



RESOURCES

Overview of National Environmental Policy Act and Appeals

The National Environmental Policy Act (NEPA), often considered to be the first “modern” environmental law (Ferry 2001), was passed by Congress in December 1969, and signed into law by Richard Nixon on January 1, 1970. This expansive piece of legislation came on the heels of growing awareness of the negative impacts of human activities on the natural environment during the 1960’s. High-profile environmental disasters such as Ohio’s polluted Cuyahoga River bursting into flames and a massive oil spill off of Santa Barbara, California underscored the need for comprehensive federal legislation to address human impacts on the natural world (Carriker 1996).

Unlike other 1970’s-era environmental laws which addressed specific facets of environmental concern, such as rare wildlife and plantlife (Endangered Species Act), water quality (Clean Water Act), or national forestlands (National Forest Management Act), NEPA was designed to apply across-the-board to any federal agency contemplating or funding an action with significant environmental risks. NEPA §101(a) contains this ambitious policy statement:

...it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Note: This paper was originally prepared in November 2003 by Jesse Abrams for *Understanding Appeals and NEPA: A Workshop for Community-Based Forestry Groups* that Sustainable Northwest convened in cooperation with the Pinchot Institute for Conservation and Wallowa Resources.

Sustainable Northwest is republishing this paper in response to recent inquiry about NEPA. The information contained here has not been updated since 2003, and may be partly out of date.

NEPA operates by imposing procedural obligations on federal agencies (and nonfederal actors enabled by federal agencies) that undertake “major Federal actions significantly affecting the quality of the human environment” (§102(c)). If a proposed action meets this standard, an Environmental Impact Statement (EIS) must be prepared, describing the environmental consequences of the proposed action and considering a range of alternatives. NEPA does not require that an agency choose the most environmentally benign alternative, nor does it prescribe any other substantive outcome, but it does require that an agency take a “hard look” at the environmental consequences of its actions and disclose information on these consequences to the public. For this reason, NEPA is often described as an Act that requires a procedural rather than a substantive outcome.

While NEPA itself is relatively brief, its implementing regulations are extensive. NEPA regulations, published by the Council on Environmental Quality (CEQ), include details on important dimensions of the Act including requirements regarding cumulative effects analysis, the

scoping process, and content requirements of the EIS. These CEQ regulations have been interpreted to have the force of law.

A proposed agency action falls into one of three general categories relevant to NEPA. First, if an agency determines the action fits within a specific agency-identified category of proposed actions and will clearly not have significant individual or cumulative effects on the environment, it is categorically excluded from the EIS obligation (commonly referred to as a categorical exclusion or CE). Second, if, on the other hand, a proposed action will have a significant effect on the environment, an EIS is required. The third situation occurs when it is not clear whether or not an action will significantly affect the environment. In these cases where effects “may” be significant, an Environmental Analysis (EA) is prepared as a means of evaluating this question. If the EA determines that effects will be significant, an EIS is prepared. Otherwise, the agency issues a Finding of No Significant Impact (FONSI) and proceeds without further obligations under NEPA (Ferry 2001). In many cases, an agency will redefine a proposed project so as to fall below the threshold of “significance” by adding mitigation measures into the project plan, resulting in what is unofficially known as a “mitigated FONSI” (Karkkainen 2002, National Environmental Policy Act Task Force 2003).

The Success and Utility of NEPA

A review of the academic literature shows an ongoing dialogue regarding the success or failure of NEPA to meet its intended policy goal, and discussions about what factors have caused NEPA to evolve in the manner it has over the last 30 years. Several researchers discuss perceived shortcomings of the Act, including inadequate post-EIS monitoring (Canter and Clark 1997), the adequacy of cumulative impacts analysis (Wagner

2000), the lack of substantive authority in the Act’s interpretation (Yost 1990), inappropriate oversight and incentive systems (Hartmann 1994, Karkkainen 2002), and the contribution of NEPA to regulatory burdens on land management agencies (USDA Forest Service 2002, Thomas 2002). A number of authors have explored the potential relationship of NEPA to the emerging concept of ecosystem management (Boyt 1993, Keiter 1990, Hodas 2000, Phillips and Randolph 2000), and some have analyzed the effect of NEPA on the Forest Service specifically (Ackerman 1990, Jones and Taylor 1995, Gericke and Sullivan 1994). While a range of perspectives on the utility of NEPA can be found, most authors seem to agree ample room exists for improvement, either in the ability of NEPA to affect substantial environmental improvement or in the degree to which the Act unduly hampers federal action.

Appeals Reform Act - Appeals of Forest Service Project Decisions

Prior to 1992, administrative appeals of proposed Forest Service actions were generally allowed by the agency but not required by law. This changed in 1992 with passage of the Fiscal Year 1993 Interior Appropriations Act (Public Law 102-381, 16 U.S.C. 1612 note). Section 322 – commonly known as the Appeals Reform Act - requires that the Forest Service “establish a notice and comment process for proposed actions and activities implementing land and resource management plans...and...modify the procedure for appeals of decisions concerning such projects.” The implementing regulations for this law can be found in 36 CFR 215, revised as of June 4, 2003, and apply to project-level agency decisions. The recent revisions to 36 CFR 215 include limiting eligible appellants to “Individuals and organizations who submit substantive written or oral comments during the 30-day comment period for an environmental assessment, or 45-day comment period for a draft environmental impact

statement” (§215.12(a)) as well as exempting projects falling under a NEPA categorical exclusion (CE) from the notice and comment procedure (§215.4(b)).

The appeals process has emerged as a contentious issue in recent years, and is beginning to receive some treatment in the academic and agency literature. Project appeals were highlighted as major contributors to the “process predicament” identified by Forest Service Chief Dale Bosworth (USDA Forest Service 2002), and the influence of appeals on fuels reduction projects was investigated both by the United States General Accounting Office (GAO 2001, GAO 2003) and by researchers at Northern Arizona University (Cortner et al. 2003). Jones and Taylor (1995) found that appeals and lawsuits involving the Forest Service had increased dramatically between 1971 and 1993, with environmentalists constituting the largest group of litigants and appellants. Little (2003) provides an overview of the divisive political context surrounding the appeals process, detailing the call by some Western elected officials to abolish the process as well as responses by environmentalists and community organizations to proposed changes.

Forest Planning and Appeal of Forest Plans

The Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 (Public Law 93-378, 16 U.S.C. 1600) and National Forest Management Act (NFMA) of 1976 (Public Law 94-588) require the Forest Service to develop and periodically revise land and resource management plans (“Forest Plans”) for all national forests. RPA §6(d), as amended by NFMA, holds that “The Secretary shall provide for public participation in the development, review, and revision of land management plans...[and] shall publicize and hold public meetings or comparable processes at locations that foster public participation.” The 1982 implementing regulations for NFMA required the Forest Service to prepare an EIS for each Forest Plan

and plan revision. These NFMA regulations are still in effect today, though they will likely be replaced in the near future by the Bush administration.

Citizen appeals of Forest Plans, while not specifically required by law, are currently provided for in Forest Service regulations (36 CFR §217). Those appeal regulations were repealed in November 2000 as part of revised regulations implementing the NFMA. However, the revised NFMA regulations were effectively suspended in May 2002 pending adoption of new NFMA regulations. The Bush administration proposed new NFMA regulations in November 2002, but they have not been finalized. In the meantime, the Forest Service is continuing to use the §217 regulations for appeals of forest plans. The Bush administration’s proposed NFMA regulations, like those drafted under the Clinton administration, provide for a pre-decisional objection process rather than a post-decisional appeals process (§219.19 in the proposed rule).

While the procedural delays resulting from Forest Plan appeals have received some attention from the Forest Service recently (USDA Forest Service 2002), the academic literature pertaining to this form of appeal is sparse. That which does exist mostly focuses on social determinants of, and responses to, participation in the appeals process. Gericke and Sullivan (1994) found some support for the notion that public participation exercises help to reduce the likelihood of Forest Plan appeals, while McClaran and King (1999) found that the factors of greatest importance to appellants may be an ability to realize personal benefits and a sense of procedural fairness.

[References on following pages.](#)

Academic References

- Ackerman, S. 1990. Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making. *Environmental Law*. 20: 703-734
- Bear, D. 1992. The National Environmental Policy Act. *Intergovernmental Perspective*. 18(3): 17-19
- Boyt, J. 1993. Struggling to Protect Ecosystems and Biodiversity Under NEPA and NFMA: The Ancient Forests of the Pacific Northwest and the Northern Spotted Owl. *Pace Environmental Law Review*. 10(2): 1009-1049
- Caldwell, L.K. 1998. Beyond NEPA: Future Significance of the National Environmental Policy Act. *Harvard Environmental Law Review*. 22(1): 203-239
- Canter, L. and R. Clark. 1997. NEPA Effectiveness – A Survey of Academics. *Environmental Impact Assessment Review*. 17(5): 313-327
- Carriker, R.R. 1996. Federal Environmental Policy: A Summary Overview. *Journal of Agricultural and Applied Economics*. 28(1): 99-107
- Cortner, H.J., G.M.R. Teich, and J. Vaughn. 2003. Analyzing USDA Forest Service Appeals: Phase 1, the Database. *Ecological Restoration Institute Papers in Restoration Policy*. Available online at [http://www.nativeforest.org/campaigns/wildfire_info_center/pdf/FS-appeals-database.pdf]
- Ferry, S. 2001. *Environmental Law: Examples and Explanations*. Second Edition. Aspen Law and Business: New York, NY
- GAO (United States General Accounting Office). 2001. Forest Service: Appeals and Litigation of Fuel Reduction Projects. GAO-01-1114R. August 31, 2001
- GAO (United States General Accounting Office). 2003. Wildland Fire Management: Additional Actions Required to Better Identify and Prioritize Lands Needing Fuels Reduction. GAO-03-805. August 15, 2003.
- Gericke, K.L. and J. Sullivan. 1994. Public Participation and Appeals of Forest Service Plans – An Empirical Examination. *Society and Natural Resources*. 7(2): 125-135
- Hartmann, C. 1994. NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act. *Journal of Air Law and Commerce*. 59(3): 709-761
- Hodas, David R. 2000. NEPA, Ecosystem Management and Environmental Accounting. 14(3): 185-192
- Jones, E.S. and C.P. Taylor. 1995. Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service. *Policy Studies Journal*. 23(2): 310-336

- Karkkainen, B.C. 2002. Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance. *Columbia Law Review*. 102: 903-972
- Keiter, R.B. 1990. NEPA and the Emerging Concept of Ecosystem Management on the Public Lands. *Land and Water Law Review*. 25(1):43-60
- Little, J.B. 2003. Un-Common Ground. *American Forests*. 109(2): 45-51
- Manning, N.J. 1995. Science, Politics, and Professionalism: Challenges for Resource Professionals. *Journal of Natural Resources and Life Sciences Education*. 24(2): 136-143
- McClaran, M.P. and D.A. King. 1999. Procedural Fairness, Personal Benefits, Agency Expertise, and Planning Participants' Support for the Forest Service. *Natural Resources Journal*. 39(3): 443-458
- National Environmental Policy Act Task Force. 2003. Modernizing NEPA Implementation. The NEPA Task Force Report to The Council on Environmental Quality. September 2003
- Parenteau, Patrick A. NEPA at 20: Great Disappointment or Whopping Success? *Audubon*. 92(2): 104-107
- Phillips, C.G. and J. Randolph. 2000. The Relationship of Ecosystem Management to NEPA and its Goals. *Environmental Management*. 26(1): 1-12
- Thomas, J.W. 2002. Dynamic vs. Static Management in a Fire-Influenced Landscape – The Northwest Forest Plan. Presented at the conference “Fire in Oregon’s Forests” Bend, Oregon – October 23, 2002
- USDA Forest Service. 2002. The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management. Available online at <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf>
- Wagner, F.R. 2000. A Common Sense Approach to Improving the NEPA Process. *Environmental Claims Journal*. 13(1): 39-53
- The Wilderness Society. 1994. How to Appeal Forest Service Project and Activity Decisions: A Citizen Handbook to the 1993 Rules (36 CFR 215). Weadon Printing, Inc.: Alexandria, Virginia
- Yost, N.C. 1990. NEPA's Promise – Partially Fulfilled. *Environmental Law*. 20: 533-549

Web References

U.S. Forest Service NEPA, NFMA, and Appeals Homepage <http://www.fs.fed.us/forum/nepa/>

U.S. Forest Service: Environmental Appeals and Litigation <http://www.fs.fed.us/emc/applit/index.htm>

The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management: <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf>

Council on Environmental Quality NEPANet <http://ceq.eh.doe.gov/nepa/nepanet.htm>

Considering Cumulative Effects Under the National Environmental Policy Act <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm>

NEPA: A Study of Effectiveness After 25 Years <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>

NEPA Statute Online <http://ceq.eh.doe.gov/nepa/regs/nepa/nepaeqia.htm>

Appeals Reform Act Online: <http://www.fs.fed.us/emc/applit/includes/93appreform.pdf>

ARA Implementing Regulations (36 CFR 215): <http://www.fs.fed.us/emc/applit/includes/finalappregso3.pdf>

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