

September 14, 2010

NEPA: *Death by Bureaucratic Assessments*

The National Environmental Policy Act began, as do many legislative acts, with the best of intentions. Created in the 1960s during a period of faith in bureaucracy, NEPA has since been emulated by over 25 states and various counties (Karkkaian). The main purpose behind NEPA was to help agencies act in a way that kept man in harmony with the environment. In addition this act established the Council on Environmental Quality and a process for forcing government agencies to think about their proposed action's possible environmental impacts.

Possible building impacts are to be explored through three steps: first is a categorical exclusion determination, then an Environment Assessment, and a Finding of No Significant Impact. Unless the impacts, either positive or negative are determined, then an Environmental impact Statement is written. Categorical exclusions are used to determine what effects if any, the proposed action will have on the environment. If an agency's actions are expected to impact protected groups or land then the agency must follow up with an EA or EIS. EA or FONSI are the statements agencies hope for because they are least time consuming to produce. They prevent officials from creating EIS, very time consuming and costly documents. Because of this EA statements have begun to outnumber EIS statements 100 to 1 (Kakkainen).

The lack of definition in NEPA is what really stops agencies from siting renewable energy sources on federal land. While NEPA doesn't lay out any barriers to new structures, the extensive process listed above is often enough to deter

WORKING DRAFT

agencies (Kahn). Most of the land available for renewable energy projects falls on federal lands, thus requiring an extensive EIS. If those over the project are lucky enough to find private land it will often come under the jurisdiction of state, county, or city NEPA's that will restrict their actions. The exhaustive process for creating an EIS is described below.

Agencies do everything in their power to avoid writing Environmental Impact Statements. The Federal Highway Administration found it took an average of 3.6 years, and a maximum of 12 years to complete an EIS (Kakkainen 16). EIS statements are costly, much of the information is difficult to impossible to gather and often the documents produced contain unreliable information (16). Often, agencies produce huge, uninformative FONSI to avoid litigation. Kakkainen, in their review of EIS reports, found that one-third of predictions given had non-verifiable findings (26).

An early report, just three years after NEPA went into effect, warned that

“Agencies must guard against a natural but unfortunate tendency to permit the writing of impact statements to become a form of bureaucratic gamesmanship in which newly acquired expertise is devoted not so much to formulating a project that meets the needs of the environment to shaping an impact statement to meet the contours of the agency's preconceived program and to withstand the test of the judicial review.” (Cramton pg 6)

Unfortunately, it appears this has happened. These authors worried that the discrepancy between how government agencies and the courts thought this act should be carried would create friction. It has led to an increase in FONSI statements, which are often written not to supply information, but to avoid EIS statements. Often it seems the courts interpret 'major' findings to mean 'any' and

WORKING DRAFT

'significantly affecting' to mean 'affecting' (Cramton 8). Early reports warned that because NEPA was very undefined it could easily lead to rigid court mandates.

The main issue reviewers had with NEPA was the lack of instruction as to how costs and benefits should be weighed. Do future emission cuts made by windmills outweigh the loss in aesthetic quality of a skyline? NEPA instructs the federal government to "attain the widest range of beneficial uses of the environment without degradation" and to "achieve a balance between population and resource use". However it doesn't say if providing Americans with a healthy environment is more important than "preserv[ing] important historical, cultural and natural aspects" of the US's natural heritage (Bisee 4).

Only one court has found that "economics and social impacts occupy a lesser tier of importance in an EIS than do purely environmental or ecological concerns." (Bisbee 21). In addition, the courts have said that aesthetic qualities will rarely require an EIS (21). It is the public however that usually pushes the aesthetic quality issue. One more revolutionary feature of NEPA is the fact that it opens these agency decisions up to the public. While some would argue that this seldom happens, especially with the increase in EA/FONSI which aren't required to be presented to the public for their feedback. The courts have said that public opinion is not meant to swing the balance of the court; however it is the public that generally puts projects on hold due to disagreements of the importance of aesthetic quality.

Bibliography

WORKING DRAFT

Bisbee, Dorothy W. "NEPA Review of Offshore Wind Farms: Ensuring Emissions Reduction Benefits Outweigh Environmental Impacts." *Environmental Affairs*

31.349 (2003): 249-384. Online.

Cramton, Roger C, and Richard K Berg. "On Leading a Horse to Water: NEPA and the Federal Bureaucracy." *HeinOnline* 71 (1973): 1-26. Cornell Online Library.

Web. 7 Sept. 2010.

Kahn, Robert D. "Siting Struggles: The Unique Challenge of Permitting

Renewable Energy Power Plants." *The Electricity Journal* 1040.00 (2000):

22-32. Online.

Karkkainen, Bradley C. "Towards a Smarter NEPA: Monitoring and Managing

Government's Environmental Performance." *HeinOnline* 102 (2002): 1-70.

HeinOnline. Web. 8 Sept. 2010.