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NEPA - The Next Twenty Years

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INTRODUCTION

It is undoubtedly a fool's errand to predict how the National Environmental Policy Act (NEPA) might interact, legally and politically, with the development of environmental policy during the next 20 years. To understand the folly of such an exercise, one need only imagine undertaking a similar assignment twenty years ago, just after Congress passed, and President Richard Nixon signed, what has become our most pervasive federal environmental statute. Who could have, or would have, foreseen the cottage industry that has grown up around environmental impact statement preparation, the evolution of agency-wide regulations through the Council on Environmental Quality, or the vast body of environmental common law that the federal courts have developed in interpreting NEPA?

Having thus established my credentials for offering a view of how NEPA might evolve during the next two decades, the only serious way that I can approach this project is to view the future course of NEPA not as someone detached from this voyage, but rather as an advocate for stronger environmental protection and better environmental decision-making within the federal bureaucratic establishment. The legal meaning of NEPA will certainly change over the next twenty years; but it should, and indeed must, change in ways that both promote and force federal actions that protect and enhance the country's environment.

While the twentieth anniversary of NEPA's passage is an appropriate point at which to take stock of NEPA's accomplishments and to measure its failures, two recent Supreme Court cases dealing with NEPA give added impetus to undertaking such an assessment now. In *Marsh v. Oregon Natural Resources Council*[1] and especially *Robertson v. Methow Valley Citizens Council*,[2] the Court put to rest, at least

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1. 109 S. Ct. 1851 (1989).
2. 109 S. Ct. 1835 (1989).

least for the foreseeable future, any hope that the judiciary might force substantive environmental responsibilities on federal agencies. While the holdings in *Marsh* and *Methow Valley* were fully consistent with earlier Supreme Court NEPA decisions,[3] both cases gave the Court an opportunity to rethink its application of NEPA against factual backdrops that argued strongly for judicial intervention. Given past precedent, however, the fact that the Court continued to insist that "NEPA itself does not mandate particular results, but simply prescribes the necessary process"[4] should surprise no one.

But the Court's decisions do perhaps indicate that NEPA has reached an important divide. Absent new direction from Congress, the continuing admonitions from the Supreme Court that NEPA is ultimately a procedural statute will eventually, if they have not already, sap the statute of much of its vitality as a vehicle for better protection of the human environment. Alternatively, if NEPA is to attain its full potential for protecting the environment, the unmistakable message from the Supreme Court is that the statute must be changed. The future, it would seem, holds two clear choices.

II. WHERE NEPA HAS BEEN

While the public promise of the National Environmental Policy Act has always been that its proper implementation will protect the nation's environment, the reality has always been otherwise. From the very outset of NEPA's enactment, the federal courts have recognized that NEPA is a procedural statute, the main purpose of which is to integrate environmental considerations into the other decision-making criteria used by federal agencies. Better environmental quality is but a byproduct of this process.

Judge Skelly Wright's 1971 opinion in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission* is one of the earliest judicial interpretations of NEPA.[5] It is still cited by environmental litigants, the courts and the law schools for its careful articulation of NEPA's broad environmental purposes.[6] Often quoted are such forceful statements as: "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department";[7] and "[t]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action."[8]

Despite the pronouncements found in *Calvert Cliffs'* about the long reach and overriding intent of NEPA, the court noted the limited mech-

3. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).
4. *Methow Valley,* 109 S. Ct. at 1846.
5. 449 F.2d 1109 (D.C. Cir. 1971).
6. *See, e.g.,* J. BATTLE, ENVIRONMENTAL DECISIONMAKING AND NEPA 115-22 (1986).
7. *Calvert Cliffs',* 449 F.2d at 1112.
8. *Id.* at 1122.

anism contained in the law for realizing the goals of the statute. Judge Wright wrote:

> We conclude, then, that section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.[9]

There is little that separates this observation by the venerated author of one of the foremost NEPA opinions from the recently offered dicta of Justice Stevens in *Methow Valley*: "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[10]

While twenty years and hundreds of NEPA opinions separate Judge Wright from Justice Stevens, both men concluded that Congress never intended to tip the decision-making balance in favor of the environment, but only to better integrate environmental considerations into the decision-making process. Wright noted that "Congress did not establish environmental protection as an exclusive goal; rather it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."[11] Stevens in turn relied on statements from Senators Jackson and Muskie to reinforce the view that while NEPA forcefully articulated a national environmental policy, agency implementation of this policy would come solely through the careful consideration of environmental values.[12]

The continuing emphasis on achieving NEPA's policy goals through a rigorous procedural process has led to a number of results. First, most federal agencies do give greater consideration to environmental values now than they did twenty years ago. The combination of the law itself, the ongoing vigilance of environmental plaintiffs, and the insistence of the federal courts on a rigorous application of NEPA's procedures has led to the achievement of at least this aspect of NEPA's purpose.

Second, when citizens, environmental lawyers and the federal courts have confronted proposed federal actions with serious environmental consequences, they have, despite their inability to stop such projects, extracted from federal agencies the full measure of compliance with NEPA's procedural duties. The environmental impact statements prepared on controversial or destructive projects have been carefully scrutinized and often rejected for their failures to adequately consider

9. *Id.* at 1115.
10. 109 S.Ct. at 1846.
11. *Calvert Cliffs'*, 449 F.2d at 1112.
12. *Methow Valley*, 109 S.Ct. at 1846.

such disparate subjects as cumulative environmental impacts,[13] worst case scenarios,[14] or an adequate range of project alternatives and newly available information.[15] Even where lawsuits over the adequacy of EISs have been unsuccessful, the sheer volume of litigation has served as a constant reminder of NEPA's presence to the federal bureaucracy.[16] Similarly, agency declarations that their actions would not significantly impact the environment have also been carefully reviewed and regularly challenged, both successfully and unsuccessfully, all across the county.[17]

Finally the ongoing inquisition into agency NEPA procedures has resulted in the production of ever more elaborate NEPA documents and ever more emphasis on process, as the policy goals of the statute go unrealized. While federal agencies give greater attention to identifying the environmental effects of their projects through the EIS process, this "action forcing"[18] component of NEPA has not achieved the promise of consistently sound environmental decisionmaking. Federal agencies again and again provide documentation of significant environmental impacts while choosing to accept such impacts in the implementation of all manner of projects and actions.

Methow Valley illustrated this salient reality. Despite Justice Stevens' hope that the combination of the "strong precatory language of section 101 of the Act and the requirement that agencies prepare detailed impact statements" would "inevitably bring pressure to bear on agencies to 'respond to the needs of environmental quality' ",[19] the Forest Service issued a decision authorizing the development of a major ski area in a rural mountain valley in north central Washington. Predicted impacts from this development included a substantial reduction of the area's 30,000 head mule deer herd and a degradation of air quality violative of state air quality standards.[20] Despite "the pressure" brought to bear by these disclosures, the Forest Service approved the project while the mitigation of these negative impacts remained uncertain.[21] The Supreme Court held that the EIS prepared on the project adequately disclosed these impacts and that the Forest Service had the discretion to move forward with the project even in the absence of a finalized mitigation plan.

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13. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

14. Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983).

15. Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980).

16. According to Carlson, *NEPA and the Conservation of Biological Diversity,* 18 ENVTL. L. 15, 35 n.109 (1986), no less than 839 NEPA challenges were filed in the federal courts in the years 1977, 1979, 1980, 1981, 1982, 1983 and 1984. The courts found either EAs or EISs inadequate in 381 of these cases. *Id.*

17. *See, e.g.,* Foundation for N. Am. Sheep v. United States Dep't of Agric., 681 F.2d 1172 (9th Cir. 1982); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

18. 115 Cong. Rec. 40,416 (1969) (remarks of Senator Jackson); *see also* S. Rep. No. 296, 91st Cong., 1st Sess. (1969).

19. *Methow Valley,* 109 S. Ct. at 1845 (quoting from 115 Cong. Rec. 40,425 (1969) (remarks of Sen. Muskie)).

20. *Methow Valley,* 109 S. Ct. at 1841.

21. *Id.* at 1842.

The lesson of *Methow Valley* is not that Supreme Court interpreted NEPA in a manner consistent with its earlier precedent, but that the Forest Service clearly failed to meet the policy goals of NEPA. It can hardly be argued that the Forest Service used "all practicable means" to act as a "trustee of the environment" or to "maintain, wherever possible, an environment which supports diversity and [a] variety of individual choice."[22] While the environmental wisdom of approving the ski area itself can certainly be debated, approving it prior to implementing adequate mitigation measures cannot. Under other statutes and regulations, the Forest Service had the discretion to withhold issuance of the special use permit for the project. If the goals of NEPA were to be fully achieved, the Forest Service, at a minimum, was obligated to exercise this discretion in a manner that made full mitigation a reality rather than a subject of speculation.

Other recent cases also provide evidence that the policy goals of NEPA are far from being achieved. While many NEPA cases present difficult facts and tough decisions, others involve a relatively clear choice between environmental protection and marginally necessary economic development. All too often, federal decisionmakers from a whole spectrum of federal agencies spurn NEPA's aims in favor of traditional courses of action. In Maine, for example, the Corps of Engineers and the Federal Highway Administration approved a new shipping facility on an undeveloped island even though there was no need for the facility until after the turn of the century.[23] In Oregon, the Bureau of Land Management insisted on additional old growth timber harvest even while the northern spotted owl, a species dependent on old growth habitat, had been proposed for listing under the Endangered Species Act.[24] In Mississippi, the Corps of Engineers continues to destroy bottomland hardwood forests and wetlands through its channelization work even though the country has identified a national priority of protection of such areas.[25] And the Federal Energy Regulatory Commission is still approving hydroelectric projects without adequate consideration of environmental values.[26] The list could go on.

III. WHERE NEPA MIGHT GO

As we look to the future it seems indisputable that, for better or worse, NEPA will continue to be the chief tool of citizens seeking to protect the environment.[27] While statutes such as the Clean Water Act,[28]

22. 42 U.S.C. §§ 4331(b)(1), (4) (1982).

23. Sierra Club v. Marsh, 714 F. Supp. 539 (D. Me. 1989); *see also* Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989).

24. Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456 (D. Or. 1989).

25. Mississippi, *ex. rel.* Moore v. Marsh, 710 F. Supp. 1488 (S.D. Miss. 1989).

26. LaFlamme v. Federal Energy Regulatory Comm., 842 F.2d. 1063 (9th Cir. 1988).

27. While NEPA has primarily been the tool of environmental groups and citizens threatened with unacceptable development, development interests have used and will continue to use NEPA and the courts to frustrate certain federal actions. *See* American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983).

28. 33 U.S.C. § 1251 (1982).

the Endangered Species Act[29] and the Federal Strip Mine Act[30] surely provide more by way of substantive environmental protection, NEPA, for all its limitations, is the only federal statute that reaches across the entire range of federal agencies and activities and touches almost every federal project that threatens the environment. Given this reach, both local activists and national environmental organizations will continue to allege violations of NEPA in their efforts to limit, change and control federal projects with unacceptable impacts.

Since environmentalists can only turn to NEPA in many instances, the disputes between federal agencies and their critics over what constitutes compliance with the law will undoubtedly continue. Agencies will prepare ever more elaborate environmental impact statements and environmental assessments in an effort to satisfy the close scrutiny of potential plaintiffs and the courts, while conservation organizations can be expected to exploit every facet of NEPA. Each side will try to capitalize on any legal breakthroughs that occur. In this context, it will be interesting to observe the ingenuity of both lawyers and the courts in trying to further expand NEPA's common law.

It is clear that some areas of NEPA will be more heavily litigated than others in the coming years. Suits over the adequacy of environmental impact statements, difficult enough to sustain in the past, will be even tougher to win in the future as result of the Supreme Court's holdings in *Methow Valley* and *Marsh.* The long odds against a successful EIS challenge will likely lead to fewer such cases being filed, although there will certainly be instances where plaintiffs feel compelled to press forward despite daunting case precedent. The NEPA lawsuits that are filed will no doubt focus on those issues of adequacy that have proved fruitful in the past: whether the potential for cumulative impacts was properly evaluated,[31] whether the EIS was readable and understandable,[32] or whether the environmental document was properly tied to other agency NEPA reviews.

It also seems that there is room for the development of additional precedent in the areas of mitigation and worst case analysis. While the Supreme Court held that binding mitigation was not required by NEPA in *Methow Valley,* the Court went to considerable lengths to stress that a thorough discussion of mitigation was a necessary part of any environmental review.[33] Justice Brennan highlighted this proposition in his concurring opinion.[34] The exact dimensions of this requirement have still not been fully explored by either environmental litigants or the courts. Similarly, while the Supreme Court in *Methow Val-*

29. 16 U.S.C. § 1531 (1988).
30. 30 U.S.C. § 1201 (1982 & Supp. V. 1987).
31. *See* Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); Save the Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988).
32. Oregon Envt'l Council v. Kunzman, 614 F. Supp. 657 (D. Or. 1985).
33. *Methow Valley,* 109 S. Ct. at 1847.
34. *Id.* at 1851 (Brennan, J., concurring).

ley refused to require the Forest Service to prepare a "worst case analysis" on the impacts of the ski area, the Court endorsed new Council on Environmental Quality regulations that require federal agencies to evaluate the potential for environmental harm from future events that are "reasonably foreseeable."[35] Given the human-caused disasters that the experts said would never happen, such as the Exxon Valdez oil spill or the Three Mile Island nuclear reactor episode, there is obviously a great deal of room for argument about what events are "reasonably foreseeable." Federal agencies will limit their analysis of such events at their peril.

It is also likely that EISs will be challenged for failing to adequately evaluate a proposed project's impacts which relate to emerging environmental concerns. Future EISs will surely be called upon to consider how a timber sale might impact biological diversity[36] or how a new power plant will contribute to acid rain. Certainly programmatic documents, such as the Forest Service's 1990 Resource Planning Act (RPA) assessment must consider how the agency's timber program on a nationwide basis is contributing to an international problem such as global warming. Since plaintiffs' attorneys and the environmentally concerned public generally move much faster than the federal bureaucracy, it can almost be assumed that such issues will be brought into the courts before the agencies are prepared to honestly deal with them.

The failure of federal agencies to prepare EISs and the adequacy of environmental assessments and findings of no significant impact will certainly remain the most fruitful arena of NEPA litigation for plaintiffs. That federal agencies even attempt to use EAs for many controversial projects is a source of wonderment to many environmental litigators, but despite continued whippings in court, the federal bureaucracy shows little sign of abandoning this procedural shortcut. Such recent cases as *Save the Yaak Committee v. Block*[37] and *State of Mississippi Ex. Rel. Moore v. Marsh*[38] demonstrate the ongoing willingness of the federal courts to reject EAs and to require EISs for federal actions that "may" significantly affect the environment.[39]

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35. *Id.* at 1849. *See also,* 40 C.F.R. § 1502.22(b) (1988).

36. For a an excellent discussion of how NEPA can be used to evaluate biological diversity, see Carlson, *NEPA and the Conservation of Biological Diversity,* 19 ENVTL. L. 15 (1988).

37. 840 F.2d 714 (9th Cir. 1988).

38. 710 F. Supp. 1488 (S.D. Miss. 1989).

39. In the Ninth Circuit, the judicial standard for determining whether an EIS is required is whether:

> [t]he plaintiff has alleged facts which, if true, show that the proposed project *may* signficiantly degrade some human environmental factor. (citations omitted) A determination that significant effects on the human environment *will in fact occur* is not essential. (citations omitted). If substantial questions are raised whether a project may have a significant effect on the human environment, an EIS *must* be prepared.

Foundation for N. Am. Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1177-78 (9th Cir. 1982) (emphasis in original).

While all manner of NEPA claims will continue to be filed in the future, both conservation advocates and federal officials recognize the fundamental dichotomy between the goals of any NEPA lawsuit and the relief that the courts can grant. Suits are filed to prevent environmental harm from occurring, but the courts can only order more studies and better documentation of environmental impacts. Despite the limited benefits to anyone of such relief, and after *Methow Valley* and *Marsh* the limited possibilities for achieving it, bad environmental decisions will force more NEPA lawsuits which, in turn, will force federal agencies into ever more elaborate efforts at procedural compliance with the law.

Given this rather bleak future, the time has clearly come to change the basic premise of NEPA. In 1969, as the country began to more seriously examine its environmental problems, it was probably appropriate to enact a procedural statute that only required the consideration of environmental values. But in 1989, a host of environmental problems remain unsolved. As we face the continuing destruction of environmental resources and identify new concerns that were unimagined just twenty years ago, it is time to amend NEPA to provide for substantive environmental protections. If the country is to progress towards a better environmental future, federal agencies cannot be allowed to continue approving actions that result in environmental harm.

At least three possible ways of amending NEPA suggest themselves. While statutory change cannot totally prevent the federal establishment from moving forward with ill-advised projects, the selection of any one of the following alternatives would be an important step forward in securing better environmental protection.

The constant admonitions from the federal courts that NEPA is a procedural and not a substantive statute indicate that perhaps the most obvious way to achieve NEPA's goals would be to develop a substantive component that would amend section 102(C)[40] to require the development of a project alternative that maximizes environmental protection and enhances environmental values. In addition, the amendment would require the selection of this alternative absent a record of decision which justifies another course of action.

By amending NEPA to create a rebuttable presumption that federal agencies will develop and follow an environmentally preferred course of action, there would still be discretion as to the exact dimensions of this course, and the ability to depart from it should circumstances warrant. At the same time, it would be far more difficult for agencies to justify decisions which negatively impact the environment, and it would be far easier for both the public and the courts to insist on the full measure of environmental protection.

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40. 42 U.S.C. § 4332(C) (1982).

A second, and less extreme way to amend NEPA would be to restructure section 102(C)(ii)[41] to require the agency to identify measures necessary to mitigate and compensate for unavoidable adverse environmental effects and then to mandate that such measures be included in the final project design. This change in the law would allow federal agencies more flexibility in their chosen course of action but would force better internalization of environmental costs into project design. The concepts of mitigation and compensation are already familiar to many federal agencies involved in private and public water projects, and have worked particularly well in the Pacific Northwest since the enactment of the Pacific Northwest Electric Power Planning and Conservation Act.[42] Finally, under such a proposal, the Supreme Court could no longer hold that federal agencies are under no duty to "mitigate the adverse effects of major federal actions."[43]

A final possibility for amending NEPA would be to develop a binding consultation process between the agency proposing the action and an agency with environmental expertise such as the Environmental Protection Agency or the U.S. Fish and Wildlife Service. While experience with the consultation provisions of the Endangered Species Act[44] teaches that consulting agencies are extremely reluctant to directly challenge the "action" agency, the process of consultation often results in significant and beneficial modifications of project design.[45]

While the limitations of NEPA have long been recognized by those familiar with the law, there have been no serious efforts to amend the statute since its enactment 20 years ago. Instead Congress and the environmental community have focused on a small host of other environmental initiatives ranging from Superfund,[46] to forest management,[47] to clean water,[48] and beyond. In creating a comprehensive body of environmental law, revisiting NEPA has perhaps not been an important legislative priority.

But at least some of the inertia in the NEPA field comes from a sense that there is more to be lost than gained in amending the statute because forces opposed to sound environmental policies and sound environmental decisions would outmaneuver the proponents. There are at least two responses to this view. First, neither Congress nor the American people have shown any inclination to retreat on issues of environmental policy over the last two decades. Many statutes have been enacted or reauthorized during this period, and while the odd provision may have been weakened, the overall record shows a steady

41. *Id.* § 4332 (C)(ii).
42. 16 U.S.C. § 837.
43. *Methow Valley,* 109 U.S. at 1847.
44. 16 U.S.C. § 1536(a)(2) (1988).
45. *See, e.g.,* Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985).
46. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982).
47. The National Forest Management Act of 1976, 16 U.S.C. §§ 1601-1614 (1988).
48. Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (1982).

strengthening of our environmental laws, often by overwhelming congressional margins. For example, Congress reauthorized the Endangered Species Act by a near unanimous margin in 1988, and the Clean Water Act sailed through both House and Senate at the beginning of the 100th Congress. The apparent lesson is not that it won't be difficult to strengthen NEPA in a manner suggested above, but that there seems little likelihood that Congress will weaken or eliminate the principal elements of the law.

Second, the dicta from the courts and the remedies available under NEPA, indicate that there is little to be gained on behalf of the environment by simply holding the line with the present law. The principal goal of the environmental movement cannot be more detailed, more complex impact statements, which are the only obvious results of NEPA litigation. The goal must be to build on the accomplishments and experiences of the past twenty years and to recognize that while NEPA is a vitally important statute in its present format, and while it has forced the federal establishment to take into account environmental values, it must change to meet the environmental needs of the future. This change must encompass, in some fashion, substantive environmental protection.[49]

49. In a move that caught most conservationists by surprise, the U.S. House of Representatives quietly approved a series of amendments to NEPA during the fall of 1989. Under H.R. 1113, NEPA's EIS provisions would be changed in two important ways. First, federal agencies would be required to develop alternatives to the proposed action which would achieve similar public purposes but which would avoid adverse environmental impacts. Second, agencies would be required to implement mitigation and monitoring measures identified through the EIS process. At this writing, no similar legislation has been introduced in the U.S. Senate.