CHAPTER 1

The Background and History of NEPA

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Introduction

Once in a while somebody comes up with a new idea, a concept so simple and so compelling that everybody wonders why it was not thought of earlier. The National Environmental Policy Act (NEPA) embodied just such a new idea—that government agencies must look before they leap environmentally. Today that concept seems self-evident, but it was not translated into statutory form until NEPA was enacted in 1969 and signed into law by President Nixon on January 1, 1970, as his first official act of the new decade. Within a few years about half the states had adopted some sort of environmental impact assessment requirement, and by the 1990s about half the nations on earth had followed the American lead, making NEPA what may well be the most imitated law in American history. A good idea, fortunately, is contagious.

This chapter summarizes how the good idea came to be, its enactment in statutory form, and what happened since—how lawyers and judges and a few governmental administrators translated the idea into action.

Legislative Origins

In 1969, conditioned by Rachel Carson’s Silent Spring and galvanized by the Santa Barbara oil spill, Americans were ready to act to preserve the environment. Numerous legislative proposals were being considered in Washington, with considerable attention given to two essential elements—the declaration of a national
policy of environmental protection and the creation of a high-level agency to watch over the implementation of that policy. But one of the proposals, S.1075 from Senate Interior and Insular Affairs Committee Chairman Henry “Scoop” Jackson, included a further element—so-called action-forcing devices to ensure that the new environmental policy was in fact implemented. In the hearings that led to NEPA’s enactment Senator Jackson had wondered out loud whether the bill’s policy provisions might not be broadened so as to “lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than going through agency by agency. . . .”\(^1\) The committee’s chief witness and consultant, Professor Lynton “Keith” Caldwell of the University of Indiana, replied that what was being discussed was “modifying or amending existing mandates to the agencies.”\(^2\) He argued for an “action-forcing operational aspect” to the new law.\(^3\) It was these “action-forcing” devices, of which the environmental impact statement is the most conspicuous, that were the genius of NEPA. Legislators can enact and administrators can ignore statements of principle. NEPA was designed to circumvent that recalcitrance. In large measure, it has succeeded. Jackson’s and Caldwell’s legacy is incalculable.

The Senate Committee Report—which is the only congressional report dealing with much of the new law—captured the spirit of the time and of the Act:

> It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation’s present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.\(^4\)

The Committee continued: “The Nation has in many areas overdrawn its bank account in life-sustaining natural elements.”\(^5\) The purpose of the Act, asserted the Committee, is “to establish, by congressional action, a national policy to guide Federal

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2. Id.
3. Id. at 10.
activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment.”

The Committee turned to its vital innovation, the coupling of the newly declared National Environmental Policy and the “action-forcing devices” to ensure its implementation: “[I]f goals and principles are to be effective, they must be capable of being applied in action.” The policies and goals of section 101 “can be implemented if they are incorporated into the ongoing activities of the Federal Government.” To remedy present shortcomings and to establish action-forcing procedures which will help insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.

The authors of NEPA fully appreciated the importance of what they were doing. Senator Jackson explained the significance of the proposed legislation on the floor of the Senate. It was, he said, “the most important and far-reaching environmental and conservation measure ever enacted.” He elaborated:

A statement of environmental policy is more than a statement of what we believe as a people and as a Nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer . . . for guidance in making decision[s] which find environmental values in conflict with other values. What is involved is a Congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on

6. Id. at 8.
7. Id. at 9.
8. Id. at 19.
9. Id. That an expansive meaning of “fullest extent possible” was intended was made clear in the statement of the House Managers in the Conference Committee. 115 Cong. Rec. 39,703 (1969); see id. at 40,418 (Senate Conferees). That legislative history was recognized by the Supreme Court in Flint Ridge Dev. Co. v. Scenic Rivers Ass’n, 426 U.S. 776, 787–88 (1976).
The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man’s relationship to his physical surroundings. If there are to be departures from this standard of excellence, they should be exceptions to the rule and the policy. And as exceptions they will have to be justified in light of the public scrutiny required by section 102.\textsuperscript{11}

Congressman John Dingell, lead author of NEPA in the House of Representatives, cautioned that people’s belief that “nature’s bounty would last forever” made them “heedless of any consequences in [the] headlong push toward greater power and prosperity.”\textsuperscript{12} Instead, he said, “we must consider the natural environment as a whole and assess its quality continuously” if we are to improve and preserve it.\textsuperscript{13}

### The Statute

The organization of the statute is direct. Section 101 states the National Environmental Policy.\textsuperscript{14} Section 102 then provides the action-forcing mechanisms to fulfill that policy.\textsuperscript{15} That section in turn contains two principal parts—102(1) and 102(2).\textsuperscript{16} It is the latter, with its environmental impact statement (section 102(2)(C)) and its environmental assessment (section 102(2)(E)) requirements, that has nearly monopolized judicial attention to NEPA. However, it is section 102(1), with its simple command that “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act,” which is to say section 101, that forms the vital linkage between section 102 and section 101 and that, as this author has suggested elsewhere, “remains and holds the unfilled promise of NEPA.”\textsuperscript{17}

Section 103 requires federal agencies to review their present statutory authority to see whether impediments exist to full implementation of NEPA, and, if so, to report back to the president.

\begin{itemize}
\item 11. Id.
\item 13. Id.
\item 14. 42 U.S.C. § 4331.
\item 15. 42 U.S.C. § 4332; see 40 C.F.R. § 1500.1(a).
\item 16. 42 U.S.C. §§ 4332(1) and (2).
\end{itemize}
by July 1, 1971. This section was designed to make agencies put up or shut up—to estop agencies from claims of legal inability to comply with NEPA. No agency found itself unable to comply.

Section 105, declaring the policies and goals of NEPA to supplement those in individual agencies’ authorizing statutes, was intended to amend the mandate of all agencies and “to demolish the want-of-power argument.” NEPA’s Title II, § 201 et seq., then created the Council on Environmental Quality and set out its responsibilities.

**CEQ Plays Its Role—Part One**

As just noted, NEPA itself created the Council on Environmental Quality, or CEQ as it is universally known. Patterned on the Council of Economic Adviser (CEA), Title II of NEPA owes much to the Full Employment Act of 1946, the statute that created the CEA. As CEA advises the president on a broad range of economic matters across the gamut of governmental activities, CEQ was expected to do the same for the environment. The statute contemplates a three-member Council, each of whom is nominated by the president subject to Senate confirmation and one of whom is designated by the president as chairman. The three-member NEPA model would prevail through the Nixon, Ford, Carter, and Reagan administrations, but the administrations of both Bushes and Clinton would appoint a chair only—no members. For this structure they looked for support to the Environmental Quality Improvement Act, the second statute that shapes CEQ. That statute, traditionally relied upon by CEQ for its authorization of professional staff support, contemplates a single agency head. One may posit three reasons for recent presidents’

20. *Id.*
22. *Caldwell*, *supra* note 1, at 10; *see also* Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).
27. *Id.*
choice of the single-head-of-agency structure—reduced cost, clearer lines of authority, and avoidance of the Sunshine Act open meetings requirements that had been held to be applicable to the multimember agency. President Obama has retained the single agency head but has also appointed a deputy director, filling a position authorized by the Environmental Quality Improvement Act but never before activated.

CEQ’s first chair—Russell Train, a former Tax Court judge, a former Under Secretary of the Interior, and wise to the ways of Washington—moved rapidly to bring on board a superb staff, to secure as CEQ’s quarters a federal townhouse on Jackson Place in front of the White House, and to seize the initiative as the agency responsible for oversight of NEPA. At Train’s instigation, President Nixon soon issued an Executive Order charging CEQ with the responsibility for adopting “guidelines” to implement the provisions of NEPA’s section 102(2)(C) dealing with environmental impact statement requirements. Those guidelines, which creatively helped to shape the future of NEPA, established CEQ as integral to the Act’s implementation and did much to give substance to the underlying statute. Among their innovations were: (1) the environmental assessment (a concept that gives meaning to the general direction afforded by section 102(2)(E) to study appropriate alternatives to recommended courses of action); (2) the whole draft-final mechanism for EISs (which builds on the requirements of section 102(2)(C) that agency “comments” on an EIS accompany the document and be made available to the public); and (3) the promotion of public involvement, which has been so central to NEPA’s success.

CEQ’s influence within the government has waxed and waned with presidential preferences. Its staff size, which hovered around 50 to 70 members through the Nixon, Ford, and Carter years, plunged to fewer than 10 under Reagan, recovered only in part under the two Bushes and Clinton, and has modestly increased under Obama. Gauging an agency’s clout within the president’s executive office is always a hazardous venture, but, in very different ways, CEQ appears to have had the most influence on presidential actions under Nixon and Carter, and in some measure

28. Pacific Legal, 636 F.2d at 1263–64.
Clinton. Under the second President Bush CEQ has clearly had access to the president, but the degree to which that access was used to further environmental goals was far from clear. Again under President Obama, CEQ’s standing and influence within the administration is waxing. Under any president, however, it is important to be aware of the strengths and limitations of CEQ as an agency. Its strength comes from being within the executive office of the president. The chair can speak to the federal agencies and to the outside world with the authority of the White House. Its limitations are those inherent in all organizations of its small size. Its limited resources require that the agency’s involvement in environmental matters be largely confined to generic issues—such as adopting the NEPA guidelines or regulations—with intervention in specific actions necessarily confined to those of the highest significance or of particular interest to the president.

The Lawyers and the Courts

To a degree equaled only by the civil rights movement, lawyers and courts have been critical to the success of NEPA. Perhaps that was inevitable. NEPA has commands, but no enforcement mechanism. Congress created its “action-forcing” devices but gave no direction as to how and by whom the actions were to be forced. CEQ is too small to play that role, and no other federal agency had a sufficient stake in NEPA’s success to take up the cudgel. The legal profession, however, did not shrink from the challenge. NEPA lent itself to judicial enforcement. Because NEPA’s obligations are “essentially procedural,” the enforcement of such obligations was familiar to judges. Whatever the judge’s environmental predilections, an obligation to file a document as a condition precedent to taking an action was readily comprehensible. If an agency failed to prepare the EIS, it could not build the dam. Reviewing the adequacy of the environmental document followed naturally. Agencies came to learn that a document that skimped on the analysis or that failed to evaluate reasonable alternatives was vulnerable. Judges would come to reject pro forma assertions that agencies gave “consideration” to the environment and would delve into the record to ensure that those agencies in fact took a “hard look” at the environmental

consequences of proposals and at less environmentally harmful alternatives to those proposals.\textsuperscript{32} The history of NEPA’s success—of the implementation of the congressional “action-forcing” commands—has been the history of judges sufficiently responsible to pierce agencies’ bureaucratic veils to make them follow the law. NEPA was, after all, designed to change the way agencies did business. Judicial acceptance of agencies’ near universal assertions that they “considered the environment anyway” would have eviscerated NEPA. Rather, the Act’s success has hinged upon judges’ willingness to question agencies’ assertions—to bury themselves in the record and accurately evaluate what was going on within the agency, to ensure they took the requisite hard look. Sometimes officials are loyal to the commands and spirit of NEPA. The action-forcing devices worked. Sometimes they are not. The Act’s success is dependent upon the insight and courage of judges to separate one from the other.

Early in NEPA’s history, the judiciary helped shape the new law. In the very first NEPA case, Chief Judge John Brown of the Fifth Circuit, fresh from that court’s courageous and proud record in civil rights, signaled judicial receptivity to the nation’s emerging environmental concerns:

> It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of the environment.\textsuperscript{33}

No case more pervasively and powerfully shaped the course of NEPA’s implementation than the \textit{Calvert Cliffs’} decision.\textsuperscript{34} Written by another Southern veteran of the civil rights struggles, Judge Skelly Wright of the Court of Appeals for the District of Columbia Circuit, the court described Congress’ enactment of NEPA and other environmental statutes as

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32. As stated in \textit{Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n}, 449 F.2d 1109, 1114 (D.C. Cir. 1971), \textit{cert. denied}, 404 U.S. 942 (1972), “The requirement of consideration ‘to the fullest extent possible’ sets a high standard for the agencies, a standard which must be rigorously enforced by reviewing courts.” If the agency’s decision was reached without individualized consideration and balancing of environmental factors—“conducted fully and in good faith—it is the responsibility of the court to reverse.” (\textit{Id. at} 1115.)


34. \textit{Calvert Cliffs’}, 449 F.2d at 1114.
\end{flushright}
attest[ing] to the commitment of the Government to con-
trol, at long last, the destructive engine of material “prog-
ress.” But it remains to be seen, whether the promise of
this legislation will become a reality. Therein lies the judi-
cial role.\footnote{35. \textit{Id.} at 1111.}

In \textit{Calvert Cliffs’}, the court invalidated the Atomic Energy
Commission’s regulations for their failure to consider nonradio-
logical environmental impacts and their failure to meld NEPA’s
commands into the agency’s regulatory structure.\footnote{36. \textit{Id.} at 1109ff.} In \textit{Scientists’
Institute for Public Information (SIPI) v. The U.S. Atomic Energy
Comm’n}, the same court required an environmental impact state-
ment on the whole of the fast breeder reactor program.\footnote{37. 481 F.2d 1079 (D.C. Cir. 1973).} \textit{Natut-
ral Resources Defense Council v. Morton} resulted in a holding, later
codified in the CEQ’s NEPA regulations,\footnote{38. 40 C.F.R. § 1502.14(c).} that agencies’ consider-
ation of alternatives not be limited to those within the jurisdiction
of the lead agency.\footnote{39. 458 F.2d 827 (D.C. Cir. 1972).} The Fifth Circuit confirmed the importance
of strict judicial review of decisions on whether or not to prepare
EISs embodied in the intervening documents (now called envi-
ronmental assessments\footnote{40. 40 C.F.R. § 1508.9.} and findings of no significant impact or
FONSI\footnote{41. 40 C.F.R. § 1508.13.}) lest the congressionally required EIS be lightly avoided.\footnote{42. Save Our Ten Acres (SOTA) v. Kreger, 472 F.2d 463 (5th Cir. 1973).} The Eighth Circuit, meanwhile, in a series of cases emphasized that
NEPA was supposed to lead to environmental consequences in
agency decision making,\footnote{43. EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), \textit{cert. denied}, 412
U.S. 931 (1973); EDF v. Froehlke, 473 F.2d 346 (8th Cir. 1972).} while the Ninth Circuit developed what
was meant by impact, stressing that such effects could be indirect
as well as direct and that such impacts as growth-inducing ones
might in some cases be the most profound.\footnote{44. City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).} Still other decisions
prohibited avoidance of NEPA’s obligations through segmenta-
tion of an action\footnote{45. Named Individual Members of the San Antonio Conservation Society v.
Texas Highway Dep’t, 446 F.2d 1013 (5th Cir. 1971), \textit{cert. denied}, 406 U.S.
933 (1972).}
responsibilities to private parties. Congress had acted and the courts had carried out the command.

While courts of appeals were wholehearted in their acceptance and implementation of NEPA, the Supreme Court has consistently accorded the law a far more grudging construction. Indeed, in every one of its cases dealing with NEPA the Court has opted for the more restrictive interpretation. The author does not mean, however, to overdraw the picture unfairly. The opinions in some of those cases, while accompanying restrictive holdings, included discussions that constructively furthered the development of environmental law.

While three Supreme Court cases dealing with NEPA had preceded it, Kleppe v. Sierra Club in 1976 was the first case to discuss NEPA in any detail. In Kleppe, the plaintiffs had sought a programmatic environmental impact statement on coal mining in the Great Plains region. Although the Court ruled against the plaintiffs in this case, it nonetheless made clear that NEPA requires programmatic environmental impact statements in some situations. The Court also confirmed that section 102(2)(C) is an “action-forcing” provision designed to “assure consideration” of environmental impacts, but it warned lower courts not to substitute

46. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).
50. Id. at 409.
their judgment\textsuperscript{51} for that of the agency on the environmental consequences of proposed actions. Rather—adopting Judge Harold Leventhal's formulation—the court's role was to ensure that the agency took a “hard look” at environmental consequences.\textsuperscript{52}

\textit{Vermont Yankee}, decided two years later, was the first of the Court's NEPA-restrictive opinions.\textsuperscript{53} The Court set out the law pertaining to the approvals of nuclear power plants and then acknowledged that NEPA had “altered slightly” that preexisting balance.\textsuperscript{54} But in an oft-repeated phrase, the Court made clear that while “NEPA does set forth significant substantive goals for the Nation, . . . its mandate to the agencies is essentially procedural.”\textsuperscript{55} The Court's decision in \textit{Strycker's Bay Neighborhood Council, Inc. v. Karlen} emphasized this point:

\begin{quote}
[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure the agency has considered the environmental consequences; it cannot “interject itself within the area of discretion of the executive as to the choice of action to be taken.”\textsuperscript{56}
\end{quote}

Notwithstanding its seemingly narrow construction of NEPA, the Court acknowledged that an agency decision under NEPA might still be reviewed under the deferential arbitrary and capricious standard of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This position was subsequently confirmed by the Court in \textit{Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.}\textsuperscript{57}

A more recent occasion for the Court’s detailed discussion of NEPA obligations arose in 1989 in \textit{Robertson v. Methow Valley Citizens Council},\textsuperscript{58} where the Court described the EIS as serving NEPA’s “action-forcing” purposes in two respects: (1) by ensuring the agency will have environmental information available in reaching its decision, and (2) by making the information available to a “larger audience,” which may also play a role in the processes of

\begin{footnotesize}
\begin{enumerate}
\item Id. at 410 n.21.
\item Id. (citing Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972)).
\item Vermont Yankee, 435 U.S. 519.
\item Id. at 551.
\item Id. at 558.
\item Strycker's Bay, 444 U.S. at 227.
\item 462 U.S. 87 (1983).
\item Robertson, 490 U.S. 332.
\end{enumerate}
\end{footnotesize}
making and implementing the decision.\textsuperscript{59} According to the Court, by focusing attention on environmental impacts, NEPA ensures that those effects will not be overlooked or underestimated.\textsuperscript{60}

Most recently (in 2004) the Court rejected an argument that ongoing activities and impacts implied an ongoing NEPA obligation to evaluate them, stating that once a plan has been approved in compliance with NEPA there is “no ongoing ‘major Federal action’” necessitating further NEPA compliance.\textsuperscript{61} In another case in the same year the Court held that since the president, not the agency, had the authority to control the cross-border movement of trucks, NEPA imposed, under a “rule of reason,” no grounds for the agency to consider the environmental impacts of their entry.\textsuperscript{62}

Over the years, the Supreme Court has considered at least 15 significant NEPA cases, and in every case the Court has opted for a narrow construction of the law.\textsuperscript{63} While implementation of NEPA’s procedural provisions has accomplished many of the Act’s intended aims, the eloquence of NEPA’s framers, echoed in the courts of appeals, has never reverberated in the Supreme Court.\textsuperscript{64}

\textsuperscript{59} Id. at 349; see Public Citizen, 541 U.S. at 768; see also Baltimore Gas & Electric, 462 U.S. at 97 (“NEPA has twin aims. First, it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.’ . . . Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”).

\textsuperscript{60} Robertson, 490 U.S. at 349.

\textsuperscript{61} Norton, 542 U.S. at 73.

\textsuperscript{62} Public Citizen, 541 U.S. at 768–70.

\textsuperscript{63} Yost, supra note 17.

\textsuperscript{64} While much has been made of the Supreme Court’s restriction of NEPA’s reach to “procedural” as distinct from “substantive” impacts, the Court has never confronted the issue of the “mitigated FONSI.” Every year approximately 450 EISs are prepared, but 45,000 EAs are completed, almost all concluding with a finding of no significant impact or FONSI. CEQ, Considering Cumulative Effects, at 4 (1997); generally see current statistics available at NEPA.gov. In many cases mitigation is imposed under NEPA (40 C.F.R. §§ 1505.2, 1505.3, and 1508.20) as a condition of preparing that FONSI instead of a full EIS, because the mitigation imposed has reduced the level of significance below the threshold that requires a full EIS. Acceptance of binding mitigation is, in effect, traded for bypassing preparation of a full EIS. See 40 C.F.R. §§ 1505.2 and 1505.3; Tyler v. Cisneros, 136 F.3d 603 (9th Cir. 1998). Such “mitigated FONSI”s” have repeatedly been upheld by the courts of appeals (see Cabinet Mountains
CEQ Plays Its Role—Part Two

The Need for Midcourse Corrections

With the success of NEPA in the courts, agency and industry lawyers seeking to defend the validity and adequacy of environmental documents counseled their clients to err on the side of overinclusiveness. If an environmental factor is discussed—and discussed thoroughly—the EIS or EA of which the discussion is a part cannot be faulted for failure to consider that factor. This was sound legal advice, but it had an unintended and unfortunate consequence for NEPA’s administration. Documents became complete, but bulky. As the proverbial kitchen sinks were thrown in to resist anticipated litigation, many EISs became so voluminous as to become distinctly user-unfriendly. That in turn undermined NEPA’s goals. Busy administrators do not have time to read multivolume documents. Members of the public are deterred, not welcomed, by mountains of paperwork. If NEPA documents are not read, they cannot achieve their purpose. Simultaneously, the emphasis on complete documents led to a time-consuming attentiveness designed to ensure adequacy, which translated into excessive delay from the point of view of business and other applicants impatiently awaiting government action. Too much paperwork and too much delay were the oft-heard criticisms of NEPA in its early years.

President Carter’s Executive Order

When Jimmy Carter became president in 1977 he appointed Charles Warren of California as the new CEQ chair. At CEQ’s instigation—and after much interagency infighting—the president...
issued a new Executive Order strengthening CEQ’s charge. The impetus for this order is best described in the president’s own words:

[NEPA] is best known for requiring federal agencies to prepare environmental impact statements before taking actions having significant environmental effects. In the seven years since its passage, it has had a dramatic—and beneficial—influence on the way new projects are planned. But to be more useful to decision-makers and the public, environmental impact statements must be concise, readable, and based upon competent professional analysis. They must reflect a concern with quality, not quantity. We do not want impact statements that are measured by the inch or weighed by the pound.

President Carter’s Executive Order made two major changes to the earlier authority President Nixon had granted to CEQ: (1) the guidelines were to be replaced by regulations, binding on all agencies; and (2) the permissible scope of the regulations—limited under the guidelines to the EIS requirements of section 102(2)(C)—was to encompass all of NEPA’s procedural provisions in section 102(2).

The CEQ NEPA Regulations

The CEQ NEPA regulations that emerged were the product of a process that is in large measure responsible for their acceptance and success. (In the three decades since their adoption only one substantive section of the regulations has been amended.) CEQ started with public hearings that consciously involved the full range of NEPA’s stakeholders. CEQ asked the U.S. Chamber of Commerce to coordinate the presentation of the views of Ameri-

67. CEQ, The President’s Environmental Program, at M-12 (1977).
68. Exec. Order 11514 as amended by Exec. Order 11991, §§ 2(g), 3(h); see Andrus, 442 U.S. at 357–58.
69. Exec. Order 11991, § 3(h). The Executive Order also strengthened the authority that CEQ had by virtue of section 309(b) of the Clean Air Act, 42 U.S.C. § 7609(b), to receive referrals of other agencies’ actions believed to be environmentally unsatisfactory. While section 309 is limited to EPA, the president now authorizes all agencies to make such referrals to CEQ under NEPA. Exec. Order 11991, § 3(h); see 40 C.F.R. Part 1504.
70. See generally Nicholas C. Yost, Streamlining NEPA—An Environmental Success Story, 9 ENVTL. AFF. L. REV. 507 (1981).
can business; the Building and Construction Trades Department of the AFL-CIO to do so for labor; and the Natural Resources Defense Council to do the same for environmental groups. The National Governors’ Association and the National Conference of State Legislatures would play critical roles on behalf of states. CEQ also obtained the participation of local governments, the scientific community, and the public generally.

Based on the public hearings and written comments, CEQ developed and circulated a 38-page questionnaire, which reflected the views and suggestions of all who testified and included the problems they identified and the solutions they suggested. Hundreds of responses that broadly and fairly represented the spectrum of interests involved with NEPA were received. CEQ then tabulated these questionnaires not only to find good ideas, but also to see where consensus existed among those who deal with the NEPA process. CEQ also met with all federal agencies to discuss their experiences and suggestions for improving the NEPA process.

Based on the information received, CEQ drafted proposed regulations that were placed into a year of interagency review and then public review. During this period CEQ took the initiative to meet with every critic of NEPA or its implementation. If a state governor had criticisms of NEPA, a CEQ representative went to visit him and hear what the problems were. If somebody wrote a critical article in the trade press, CEQ called her or him. Congressional oversight committee staffs were asked to inform CEQ of any complaints they received. CEQ staff called on all those who complained, listened to what they had to say, and either changed the draft regulations to reflect the concerns or explained why that could not be done.

When the regulations became effective in 1979 every major group in the United States concerned with implementation of NEPA supported the new regulations. The United States Chamber of Commerce “congratulated” CEQ, finding the regulations “a significant improvement over prior EIS guidelines.” The National Governors’ Association commended CEQ for “a job well done.” The Natural Resources Defense Council wrote to “welcome” the regulations as an “important improvement” over the guidelines. The National Wildlife Federation stated that the regulations “cut the wheat from the chaff” and will make the process “much better” for citizens and “for better decisions as well.”

71. U.S. Senate, Hearing Before the Subcomm. on Toxic Substances and Environmental Oversight of the Comm. on Environment and Public Works,
The new regulations made a series of changes in the way NEPA was implemented:72

- The regulations reduced the length of EISs to a normal 150 pages or less with a maximum of 300 pages for complex proposals.73
- The new regulations borrowed the concept of “scoping” from the Massachusetts “Little NEPA” to ensure the early participation of those involved in the process and the identification of important issues. Significant issues were to be given adequate study, but lengthy analysis of insignificant issues was to be avoided.74
- The regulations emphasized interagency cooperation before the EIS is drafted rather than adversary comments on a completed document, using the concept of “cooperating agency” to persuade agencies other than the lead agency help write the statement in the first place.75
- The regulations placed new emphasis on the statutory command to “utilize a systematic interdisciplinary approach” to decision making.76
- The regulations placed a still greater emphasis on alternatives analysis, while de-emphasizing the bulky and not particularly useful descriptions of the preexisting environmental setting.77
- The new mandate for time limits on the NEPA process, which could be established at the request of the applicant, was the single provision most attractive to the business community.78

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72. See generally 40 C.F.R. §§ 1500.4, 1500.5. The principal legislative history of the CEQ NEPA regulations is found in the preamble to the final regulations. 43 Fed. Reg. 55,978 (1978), reprinted in NEPA Deskbook 270 (3d ed. 2003).
73. 40 C.F.R. § 1502.17.
74. 40 C.F.R. § 1501.7.
75. 40 C.F.R. §§ 1501.6, 1508.5.
76. NEPA § 102(2)(A), 42 U.S.C. § 4332(2)(A); 40 C.F.R. §§ 1501.2(a), 1502.6; see 40 C.F.R. § 1507.2(a).
77. 40 C.F.R. §§ 1502.14, 1502.15.
78. 40 C.F.R. § 1501.8.
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• The lead agency was now required to identify other permits and reviews that would be necessary before a project is to proceed.79

• Applicants to the government often have difficulty in knowing what is expected of them with respect to environmental requirements. The NEPA regulations required all agencies to develop procedures to assist applicants.80

• NEPA is our most pervasive environmental law. In one of the most important sets of provisions, the regulations required using the EIS to pull together all the different reviews mandated by law, thus ensuring that the reviews take place concurrently rather than consecutively.81

• The regulations used the EIS to require other permitting agencies to identify the information they will need to pass upon the project and the mitigation measures that will be necessary for the approval of the project.82

• The regulations required federal agencies to work with appropriate state or local agencies as joint lead agencies to eliminate duplication and to prepare one document that satisfies both federal and state requirements.83 Similarly, duplication among federal agencies was avoided by allowing one agency, with appropriate safeguards, to “adopt” the work of another.84

• Of greatest significance to the environmental community was the Record of Decision (or ROD). The decision maker was required to record the environmentally preferable alternative (or alternatives) and then describe how this alternative was balanced with other “essential considerations of national policy” in making the decision. The choice of the environmentally preferable alternative is not mandated by NEPA or the regulations, but the ROD at least forces the decision maker to think about proceeding in what the EIS has shown to be an environmentally sensitive manner rather than in an environmentally insensitive manner.85 The ROD must further state whether all practicable

79. 40 C.F.R. § 1502.25(b).
80. 40 C.F.R. §§ 1501.2(d), 1507.3(b)(1).
81. 40 C.F.R. § 1502.25(a).
82. 40 C.F.R. § 1503.3.
83. 40 C.F.R. § 1506.2.
84. 40 C.F.R. § 1506.3.
85. 40 C.F.R. § 1505.2.
means to avoid or minimize harm to the environment were adopted, and, if not, explain why.86

- The regulations also placed a new emphasis on follow-up, encouraging the decision to reflect the information gathered in the EIS and requiring the implementation of any chosen environmental protection measures to be set out in an enforceable document (the ROD or agency decision). An emphasis was now placed on mitigation and monitoring and, where appropriate, on reports outlining the progress of such measures.87

Both during and after the adoption of the NEPA regulations, CEQ held meetings both with the public and with the agencies. These latter meetings were held not only in Washington, but in two rounds of meetings in each of EPA’s 10 regional headquarters. Those meetings, in turn, resulted in CEQ’s formalizing and publishing the answers to the questions most often posed to it—the “Forty Questions,” one of the two principal documents interpreting the NEPA regulations.88

The Role of the Agencies

NEPA’s coverage is broad. Section 102(2), introducing most of the action-forcing provisions, applies by its own terms to “all agencies of the Federal Government.”89 The regulations recognize exemptions only for Congress,90 the judiciary, and the

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86. 40 C.F.R. § 1505.2(c).
87. Id.; 40 C.F.R. § 1505.3. Mitigation adopted on the ROD becomes an enforceable obligation. Tyler, 136 F.3d 603.
88. CEQ, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981). The other principal interpretive document is the preamble to the final regulations, reprinted in NEPA Deskbook, supra note 72, at 270. Over the years CEQ has issued multiple guidance documents, which are generally available at NEPA.gov. As of the time of writing, CEQ has outstanding for comment significant guidance addressing climate change in NEPA documents and has recently issued guidance on mitigation and monitoring and on categorical exclusions. Id.
89. NEPA § 102(2), 42 U.S.C. § 4332(2).
90. However, an executive branch proposal to Congress may require an EIS. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1506.8, 1508.17.
NEPA section 102 requires that all agencies “to the fullest extent possible” administer their laws in accordance with the national environmental policy and implement the action-forcing provisions of the Act. This means that agencies are expected to comply with the Act to the fullest extent possible under their statutory authorizations and are not to interpret the language so as to avoid compliance, nor construe their statutory authorizations excessively narrowly. Indeed, the Act states that its policies and goals are supplementary to those in agencies’ existing statutory authorizations. As Caldwell and Jackson intended, NEPA makes environmental protection the mandate of every federal agency.

Under CEQ NEPA regulations, each agency is charged with adoption of “implementing procedures” to supplement the regulations. These procedures are intended to integrate NEPA and CEQ regulations into the ongoing activities and processes of each agency. These procedures, it should be noted, do not become

91. 40 C.F.R. § 1508.12. Performance of staff functions for the president in the EOP is also excluded. For NEPA purposes a “federal agency” may also include a state or local government or an Indian tribe that assumes NEPA responsibilities as a condition of receiving funds under section 104(h) of the Housing and Community Development Act of 1974, 42 U.S.C. § 5304(a). State agencies of statewide jurisdiction—principally transportation departments—may take the lead in NEPA compliance under section 102(2)(D) of the Act, 42 U.S.C. § 4332(2)(D).

92. The Supreme Court has interpreted the term “fullest extent possible” as furthering NEPA’s environmental mandate. See Flint Ridge, 426 U.S. at 787–88.


95. Calvert Cliffs’, 449 F.2d at 1112. See discussion accompanying supra notes 1 and 2. While NEPA has become part of the mandate of every agency, it is important to bear in mind throughout that the courts owe the agencies no deference with respect to the interpretation of NEPA. As noted earlier, it is to CEQ that substantial deference is owed with respect to NEPA. (Andrus, 442 U.S. at 358.) NEPA, after all, is a regulatory statute directed at the agencies. For that reason deference in construing NEPA’s obligations is not due to the agency undertaking the action that is the subject of the law. Citizens Against Rails-to-Trails v. Surface Transportation Board, 267 F.3d 1144, 1150 (D.C. Cir. 2001); American Airlines, Inc. v. Department of Transportation, 202 F.3d 788, 803 (5th Cir. 2000).

96. 40 C.F.R. § 1507.3.
effective until they are approved by CEQ. Some agencies treat the procedures in a formal manner such that they appear in the Code of Federal Regulations. Others use “orders” or “manuals” to disseminate the procedures.

A necessary by-product of NEPA responsibilities was the creation of NEPA staffs within each agency. The existence of staff trained in NEPA’s environmentally holistic approach has had a pervasive and beneficial influence on agency activities and decisions. Similarly, the demand for outside assistance in completing NEPA documents has fostered the growth of multidisciplinary environmental consulting firms, the existence of which both fosters NEPA’s insistence on professional environmental analysis and serves to cross-fertilize the NEPA approaches of different agencies.

EPA plays a unique role in the NEPA process. On the one hand, it is a line agency with responsibilities to prepare substantial numbers of its own NEPA documents. On the other, it is charged under section 309 of the Clean Air Act with (1) commenting on and rating every other agency’s EISs; and (2) referring to CEQ the actual actions of other agencies found to be environmentally unsatisfactory. EPA also serves as the repository for all agencies’ EISs and publishes notices in the Federal Register concerning NEPA filings.

97. Id. CEQ has a 30-day review period, and if dissatisfied with the agency procedures, will either work with the agency to improve them or send the agency a letter for the record stating the procedures are not in compliance with the law or the regulations. An agency’s NEPA procedures revised without consulting CEQ are invalid. Piedmont Environmental Council v. FERC, 558 F.3d 304 (4th Cir. 2009); see also Michigan Gaming Opposition v. Kempthorne, 525 F.3d 23, 28–29 (D.C. Cir. 2008) (agency not bound to follow “checklist” that is not part of CEQ-approved procedures).

98. CEQ publishes lists from time to time containing citations to all federal agencies’ procedures. (The most recent is reprinted in NEPA DESKBOOK, supra note 72, and is available at NEPA.gov.)

99. CEQ also published lists of the NEPA liaisons whom every agency must appoint and who are the appropriate persons within the agencies to whom to pose NEPA questions. Found at NEPA.gov.

100. 42 U.S.C. § 7609.

101. 40 C.F.R. §§ 1506.9, 1506.10.
Conclusion

NEPA has served the nation, including the Act’s various stakeholders, well. Environmental review and analysis now precedes virtually all agency action. We as a nation now look before we leap environmentally.

Despite its pervasive influence on virtually all agency activities, NEPA has not been amended in almost 40 years. Even the CEQ NEPA regulations have been substantively amended only once, and that was limited to one section. NEPA thus appears to be serving the nation well. It guarantees citizens the right to information about the environmental consequences of proposed government actions, and it ensures a right not only to comment but to written responses to those comments. Private applicants for government authorizations face a relatively predictable process that augments their own planning and that over the years has become increasingly efficient, although the battle to reduce excess paperwork and delay continues. It is in the long run cheaper to predict and avoid environmental problems than to clean them up in later years. NEPA’s total benefits are impossible to measure, but the very fact of analysis forces decision makers and applicants to focus their attention on the environmental consequences of their actions and on the ways that they can avoid or mitigate environmental harm. Even if NEPA’s promise has yet to be completely fulfilled, NEPA has significantly advanced the aspirations of its authors.

102. However, other statutes have been enacted that have had the effect of indirectly affecting NEPA’s reach. See, e.g., 23 U.S.C. § 139(c)(3) (local government role in preparation of NEPA documents).

103. See supra note 17.