

ENVIRONMENTAL IMPACT STATEMENTS: THE STATUTORY FRAMEWORK¹

SAMUEL BUFFORD,² College of Law, Ohio State University, Columbus, OH 43210

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The purpose of this paper is to lay out the legal framework of the National Environmental Policy Act (NEPA), as it relates to the requirements for environmental impact statements.

First of all, attention should be called to the fact that NEPA is just a small part of American environmental law. There are other federal statutes relating to the management of forests and wildlife, the cleaning of the air, the preservation of endangered species, and the preservation of historical landmarks. A number of states have legislation imposing environmental quality standards beyond those found in federal law. In addition, the common law, apart from any legislation, has historically imposed certain environmental protection standards upon property owners. It is NEPA, however, that has been the focus of the spotlight in recent years.

The purposes of the Act are set out in § 2, 42 U.S.C. § 4321 (1970):

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 . . .

Under the declaration of National Environment Policy in § 101, 42 U.S.C. § 4331, Congress adopted very broad language to declare the national policy with regard to environmental protection:

. . . 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 . . . to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

This language is broad and sweeping and may give the appearance of committing the nation to an extensive program of environmental conservation. However, this section has generally not been interpreted to impose substantive requirements for environmental protection: it contains no operative provisions.

The main operative provision of Title 1 of the Act is in Section 102, which is the source of the requirement for environmental impact statements. The scope of application of the provision is limited to proposals for federal legislation and other major federal actions significantly affecting the quality of the human environment. It does not apply to state

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²Present address: Sullivan, Jones and Archer, 130 Sutter Street, San Francisco, CA 94104.

or local governments, nor to actions by non-governmental entities.

An environmental impact statement, according to the statute, must contain the following elements:

1. A statement of the environmental impact of the proposed action.
2. A statement of unavoidable adverse environmental effects.
3. A description of all alternatives to the proposed action.
4. A description of the relationship between local short-term uses and the maintenance and enhancement of long-term productivity.
5. An identification of any irreversible and irretrievable commitments of resources involved in the proposed action.

Subparagraph (A) also requires, in the development of an impact statement, the utilization of a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment.

In addition, the statute requires the responsible federal official to consult with and obtain the comments of any federal agency which either has jurisdiction with respect to any environmental impact involved or has special expertise in the matter. Furthermore, appropriate state and local agencies must be consulted, and their comments and views, together with those of all relevant federal agencies, must be made available to the President, the Council of Environmental Quality and the public.

The environmental impact statement must be prepared early enough in the planning of the project so that its results are presented to the decision-making authority before the decision is made on whether or not to undertake a project. The statute requires that all of the comments from federal, state and local agencies shall accompany the proposal through the agency review process.

It should be noted that this statute usually has been interpreted to impose no requirements that the decision-making

officials actually consider the environmental impact statement in making their decisions. Courts have, for the most part, interpreted the statute to impose only an obligation of full disclosure to the decision-making authorities. Essentially the requirements of the Act are procedural: if the procedure required by the Act is followed, the statutory requirements are met.

There are three main problem areas that have arisen with regard to the implementation of the statute. First, in a number of cases impact statements have been incomplete, particularly in the early experience of preparing such statements. With the development of expertise in preparing such statements, this has become somewhat less of a problem. Second, in some cases the decision-making authorities really have wanted to ignore the environmental impact of certain projects, and have treated the preparation of the impact statement as a formality. Where the statements have not been prepared in time to be placed before the decision-making officials at the time the decisions were made, the courts have held that the statute has not been complied with, and have required a review of the decisions in light of the impact statements completed later. Third, some impact statements have given inadequate or no attention to alternatives to the proposed projects. Where no consideration of alternatives is given at all, courts have held that the statute has not been complied with, and that the impact statements must be revised and the decision reviewed. On the other hand, even a relatively cursory presentation of alternatives in the impact statement has usually been held to satisfy the statutory requirements.

In summary, the courts have treated NEPA primarily as a procedural statute, imposing upon federal agencies the requirement of full disclosure of the environmental impacts of proposed legislation or major federal actions, and the major result of this legislation has been the preparation of environmental impact statements, which to a considerable extent are now taken into account in administrative decision-making processes.