44</sup> Little or no coordination or uniformity existed among federal agencies with regard to environmental

40. In *State of Alaska v. Andrus*, 429 F. Supp. 958, 962 (D. Alaska 1977), the court held that Secretary of Interior's acquiescence to a state program of wolf hunting was not a "major federal action" that triggered NEPA requirements; *Contra* *Defenders of Wildlife v. Andrus*, 9 Env'tl. Rep. Cas. 2111, 2119 (BNA) (1977), in which the court held that Secretary of Interior's acquiescence to a state program of wolf hunting was a "major federal action" that necessitated compliance with NEPA. The issue was ultimately resolved by the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the Alaska District Court, holding that the Secretary of the Interior's acquiescence was not the type of conduct that required an environmental impact statement. *State of Alaska v. Andrus*, 591 F.2d 537, 540 (9th Cir. 1979).

41. *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972) (project achieving a substantial degree of completion as of NEPA's effective date should not be subject to the Act's requirements), *cert. denied sub nom. Fugate v. Arlington Coalition on Transp.*, 409 U.S. 1000 (1972); *contra* *Env'tl. Defense Fund, Inc. v. Tennessee Valley Authority*, 468 F.2d 1164, 1177 (6th Cir. 1972) (project must meet NEPA requirements if it takes steps that will result in a significant environmental impact, regardless of whether these steps really represent the final phases of an integrated operation).

42. An example of this phenomenon singled out for mention by CEQ occurred within the Forest Service. In 1971, the Forest Service incorporated NEPA mandates into its formal policy statements, provided detailed procedural guidelines for environmental impact statement preparation to its personnel, and eventually employed a substantial number of individuals to carry out the NEPA process. Council on Environmental Quality, *Fifth Annual Report*, 378-379 (1974).

43. Anderson, *supra* note 4, at 246.

44. For example, the Department of Housing and Urban Development enacted procedures whereby its regional offices were to prepare EISs only for highly controversial actions. In contrast, the Army Corps of Engineers issued guidelines indicating that, with very limited exceptions, all of its projects necessitated preparation of an EIS. R. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH* 96-97 (1976).

review. The courts continued to make rules concerning the NEPA process through case-by-case decisions. Though increasing numbers and complexity of individual agency guidelines helped settle the NEPA process, uncertainty remained.

Substantial uncertainty in the NEPA process also led to unfortunate excesses. By the middle of the 1970s, environmental impact statements were characterized by foolish extremes. EISs were released in multi-volume sets.<sup>45</sup> Boilerplate became the norm rather than the exception. Every aspect of a project was examined in excruciating and seemingly unnecessary detail: EISs seemed to become monuments to satisfying the judicial process rather than studies designed to uncover and discuss real environmental concerns.

Predictability for the business community received a major boost when the Council on Environmental Quality<sup>46</sup> published guidelines to clarify the NEPA process.<sup>47</sup> In 1971 and 1973, CEQ guidelines began to funnel disparate agency procedures into a more uniform approach.

Though they never attained the status of formal regulations, these early guidelines were of considerable importance in the evolution of NEPA. In an iterative process with the courts, CEQ attempted to address close questions under the Act: when, whether, and how an environmental impact statement should be prepared, who should write it, and the material it should contain. A respected commentator has noted that "the habits and standard procedures of the Environmental Impact Statement (EIS) process today owe their existence in large part to the [CEQ] guidelines."<sup>48</sup>

While these guidelines were of great help, they did not by themselves create the degree of predictability sought by the business community. Indeed, the CEQ guidelines met with differing degrees of judicial acceptance. In *Carolina Action v. Simon*, the CEQ guidelines were accorded considerable weight in a judicial opinion.<sup>49</sup> This disposition was directly contradicted in *Hiram Clarke Civic Club, Inc. v. Lynn*<sup>50</sup> and *Green County Planning Board v. FPC*,<sup>51</sup> in which the courts treated the CEQ guidelines as merely advisory, and took a different direction.

45. For example, the Bureau of Land Management issued a draft environmental impact statement concerning coal mining in Northwest Colorado that consisted of seven thick volumes. BUREAU OF LAND MANAGEMENT, DRAFT ENVIRONMENTAL IMPACT STATEMENT — NORTHWEST COLORADO COAL (1983).

46. CEQ was created by NEPA as an advisor to the President on environmental matters. 42 U.S.C. §§ 4321, 4344 (1982).

47. These guidelines were issued pursuant to Executive Order 11514, 35 Fed. Reg. 4247 (1970), issued March 5, 1970, requiring the CEQ to set forth guidelines that would assist agencies in preparing environmental impact statements.

48. W. RODGERS, ENVIRONMENTAL LAW 706 (1977).

49. 389 F. Supp. 1244, 1246 (M.D.N.C. 1975) (involving action to enjoin a construction project allegedly in violation of NEPA), *aff'd* 522 F.2d 295 (4th Cir. 1975).

50. 476 F.2d 421, 424 (5th Cir. 1973) (involving a challenge to a Department of Housing and Urban Development decision not to prepare an EIS for federal funding of a housing project).

51. 455 F.2d 412, 421 (2d Cir. 1972) (involving review of federal power commission orders regarding authorization of construction of high voltage transmission lines), *cert. denied*, 409 U.S. 849 (1973).

## IV. THE ADMINISTRATIVE YEARS

The predictability sought by the business community was forthcoming with the continued evolution of the NEPA process. The growing acceptance of the NEPA process which characterized the end of NEPA's first decade led in 1978 to the event of single greatest importance under the statute: CEQ promulgated a set of regulations<sup>52</sup> that required uniformity in the NEPA process.<sup>53</sup> Designed to replace the 1971 and 1973 guidelines, these regulations were intended to reduce paperwork, to reduce delays, and to produce better decisions taking environmental protection into account.<sup>54</sup>

CEQ's regulations are rules binding upon government agencies.<sup>55</sup> Unlike many others, the CEQ regulations are also direct, clear, and comprehensive, making them perhaps the best-drafted set of rules in the Code of Federal Regulations. They lay out with considerable precision requirements for potentially troublesome aspects of the NEPA process.<sup>56</sup>

The path government and the business community must follow to satisfy NEPA is dramatically clearer as a result of the CEQ regulations. The extent to which this clarity has increased is reflected in the extent to which NEPA litigation has decreased. The number of NEPA cases filed in the federal courts in 1974 numbered 189, an all-time high.<sup>57</sup> By 1981, two full years after the CEQ regulations had been promulgated, the number of NEPA cases filed dropped to 114.<sup>58</sup> By 1987, the most recent year for which litigation data is available, the number of cases based upon NEPA claims had dropped to 80.<sup>59</sup> Compliance with NEPA became almost routine.

## V. NEPA TODAY

The NEPA process for the most part no longer suffers from the ambiguity which characterized its early history. It is now an understood and accepted part of the administrative process, as government agencies routinely write and consider environmental assessments, findings of no significant impact, and environmental impact statements.

52. 40 C.F.R. §§ 1500-17 (1988).

53. These regulations were unusual in that they were promulgated pursuant to an executive order (Executive Order 11991, May 24, 1977) rather than under authority of an Act of Congress. 40 C.F.R. § 1500 (1978). The United States Supreme Court has ruled that the CEQ regulations are entitled to substantial deference. *Sierra Club v. Andrus*, 442 U.S. 347, 358 (1979).

54. 40 C.F.R. § 1500.1 (1988).

55. See *supra* note 53.

56. For example, how an environmental impact statement should be presented is no longer in question, as the regulations specifically set forth a recommended format, writing style, and length for the document. 40 C.F.R. § 1502 (1978).

57. COUNCIL ON ENVIRONMENTAL QUALITY, EIGHTEENTH AND NINETEENTH ANNUAL REPORT, 210 (1988) (two annual reports are combined in one volume).

58. *Id.*

59. *Id.*

The heightened skill with which federal agencies engage in the NEPA process has created much greater predictability for the business person, and, for the normal project, much greater certainty.

No statutory scheme, including that of NEPA, works perfectly in all situations, however, or stands up in the face of overwhelming controversy. Despite the efforts of so many to eliminate the shortcomings of the NEPA process and the unwelcome surprises its early implementation created, when controversy arises the unpredictability of NEPA reappears even today.

The statute certainly still can be used as an instrument of delay and diversion. When a major federal project is highly controversial, it is the norm rather than the exception to see NEPA at the heart of the controversy. Recent specific instances include a controversy over the northern spotted owl in Oregon and the Two Forks Dam and Reservoir in Colorado. Each are discussed briefly below.

The northern spotted owl controversy involves the harvesting of timber in western Oregon.<sup>60</sup> Environmentalists claim that the habitat of the owls will be destroyed if the logging of trees is allowed to continue. This logging, environmentalists argue, will ultimately lead to the extinction of the species. This typifies the usual case under NEPA. The owl is the foil while the logging is the target.

This controversy has landed in court under NEPA as plaintiffs claim the government's environmental impact statement failed adequately to consider the effects of logging activities on wildlife. A myriad of injunctions and court orders have ensued, alternately allowing and disallowing timber logging in the area in question.<sup>61</sup> The situation is a nightmare for the business community, as investments are endangered by the on again, off again nature of logging projects.

The Two Forks Dam and Reservoir is a project designed to address the water needs of the Denver metropolitan area well into the next century. In order to obtain the necessary government approval for construction of the project, the Denver Water Board submitted an application for a permit under Section 404 of the Clean Water Act.<sup>62</sup> An environmental impact statement was completed by the United States Army Corps of Engineers in cooperation with the United States Forest Service and the Bureau of Land Management in 1987.<sup>63</sup> The purpose of the EIS process, as with all such statements, was to determine the impacts of the project and to evaluate other alternatives. The EIS identified the Two Forks project as having the most environmental impacts

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60. *Portland Audubon Society v. Lujan*, 884 F.2d 1233, 1234 (9th Cir. 1989).

61. *Id.* at 1236-37.

62. 33 U.S.C. § 1344 (1972). See TWO FORKS TASK FORCE, TWO FORKS - PERMIT CONDITIONS, 3 (1989). The Two Forks Task Force is a panel consisting of representatives of cities, counties, and water and sanitation districts, proponents of the Two Forks Dam and Reservoir Project.

63. U.S. ARMY CORPS OF ENGINEERS, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR METROPOLITAN DENVER WATER SUPPLY (1988).

of the various alternatives examined.<sup>64</sup> Nonetheless, the water providers believed that the project should be built and proceeded to push for its construction.

Largely based upon findings in the environmental impact statement, opponents of the Two Forks project assert that it will have a devastating impact on wildlife downstream.<sup>65</sup> They argue that the Army Corps of Engineers is biased in favor of construction of the project and that the economic analysis in the environmental impact statement therefore did not present an accurate picture of the effects of the project.<sup>66</sup> Drawn out review of this situation by the Environmental Protection Agency (under wetlands authorities) has resulted in a recommendation that an Army Corps of Engineers Section 404 permit for the project not be issued.<sup>67</sup>

When viewing the Two Forks NEPA review from the outside, one must question the efficacy of the process. The EIS did in fact function as intended, and identified the impacts associated with the various alternatives. Yet the NEPA statement in this matter has already cost in excess of \$38 million.<sup>68</sup> One must question whether such an expense is ever justified for an environmental impact statement.

## VI. CONCLUSION

In hindsight stretching over 20 years, the evolution of NEPA has been a mixed blessing from the business perspective. In general, an ordinary "major federal action significantly affecting the environment" does not trouble the business community, as government has learned to comply with NEPA's rules and businessmen are able to predict with some certainty the outcome of the administrative review process. Yet even 20 years after the passage of the statute, substantial controversies continue to suffer the effects of its unpredictability.

The business community has learned, for the most part, to live in harmony with NEPA. This accommodation has largely been a result of internalization of the process within government agencies. Without doubt, the statute has succeeded.

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64. *Id.* at Vol. I, pp. 1-15 — 1-41.

65. The Denver Post, Mar. 25, 1989, at 13A.

66. The Denver Post, Apr. 26, 1989, at 3B.

67. The Denver Post, Aug. 30, 1989, at 1A.

68. Denver Water Department, Two Forks: The Facts (1987).