

Lecture 11 overview

1. NEPA Title 1
2. Early lawsuits

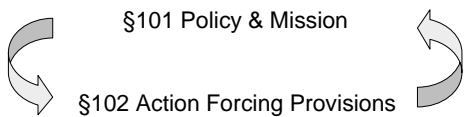
NEPA

Title 1 NEPA

Title 2 CEQ

NEPA

Title 1 NEPA



Purpose

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

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§ 101(a): Declaration

1. Profound impact of man's activity
2. Critical importance of environmental quality to welfare of man
3. Continuing policy of the government to:
 - Create & maintain conditions for productive harmony of man & nature
 - Fulfill requirements for present & future generations

§ 101(b): Declaration

Continued responsibility to:

1. Act as trustee for succeeding generations;
2. assure a safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment;

§ 101(b): Declaration

Continued responsibility to:

4. preserve historic, cultural, and natural heritage, diversity, and individual choice;
5. balance population and resource use to permit high standards of living;
6. enhance renewable resources and attainable recycling.

§ 101(c): Declaration

Recognition:

1. Each person should enjoy a healthful environment;
2. each person has a responsibility to contribute to the preservation and enhancement of the environment.

S. 1075 language

“each person has a fundamental and inalienable right to a healthful environment”

§ 102: Procedure

The Congress authorizes and directs that, to the fullest extent possible:

- (1) policies, regulations, and public laws shall be interpreted and administered in accordance with this Act
- (2) all agencies shall --

§ 102(2)(a): Science

- utilize a systematic, interdisciplinary approach;
- integrated use of the natural and social sciences and the environmental design arts;
- planning and decisionmaking;

§ 102(2)(b): Methods

- identify and develop methods and procedures;
- in consultation with the CEQ
- unquantified environmental amenities and values given appropriate consideration in decisionmaking with economic and technical considerations;

§ 102(2)(c): EIS

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

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§ 102(2)(c): EIS

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

§ 102(2)(c): EIS

- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

§ 102(2)(c): Coordination

Prior to making any detailed statement:

- consult with and obtain the comments of,
- any Federal agency which has jurisdiction by law or special expertise

§ 102(2)(c): Distribution

Prior to making any detailed statement:

- copies of statement and comments;
- shall be made available to:
 - the President;
 - the CEQ;
 - the public,
- shall accompany the proposal through the review processes;

§ 102(2)(d): State Preparation

The detailed statement for any Federal action funded under a program of grants to States shall not be deemed to be legally insufficient prepared by a State agency or official

§ 102(2)(e): Alternate Resources

- study, develop, and describe appropriate alternatives for unresolved conflicts;
- alternative uses of available resources.

! Independent of 102(2)(c) alternative requirement !

§ 102(2)(f): International Authority

- recognize worldwide and long-range character of environmental problems;
- provide support to initiatives, resolutions, and programs
- maximize international cooperation to prevent decline in the environment;

§ 102(2)(g): Information & Advice

make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

§ 102(2)(h): Ecological Planning

initiate and utilize ecological information in the planning and development of resource-oriented projects.

§ 102(2)(i): Assist CEQ

assist the Council on Environmental Quality established by title II of this Act.

§ 103 Review of Procedures

- review their present statutory authority, regulations, policies & procedures
- determining deficiencies or inconsistencies which prohibit full compliance with the Act
- propose to the President by July 1, 1971, necessary measures to bring their authority and policies into conformity

§ 104 Supplementary Nature

Nothing shall affect the statutory obligation to:

- (1) comply with criteria or standards;
- (2) coordinate or consult with other agency;
- (3) refrain from acting upon agency recommendations or certifications.

Muskie-Jackson compromise

§ 105 Supplementary Nature

Policies and goals are supplementary to existing authorizations of Federal agencies.

1. Have authority to comply with NEPA, but,
2. No authority to act outside their statutory mandate.

Dimensions of NEPA

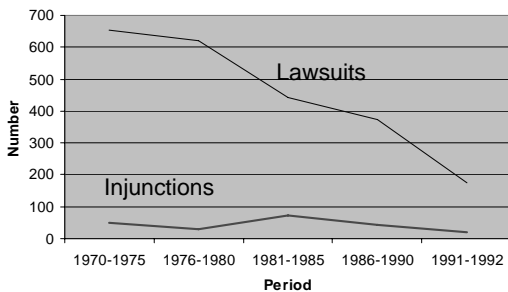
1. Substantive: goals, principles & values
2. Operative: instructions to be followed in plans, programs & decisions
3. Evaluative: means to reinforce and reform values and behaviors
4. Progressive: foundational agenda for the future

Reality of NEPA

Open to conflicting use & interpretations:

1. Allow agencies to use environmental values in decision making
2. Use by litigants to stop or delay projects

NEPA Litigation



Calvert Cliffs'

NEPA requirements:

*Calvert Cliffs' Coordinated Committee v.
Atomic Energy Commission*
D.C. Circuit Court, 1971

- Review AEC rules on NEPA implementation
- AEC required detailed statement of costs, benefits, and alternatives
- But set limits on environmental issues considered in decisionmaking.

Calvert Cliffs'

Ruling:

1. The general *substantive* policy in Section 101 of NEPA is flexible. "It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."

Calvert Cliffs'

Ruling:

2. The *procedural* provisions in NEPA Section 102 are not as flexible and indeed are designed to see that all federal agencies do in fact exercise the substantive discretion given them.

Calvert Cliffs'

Ruling:

3. Agencies are "not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require agencies to *consider* environmental issues..."

Calvert Cliffs'

Ruling:

4. The "detailed statement" is to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of the planned action.

Calvert Cliffs'

Ruling:

5. Congress did not intend the Act to be a paper tiger." NEPA's procedural requirements must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority."

Calvert Cliffs'

Ruling:

6. NEPA mandates a careful and informed decisionmaking process and creates judicially enforceable duties.
7. The courts could not reverse a substantive decision on the merits, but if the decision were reached procedurally, without consideration of environmental factors, it is the responsibility of the courts to reverse

Calvert Cliffs'

Ruling:

8. The AEC's interpretation of its NEPA responsibilities was "crabbed" and made "a mockery of the Act."
9. The AEC improperly abdicated its NEPA authority by relying on certifications
10. By not considering alterations until construction is completed, the AEC effectively forecloses environmental protection envisioned by Congress.
11. Delay may occur but is not a reason to reduce or eliminate consideration of NEPA.



And the Lord spoke unto Moses, "There is both good news and bad news.

The good news is that plagues shall smite your Egyptian oppressors, the Nile shall be turned to blood, frogs and locusts shall cover the fields, . . .

And Moses said, "O Lord, that's wonderful; but tell me, what's the bad news?"

And the Lord replied, "It will be up to you to write the environmental impact statement." -- Playboy 1975

Next Time. . .

- CEQ & CEQ Regulations
- Reading:
 - Jain et al., 3.5-3.6, 4.1-4.2, Appendix D
 - Reinke & Swartz, Part II, O188:190
