



Environmental Planning National Environmental Policy Act (NEPA)



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Env Movement Prior to NEPA

- Primarily a postindustrial movement led by the U.S. and Europe.
- Started 100 years before NEPA's enactment.



1800's

- Concern for the bison, massacred to near extinction.
- 1864 publication of *Man and Nature* by George Perkin Marsh, who wrote about environmental degradation and promoted natural healing of damaged environments.



1800's

- 1872 - enactment of law establishing Yellowstone National park the worlds first National Park, setting a precedent for the preservation of federal lands.
- 1873 – Congress expanded National Parks and Forests and the U.S. Soil Survey.
- 1891 – John Muir founded the Sierra Club, one of the seminal organizations of the environmental movement, which remains today.



1900's

- Theodore Roosevelt set aside 125 million acres of federal lands for protection during his term of office (1901-1909).
- To prevent vandalism in the SW, Congress passed the Antiquities Act in 1906.
- But,,,,, the Environmental debate began



Environmental Debate.

- President Roosevelt did much for preservation but some of his federal actions were not free from controversy.
- John Muir (Sierra Club) claimed policies served to stimulate economic uses of lands should be protected.
- Criticism stimulated a debate that continues today.



1930's

- SW experienced drought, other agricultural challenges with depression.
- President Franklin Roosevelt created the Soil Conservation Service and the Agricultural Stabilization and Conservation Administration to promote:
 - sustainable land practices
 - Other beneficial land management practices.



1940's & 50's

- U.S. focused on winning World War II and the reconstruction of shattered European economics in the post-war era.
- The environmental movement had yet to move beyond land management and species conservation and deal with pollution and the environmental impacts of an industrial society.
- ** 1955 1st version of the Clean Air Act (CAA)



1960's

- American public and Congress becoming increasingly concerned over environmental degradation.
 - Santa Barbara oil spill.
 - Love Canal incident.
 - Lake Erie pronounced “dead.”
 - Smog alerts in major cities.
 - Expanding Nuclear power industry
 - Cuyahoga River in Cleveland caught on fire.
 - Environmental movement aggressively promoted awareness.



Congressional Philosophy

- More moderate supporters, RECOGNIZING that powerful BUSINESS INTERESTS would oppose (successfully?) environmental restrictions on the private sector.
- Urged a statute that would focus EXCLUSIVELY ON the actions of the FEDERAL GOVERNMENT.



Why the Federal Government?

- Would demonstrate the seriousness with which Congress viewed environmental protection.
- Set a precedent for subsequent legislation that could effect the private sector.
- The single largest entity in the U.S.



Following NEPA's enactment.

- Congress created the Environmental Protection Agency (EPA) in 1970.
- Earth Day was first celebrated April 22nd, 1970.
- President Nixon granted the CEQ authority to issue NEPA interim guidelines in 1971 revised in 1973.



Differences NEPA & other acts

- NEPA does not contain the detailed technical & substantive requirements of other major environmental legislation like the CAA and the CWA. (numeric standards *****)
- NEPA differs from other environmental laws by at least three different ways.....



Differences NEPA & other acts.

- Most laws regulate within narrow scope. (RCRA storage, processing & disposal of hazardous waste)
- Most statutes and regulations are concerned with controlling, regulating, or limiting certain specific actions. (NEPA does not control provides a framework for planning future actions)
- Most laws clearly define mechanisms for implementation.



NEPA's mandate.

- 3 sections. (about 5 pages)
 - Statement of purpose
 - Title I – declares a national environmental policy and sets forth procedural requirements that must be followed in pursuing proposed actions.
 - Title II – creates the Council of Environmental Quality.



Statement of Purpose

- National policy encourages productive and enjoyable harmony between man and his environment; promote efforts that prevent eliminate damage to the environment,,,,,



Title I.

- Heart of NEPA, national policy and goals and creates specific responsibilities for federal agencies.
- Section 101- defines nations environmental policy; “Spirit of the Law;” uses best practical means financial or technical. (BAT)
- Section 102 – specifies procedural requirements “Letter of the Law.”



Title II.

- Establishes the CEQ; however no enforcements policy.
 - Resolve interagency disagreements.
 - Gathering information about the quality of the Environment.
 - Prepare the annual Environmental Quality Report
 - Recommendations in respect to policy and legislation.
 - 3 member council (1 is chairman; reports to the President)



De Minimis Level – Not recognized

- - It is not uncommon to hear that NEPA is only required for actions resulting in significant impacts.
- Unlike many other environmental laws, NEPA does NOT recognize a de minimis level. (A level that NEPA does not apply)
- All federally actions are potentially subject to NEPA.

Grandfathering – Not Recognized

- NEPA does not recognize “grandfathering” in the traditional sense.
- Facilities, operations, and activities that existed prior to the enactment of NEPA are still subject to it’s requirements.
- However, in practice previous activities are not considered unless there is a new action or change is existing facility.
- What’s a change?



Misconceptions

- Compliance with other environmental laws does NOT absolve an agencies responsibility to also comply with NEPA.
- “Calvert Cliffs” (meeting water discharge limitations didn’t excuse from looking at alternatives)





Implementation

- Responsibility for implementing NEPA rests with the individual federal agency.
- In a “professional and ethical” manner
- Agency determines the scope and details of the issue.



Implementation

- Agency determines the methodology and models.
- Typically the burden of proof in showing the agency did not adequately perform NEPA rests with the challenging agency.
- Case law “normally” in favor of the sponsor as long as it’s an honest disagreement.



When must NEPA begin?

- Preparation must be started so that it “can be completed in time for the final statement to be included in any recommendation or report on the proposal.”
- A PROPOSAL is when.....
 - An agency has a goal.
 - The agency is preparing to make a decision on one of more alternatives to accomplish the goal.
 - The effects can be meaningfully evaluated.



Three levels of NEPA Compliance.

- Categorical Exclusion (CATX)

- Environmental Assessment (EA)

- Environmental Impact Statement (EIS)
 - **** sliding scale
 - **** rule of reason
 - **** 1% of construction cost



Categorical Exclusion (CATX)

- Most effective way to streamline NEPA compliance.
- NEPA review process has been satisfied
- Action which does not individually or cumulatively have a significant effect on the environment.



Environmental Assessment (EA)

- Concise public document for which a federal agency is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a Finding of No Significant Impact (FONSI)



Environmental Impact Statement (EIS)

- Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analysis.



Flexibility in NEPA decisions.

- Principle advantage is it allows an array of pertinent factors be considered.
 - Cost
 - Schedules
 - Safety
 - Political factors
 - Public sentiment
 - Agency Mission directives (Title X)



Early and Open Process

- Environmental factors are publicly considered
- In plain English
- Reasonable mans standard
- Scope of the project



Writing documents in “Plain English”

- Analysis must never lose sight of the potential audience.
- Scientist, Engineers, regulators, lawyers, judges and citizens.
- Employ writers of clear prose.
- ie “can cause maternal toxicity” or “can kill babies”



Reasonable Man Standard

- Roots in old English common law
- Law was comprehensible if it could be understood by the “common man”
- A person possessing a reasonable level of intelligence and ability to comprehend such laws.



Public Involvement

- Copies of statements, comments, and views of the appropriate federal, state, and local agencies.... Shall be made available to the President, the CEQ and the public.
- “Sunshine Act” all aspects of decision making are open to public review.



Scoping

- NEPA must have diligent efforts to involve the public.
- Agency must actively solicit public attention so as to gain participation (document)
- City hall, public forums for scoping meetings.



Integrating Environmental Design

- View and understand architecture and urban planning.
- Have a “Master Plan” of construction.



Receptors & Resources

- Air Quality
- Water Bodies
- Ambient noise levels
- Species
- Cultural Resources
- Almost unlimited.



Consequences & Significance

- Analysis is to interpret and convey to the decision maker and the public what a disturbance to a given resource actually means.
- An agency can mitigate a significant item non significant, or monitor for actual impact.
(groundwater)



Proposed Action & Alternatives

- Actions & proposal
- Typically 3 types of alternatives
 - No action alternative
 - Other reasonable courses of action
 - Mitigation measures (not part of proposed action)



Environmental Impact (impact=effects)

- Direct – caused by the action; occur same time and place.
- Indirect – caused by the action; later in time or farther in distance; reasonably foreseeable.
- Cumulative Impacts – incremental impact on the environment; from past, present and and reasonably foreseeable future, regardless of federal or non federal.



Environmental Impacts

- Significance
- Monitor
- Mitigate



Process

■ NEPA (3 steps)

- Predict
- Mitigate
- Implement

■ Adaptive Management

- Predict
- Mitigate
- Implement
- Monitor
- Adapt



Interim Actions

- Large and complex EIS's can take 2+ years.
- NEPA has a provision for “interim actions” which will allow lower tier actions to take place (chapter 10)



Actions not subject to NEPA

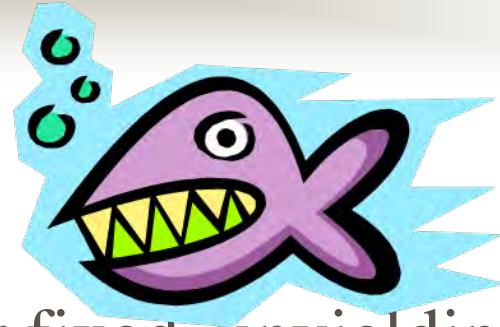
- Emergency Situations
- Explicit Statutory Exemptions
- Implicit Statutory Conflict Exemptions
- Functional Equivalency Exemptions
- Presidential and Executive Office Exemptions

Pike Syndrome:



- Bell Jar filled with minnows is placed aquarium.
- Pike will repeatedly charge jar, striking its face against the glass.
- Sooner or later the Pike will “give up” and ignore minnows.
- Remove the minnows from jar, Pike will ignore them, even though the minnows may surrounded them.

Pike Syndrome:



- Has become a metaphor for fixed, unyielding, conditioned thinking.
- *Pike Syndrome* most certainly has been responsible for extinction of many species.



Inverse Relationship

- NEPA Compliance increases (+)
- Risk of successful legal challenge (-)
- What do you do?????? Time???
- Sliding Scale Approach
- Rule of Reason



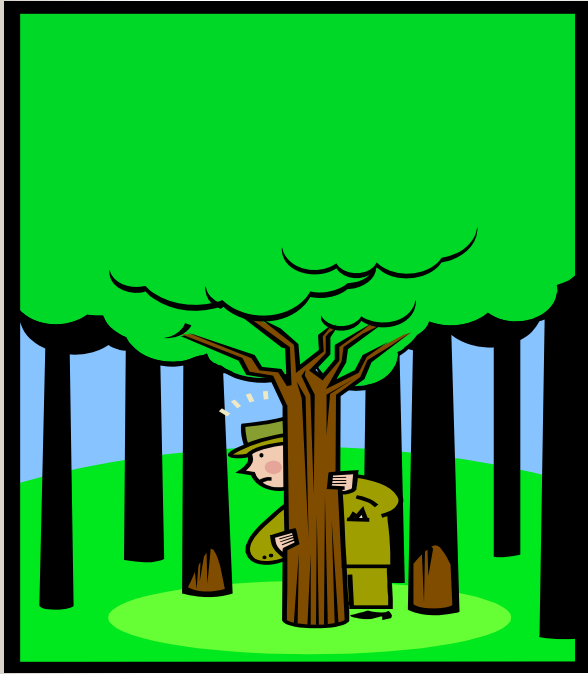
Sliding Scale Approach

- Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. (40 CFR 1502.2)
- NEPA documents must concentrate on the issues that are truly significant to the actions in question, rather than amassing needless detail. (40 CFR 1500.1)



Rule of Reason

- *“In certain instances a strict of unreasonable application of a regulatory requirement may lead to a decision, course of action, or level of effort that is wasteful, ridiculous, or absurd.”*
- *Rule of Reason* is a mechanism used by courts for injecting reason into the NEPA process. (fed/state legal)



Questions

