

The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA) is considered the Magna Carta of environmental protection. In the wake of Rachel Carson's *Silent Spring*, Congress set forth a "look before you leap" environmental planning process which forces federal agencies to consider their environmental impacts proactively. Prior to the enactment of NEPA, federal agencies were not accountable for their potentially harmful impact on the environment. NEPA mandates all federal agencies to evaluate the environmental impacts of their actions which also extends to state and private activities when a federal link is present. (Mandelker, p. 293) The vague language of the act spawned years of litigation between agencies and the Supreme Court. After reviewing the historical context of the Act, an overview of three of these cases provides a foundation for understanding how these cases ultimately weakened NEPA in regards to its original purposes.

The historical importance of NEPA can be appreciated thorough review of the environmental conditions which preceded the signing of the act. The United States was under considerable environmental stress in the 1960's. The economy was driven by an insatiable desire for material goods which taxed the land, air, and water. Forests were being clear-cut; industrial water pollution and acid mine drainage rendered rivers and streams unusable; dams rendered rivers silent and still; highways and developments consumed vast areas of rural America, and smog blanketed cities. Citizens across the country were beginning to see how our collective actions were affecting plant, animal and human health to a degree not witnessed before. Politicians across the nation heard testimony from the scientific community regarding the state of environmental degradation. Alarmed by the prospect of potential ecological disaster, Professor Lynton Caldwell, a special assistant to the Senate, highlighted to his peers that there was no comprehensive national policy to manage the environmental issues which were compounding. Along with Professor Caldwell, Senator Henry (scoop) Jackson of Washington recognized that a national mechanism was needed to force federal agencies to consider their environmental impacts and incorporate it into their decision-making process. Jackson, the bill's chief Senate sponsor, stated, "NEPA serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values." (Eccleston, p. 11) NEPA has been adopted in various contexts and degrees by countries across the world, proving that the signing of NEPA was well suited to a time where the state of the environment was a priority.

Since the enactment of NEPA, there have been landmark cases which have further clarified NEPA's intent, breadth and scope. *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission* 449 F.2d 1109 (D.C. Cir. 1971) was a precedent-setting case which established that agencies had judicially enforceable obligations under the statute. The principle issue this case clarified was if NEPA mandated a federal agency to consider environmental factors at every critical stage in the decision-making process. To that end, the action-forcing provision of the law mandates that agencies prepare a detailed environmental impact statement (EIS). The precedent that this case set forth was that the impact statement was of critical importance to ensure that each agency decision maker takes into account all possible approaches to a particular project, including abandonment, which would impact the environment. Judge Skelly Wright's dissenting opinion states "These cases are only the beginning of what promises to become a flood of new litigation-litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."^[1] A review of the Supreme Courts cases following Calvert Cliffs provides the substance for an argument that NEPA has been weakened as time progressed.

The issues argued in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) surrounded the specificity and timing of NEPA-mandated EIS reports. The Department of Interior (DOI) was interested in developing coal reserves in four northwestern states. The DOI plan included granting leases, approving mining plans, and issuing permits to private entities to develop individual mining operations. The Sierra Club claimed that federal officials could not allow further development of coal reserves on federal land without a comprehensive EIS on the entire region. The court held that there was no proposal for regional development and thus that there was nothing to prepare an EIS on. The Sierra Club argued that the nationwide, generic EIS which the DOI prepared was insufficient and lacked specificity. The Supreme Court found that the mere contemplation of a certain action is not sufficient to require an EIS.

In the dissent given by Judge Powell, it was indicated that the Supreme Court believed that NEPA's mandate, the preparation of an EIS, is largely procedural. The only role of the court is to ensure that the agency in question has taken a 'hard look' at the environmental consequences and alternatives. As such, the findings in *Kleppe* highlight that NEPA does not require the best environmentally mindful alternative to be selected. In addition, NEPA does not require a particular result. Because of these reasons, it can be argued that this case weakened NEPA.

The Supreme Court findings in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) also weakened NEPA. In *Vermont Yankee*, the Supreme Court reversed two D.C. Circuit rulings that had remanded cases to the Atomic Energy Commission (AEC) based on NEPA violations. The Supreme Court disagreed with the lower courts that the AEC had violated NEPA by failing to fully explore the environmental effects of the uranium fuel cycle in its agencies rulemaking. As such, this case examined the adequacy of the discussion of alternatives considered during the NEPA process. This case granted federal agencies more command over the issues inherent to their field of specialty based on their holding of 'specialized knowledge.' It was found that the courts could not impose rulemaking on federal agencies under the Administrative Procedures Act (APA). Although the Courts should ensure that agency decisions are "fully informed," they must restrict their examination of agency decision-making processes to that inquiry. (Urban Law Annual, p. 254) It is this 'specialized knowledge' that ultimately weakens NEPA due to the shift in power towards the agency themselves.

In the case *Robertson v. Methow Valley Citizens Council*, the Supreme Court essentially laid to rest any remaining questions regarding NEPA's mandate to protect the environment. (Eccleston, p. 303) The Supreme Court unanimously reversed a Ninth Circuit decision requiring the Forest Service to prepare a more detailed EIS before issuing a special use permit to develop a resort within a national forest. [2] The Court of Appeals cited NEPA's substantive duty to "develop the necessary mitigation measures before the permit is granted" and that the accompanying EIS must include a "detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action" instead of a list of possible mitigation measures. Judge Stevens' dissenting opinion emphasized, again, that NEPA's requirements are entirely procedural and concluded that "NEPA merely prohibits uninformed—rather than unwise—agency action." Weakening NEPA, this case freed agencies from having to consider worst case scenarios or including preventative measures. Instead, the agencies only needed to outline the impact of their actions.

The common thread running through these court cases is that NEPA's *procedural* requirements must be enforced. Skirting any indication of mandated enforcement, the findings in these cases highlight the Supreme Courts' interpretation of NEPA as procedural. The opinions of the Supreme Court appear to all deter lower courts from actively enforcing the statute. In this regard, NEPA was weakened as courts processed its vague and ambiguous language. Placed in the context of NEPA's purpose set out in Section 2, the collective Court opinions and findings appear to vaguely support the original statements. NEPA's purposes are set out in Section 2 of the Act:

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.

The ability to determine whether the common findings of the cases support or weaken NEPA rides on the degree to which they support these original purposes. All three cases provide scope and definition to the judicial review of agency actions. The weakening of NEPA is centered around the shifting of power towards the agencies themselves.

NEPA was incredibly groundbreaking when it was enacted. It provided a level of disclosure that was not available in the 1960's. Although it did not prevent agencies from taking unwise actions, it did allow for review of the impacts of the actions. The fatal flaw was the optimistic thinking that over time, agencies would understand that there are environmental impacts to their actions. This was neither profitable or enforceable, and agencies were producing large volumes of EIS's which were broad and inclusive.

By reviewing NEPA's historical context and the three selected Supreme Court cases which followed its enactment, we have gained a perspective which lends itself to both sides of the argument. Although the NEPA lacks enforcement of favorable outcomes towards the environment, agencies are mandated to consider their environmental impacts and this is a monumental shift from previous years. NEPA is still considered the Magna Carta of environmental protection but environmental issues are notoriously hard to enforce in a capitalistic economy. The importance of NEPA today is reflected in our ability to hold agencies accountable for their actions. In some contexts this is not possible but it is a far reach from reckless and unaccounted destruction of the environment. Judge Wright intuitively understood the inherent, structural reasons why environmental law is hard to make, maintain, and enforce over time. As such, making people think before they act is the keystone of NEPA. Judge Marshall's dissenting opinion in *Kleppe* reminds us that "early consideration of environmental consequences is the whole point of NEPA."

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[1] 449 F.2d at III 1. *Dissenting opinion, J. Skelly Wright*

[2] *Methow Valley*, 490 U.S. at 335-36, 346-47