

ARTICLES

The Effect of NEPA Outside the Courtroom

by Michael B. Gerrard

Michael B. Gerrard is Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School. He is Senior Counsel to Arnold & Porter LLP, where he was formerly managing partner of the New York office. Among his books is *Global Climate Change and U.S. Law* (ABA 2007). Katherine Regan, a J.D. candidate at Columbia, provided invaluable research assistance. This is a revised transcription of the remarks Mr. Gerrard gave at the NEPA at 40 Conference on March 23, 2009.

The central purpose of the National Environmental Policy Act (NEPA)¹ is not to produce gorgeous or perfect documents; that's a means to an end. The ultimate purpose is to improve governmental decisionmaking by making relevant information available to officials and by ensuring that everyone affected by the decisions is given a voice. I would like to focus on the effect of NEPA on decisions.

I will discuss three issues.

First, I will talk about the effect that NEPA has had on internal decisionmaking by agencies.

Second, since NEPA attempts to focus decisionmakers on predictions of future environmental conditions with or without proposed actions, and their various alternatives and mitigation measures, it matters whether the predictions in environmental impact statements (EISs) turn out to be accurate; I'll discuss that.

Third, the time and expense in preparing an EIS are so great that it would be a real waste if this laboriously gathered information could only be used once, and was not disseminated and could not be retrieved by future researchers. Thus, I'll get into the matter of whether old EISs fade away or have continued life.

I. The Effect That NEPA Has Had on Internal Decisionmaking by Agencies

I believe the greatest effect of EISs is on the people who write them, not the people who read them. Not many upper-level officials actually read EISs, at least beyond the executive summary. Several courts have been asked to allow depositions of officials to ask if they actually read the EIS on which they made a decision, but such questions have rarely if ever been allowed. In fact, I suspect that those of us in this room are an unduly large percentage of the people on the planet who are entitled to membership in what might be called the world's

dullest mile-high club—that is, the club of people who have actually read so many EIS that, piled one on top of another, they would be mile high.

Those of us who have participated in the preparation of EISs have all observed and contributed to two mechanisms that can rarely be seen from the outside but that I believe are at the heart of the beneficial impact of NEPA.

First, the *near miss effect*: the project team discovers specific permit requirements that would be applicable, and figures out how to design around them. For example, it might be learned early in the process that a project will require a Clean Water Act (CWA) §404² dredge and fill permit. When no general permit is available, many applicants for contentious projects feel that while entering the §404 process may not be suicidal, it is certainly masochistic. Likewise, the project team may learn that parts of the site bear various designations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³; the Resource Conservation and Recovery Act (RCRA)⁴; the Endangered Species Act (ESA)⁵; the National Historic Preservation Act⁶; or other laws. Early engagement by the applicant in the NEPA process may discover problems while there is still time to redesign or move the project in a way to avoid these problems.

Second, the *tourniquet effect*: if you find that there are just one or two adverse impacts that can trigger an EIS, and it's possible to tie them off so they don't happen, you can avoid an EIS. That's the mitigated finding of no significant impact (FONSI), which is one of the hallmarks of the modern NEPA process. The mitigated FONSI is the shortcut that allows the great bulk of projects to pass through without clogging up the process—it's to the environmental review system what the plea bargain is to the criminal justice system. In fact, the

1. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §2-209.

2. 33 U.S.C. §1344, ELR STAT. FWPCA §404.

3. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

4. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

5. 16 U.S.C. §§1531-1544, ELR STAT. ESA §2-18.

6. 16 U.S.C. §470 et seq.

ratio of mitigated FONSI to EISs is greater than the ratio of pleas to trials in the federal courts.⁷

The near miss effect and the tourniquet effect can be utilized constructively through careful design of regulatory programs. I will illustrate an example of the tourniquet effect. A government agency could define best practices for certain kinds of projects, and adopt a rule that a project that meets these best practices can avoid an EIS through a mitigated FONSI or at least can obtain a limited scope. For example, for an office building, the best practice might be defined as Leadership in Energy and Environmental Design (LEED) Gold; a building that pledged to meet LEED Gold standards might get a mitigated FONSI if its only significant adverse effects were energy and water consumption; and if the building would also unavoidably intrude on a wetland or destroy an historic property, at least the EIS could avoid the impacts covered by LEED.

Likewise, a standard might be adopted for the minimum unavoidable greenhouse gas (GHG) emissions from particular classes and sizes of projects. The environmental assessment (EA) would have to quantify the emissions. If the number for a particular project added up to something larger than the threshold, the applicant could adopt a series of mitigation measures to get the projected emissions below the threshold, or else it would need to explain why it could not get below the threshold and, perhaps, even request a variance. This, of course, requires clear guidelines on how to do the calculations, or else we would see a lot of voodoo numbers.

This blending of the mitigated FONSI and something like a best available control technology (BACT) standard could be a very important regulatory tool for those sectors that are not subject to caps under a cap-and-trade system.

In fact, it is not widely recognized but the United Nations Framework Convention on Climate Change, which the U.S. ratified in 1992, in Article 4, §1(f), specifically calls out environmental impact assessment as an important tool for considering and reducing climate impacts.

My proposition that EISs have the greatest impact on the people who write them, not the people who read them, leads to an important question: who does write EISs?

Under NEPA, draft EIS are mostly written by consulting firms hired by federal lead agencies. Especially when private applicants are involved, this process is somewhat divorced or at least estranged from the planning process that leads to the design of the project. In my home state, under the New York State Environmental Quality Review Act, EIS are mostly written by consulting firms hired by the applicants, and these firms are often at the table when the projects are being designed—in fact it's often physically *their table*. That dynamic inserts the environmental review process into the project planning process, and it means that the near miss effect and the tourniquet effect are much more likely to work.

7. It has been widely said that in an average year, there are 250 EIS under NEPA, and 20,000 EAs. Thus, about 1.2% of actions subject to NEPA underwent EIS. In 2007, in the U.S. district courts, 3,414 criminal cases were decided after trial, and 75,949 defendants pled guilty or nolo contendere. Thus, about 4.5% cases went to trial. Sourcebook of criminal justice statistics online, www.albany.edu/sourcebook/pdf/t5222007.pdf.

In other words, adverse environmental impacts are identified early, during the planning process, before the application is even submitted. Final EISs are the responsibility of lead agencies, though there too the applicants' consultants do much of the writing.

Admittedly, it may lead to less objective EISs, and there are often accusations, which the courts typically reject, of a conflict of interest. I'm going to say something heretical here, but we're in an academic setting, so hopefully I'll get away with it. It is not obvious to me that this negative effect of letting applicants play an overt role in the preparation of draft EISs overcomes the real positive effect of injecting environmental review directly into the muscle of project planning, when the review process is closely overseen by a diligent lead agency and there is meaningful public involvement.

One study published in 1999 looked at modifications to projects during the environmental impact assessment process in eight European countries. The European Commission monitors how member states perform their obligations under the 1985 directive of the European Council of Ministers that requires EIA. The study found not only that most projects undergo modifications during the EIA process, but also that most of these modifications occur *before* the applications are submitted for government approval. This suggests that the principal effect occurs during internal applicant development of their projects, not once the proposals get in the hands of the reviewing government agencies.⁸ This brings me back to my point that it's more important to inject environmental information, even if imprecise, toward the beginning of the planning process than it is to end up with a technically gleaming document that no one with any real power will ever read.

I'm not saying that the foxes should be given control of the henhouse, but I do think it is worth considering whether applicants could usefully become more intimately involved in the preparation of EISs for their projects, thereby allowing the near miss effect and the tourniquet effect to play out fully, in view of my argument that it's more important to get good decisions and projects than perfect documents.

II. The Accuracy of Predictions in EISs

My second topic is the accuracy of the predictions contained in EISs about the impacts of projects. This is very important because if the predictions in EISs are way off, then EISs might be worse than useless as guides to decisionmaking.

A search for studies about the accuracy of predictions in EISs unearthed only a small handful of studies that looked at specific EISs and then figured out what had actually happened.⁹ The good news is that the predictions were by and

8. Adam Barker & Christopher Wood, *An Evaluation of EIA System Performance in Eight EU Countries*, 19 ENVTL. IMPACT ASSESSMENT REV. 387, 397 (1999).

9. E.g., Ben Dipper et al., *Monitoring and Post-Auditing in Environmental Impact Assessment: A Review*, 41 J. ENVTL. PLAN. & MGMT. 731 (1998); Christopher Wood et al., *Auditing the Assessment of the Environmental Impacts of Planning Projects*, 43 J. ENVTL. PLAN. & MGMT. 23 (2000); Paul J. Culhane, *The Precision and Accuracy of U.S. Environmental Impact Statements*, 8 ENVTL. MONITORING & ASSESSMENT 217 (1987).

large fairly close to the mark. They were rarely out of the ballpark. And most importantly, there were few instances of completely unanticipated impacts.

The bad news is that it was exceedingly difficult to perform these studies because there was very little post-EIS auditing of the results. After the decision is issued, EISs are largely forgotten. Rarely was there a requirement for ongoing monitoring of the conditions found in the EIS, and even more rarely did someone dust off an old EIS and compare the predictions to the eventual real world to see how they match up.

In many areas of human endeavor, detailed statistics are kept on the outcomes of various activities. Sometimes the stakes are very high—such as the fatality rates after certain kinds of surgical procedures. Sometimes the stakes are low—such as what kinds of pitches are most effective against left-handed hitters in July. The activities that are subject to EISs are environmentally significant, by definition, but after the projects are built, we rarely look back quantitatively and see what really happened. That means that we typically lack reality checks to see if the methodologies used in EISs have any validity.

III. What Happens to EIS After the Record of Decision Is Issued?

Most of us who write books hope that they will remain in print for a while, or at a minimum that they will stay on library shelves and be readily accessible for many years. An EIS typically takes as many person-hours as a book to write, and sometimes more years, and it will often contain a whole lot more substantive information. But unfortunately, once the decision is made, the EIS typically goes on a shelf and is forgotten.

And that is the best case. Under the New York State Environmental Quality Review Act, the State Department of Environmental Conservation (DEC) is to receive a copy of every EIS. It stored a lot of old EISs in a basement; there was a flood, and they were lost. Some years later, when DEC moved to a smaller building with less shelf space, many of the surviving EISs were tossed. I don't want to compare this to the burning of the library at Alexandria, but it does represent the loss of an enormous wealth of information and data. Studies of species abundance, water and air quality, traffic patterns, and a whole host of other conditions were laboriously prepared and would be invaluable years later in understanding environmental trends, base case conditions, the impacts of various human actions, and other factors.

Even those old documents that survive are inaccessible. Few people know where they are, and essentially no one knows what's in them. There is no master index. They are widely dispersed and virtually buried treasure chests of information. Fortunately, at the federal level the Transportation Library at Northwestern University in Illinois has a large collection of federal EISs, though only a fraction of them are in electronic form. Few states have anything comparable for the EIS prepared under their little NEPAs.

I think two things should be done. First, there should be an EIS rescue project. Many old EIS reside in the attics and warehouses of government agencies, law firms, and consulting firms. If a call were put out to send your old EIS to a central repository, where one of each could be preserved and the rest were recycled, hundreds or perhaps thousands could be saved.

The second thing that should be done is an EIS digitization project. Take all these old EISs and scan them into a database. Load into that database the newer EISs that are online or on compact discs or other electronic media. Come up with a comprehensive searchable database that would be an extraordinary collection of data and experience, and would avoid the need to reinvent 1,000 wheels.

A number of laws already on the books arguably call for new EISs to be available online. Provisions of the Paperwork Reduction Act Amendments of 1995, the Electronic Freedom of Information Act of 1996, and the E-Government Act of 2002 arguably require NEPA EISs to be put online. The day after his inauguration, President Barack Obama issued a memorandum regarding the Freedom of Information Act in which he directed that "All agencies shall use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely." A New York State Environmental Quality Review Act amendment of 2005 explicitly has such a requirement, though the state DEC has been very lax in implementing it.

In the ideal world, these electronic EISs would be linked to a geographic information system so that researchers could find every EIS reference to particular locations. Geographic information system technology is already being used to assemble disparate information about some projects, such as electric transmission lines. That could be greatly expanded.

With this kind of electronic preservation and dissemination, NEPA could serve one of its great unrealized potentials—to be the font of information about the natural world, about how humanity has affected it, and about what can be done to prevent or reverse these impacts.