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OUTLINE

NATIONAL ENVIRONMENTAL POLICY ACT: ITS SUBSTANCE, EFFECTS, AND RELATIONSHIP TO MINERAL AND WATER RESOURCE DEVELOPMENT IN THE WEST

BY

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FEDERAL LANDS, LAWS AND POLICIES AND THE DEVELOPMENT OF NATURAL RESOURCES

THE UNIVERSITY OF COLORADO SCHOOL OF LAW
I. NEPA (42 U.S.C. § 4321 et seq.) as a "full disclosure" statute

A. Provisions

1. Need for an environmental impact statement for all "major federal actions" significantly impacting the environment (§ 102(2)(C))

   Contents of an EIS--requirements:

   a. Identification and description of direct environmental impacts

   b. Discussion, also, of "secondary" (indirect) impacts (e.g., the "but for" concept); see City of Davis v. Coleman, 521 F.2d 667 (9th Cir. 1975)

   c. Discussion of cumulative impacts; see, e.g., Nebraska v. Rural Electrification Administration, 12 ERC 1156 (D.Neb. 1978)

   d. Discussion of "reasonable" alternatives, particularly those less environmentally damaging; see, e.g., Akers v. Resor, 443 F. Supp. 1355 (W.D. Tenn. 1978)

3. Necessity for consultation with other governmental agencies. See Texas Committee on Natural Resources v. Alexander, 12 ERC 1676 (E.D.Tex. 1978)

4. Need for a rational defense of decision not to write an EIS (i.e., a "negative declaration"). See, e.g., Save the Bay, Inc. v. Corps of Engineers, 14 ERC 1456 (5th Cir. 1980); Get Oil Out, Inc. v. Andrus, 468 F. Supp. 82 (C.D.Cal. 1979)

B. Common-variety litigation under NEPA

1. First round (1970-circa 1973)--need for an EIS: whether federal actions were "major"

2. Second round of litigation (1973-present)--adequacy of an EIS

C. Major effects of NEPA

1. Exposes governmental decisionmaking to plain view--which itself has significant prophylactic implications

2. Opens up federal decisionmaking to "public participation"and, theoretically at least, a more fully-balanced political process

3. Encourages (but does not mandate) minimization of environmental harm. See § 101, 40 C.F.R. § 1505.2(c)

4. Bottom line: more defensible federal decisions

D. What NEPA is not

1. Not a mandate to avoid unreasonable environmental insult. Matsumoto v. Brinegar, 568 F.2d 1289 (9th Cir. 1978); see also Strycker's Bay Neighborhood Council v. Karlen, 100 S. Ct. 491 (1980); but see Public Service Co. v. NRC, 582 F.2d 77 (1st Cir. 1978)

2. Not a mandate to choose the least damaging alternative, but must "state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not," 40 C.F.R. 1505.2(c), supra

II. Special issues under NEPA

A. The need for "programmatic" EIS--when it is and when it is not required

1. CEQ regs, 40 C.F.R. § 1502.4(b) and (c)(2)

B. Need for **regional** EISs

1. CEQ regs, 40 C.F.R. 1502.4(c)(1); see EDF v. Andrus, 13 ERC 1374 (9th Cir. 1979)


C. When a decision not to prepare an EIS is litigable--the question of "ripeness;" see, e.g., Sierra Club v. Corps of Engineers, 481 F. Supp. 397 (S.D.N.Y. 1979); BRS Land Investors v. United States, 596 F.2d 353 (9th Cir. 1979)


III. NEPA and Mineral Resource development

A. Coal development in the West--when do EISs need to be prepared


2. With decision to lease in a given region--regional EISs; see Cady v. Morton, 527 F.2d 786 (9th Cir. 1975)


4. Site specific leases; cf. Cady v. Morton, supra

5. Approval of mining plans by OSM or state regulatory agencies

6. Need for EIS on preference right leases; see NRDC v. Berklund, 609 F.2d 553 (D.C.Cir. 1979)
B. Oil and gas

1. Need for EIS for exploration and development leases; but cf. Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978)

2. Special problems of oil and gas leasing in wilderness areas—the use of NEPA (EISs) to solve tough balancing problems

a. BLM land

(1) Wilderness study areas protected under § 603(c), FLPMA (43 U.S.C. § 1782(c)), but how much?

(2) Wilderness designated areas protected under Wilderness Act, see § 603(c), supra, and 16 U.S.C. § 1133(d)(2)

b. Forest Service land


(2) Wilderness designated area protected under Wilderness Act, supra; see Izaak Walton League of America v. St. Clair, 353 F. Supp. 698 (D.Minn. 1972), rev'd on procedural grounds, 497 F.2d 849 (8th Cir. 1974)

c. Hardrock mineral development (uranium, gold, copper, molybdenum, etc.)

(1) Prospecting permits on public land—need for an EIS

(a) Forest Service regs, 36 C.F.R. § 252.4(f); see Jette v. Bergland, 579 F.2d 59 (10th Cir. 1978)

(b) BLM proposed regs, 43 C.F.R. § 3809.2-1, at 45 Fed. Reg. 13963 (March 3, 1980)

(2) Approval of mining plan—need for an EIS

(a) To determine necessity for environmental protection measures, the cost of those measures, and thus whether there is a "valuable deposit." Cf. NRDC v. Berklund, supra
(3) Patent--need for an EIS

(a) Right to condition patent on environmental protection requirements?

(b) Need for an EIS to determine those conditions, and thus whether there is a "valuable deposit"--and right to a consequent patent; but see South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980); U.S. v. Kosanke Sand Corp., 12 I.B.L.A. 282, 80 I.D. 538 (1973)

IV. Water resource development and NEPA

A. Issuance of § 404 permits for discharges of dredge or fill in navigable waters: dams and diversion structures


2. When individual permit not necessary--the "national permit" scheme; § 404(e)(1) of Water Act, 33 U.S.C. § 1344(e)(1)

3. When will the issuance of a permit be a "major federal action?"

4. When will the issuance of a permit not be a "major federal action?"

5. When an EIS is written, must it deal with the impacts of everything to which a dam may relate (e.g., a coal-fired power plant) or can the dam be looked at in isolation; cf. Sierra Club v. Hodel, 544 F.2d 1036 (9th Cir. 1979); but see Save the Bay, Inc. v. Corps of Engineers, 610 F.2d 322 (5th Cir. 1980)

6. Is an EIS necessary to make the "public interest" determination--the pivotal criterion for permit issuance--called for under Corps regs at 33 C.F.R. § 320.4?

7. A footnote: the impact, if any, of § 101(g) (the "Wallop Amendment") of the FWPCA on the federal government's right to regulate dam-building so as to protect the environment

B. Dams as a "point source" of pollution--need for § 402 permits

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2. If so, will they be considered "new sources" of pollution and require an EIS?

3. If states administer the § 402 authority, does NEPA apply to this delegated-state program— that is, do states have to write EISs; see Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Board, 453 F. Supp. 122 (E.D.Va. 1978)

C. NEPA as satisfying requirement of Fish & Wildlife Coordination Act

1. Coordination and consultation with Fish & Wildlife Service whenever waterways of U.S. will be modified; see 16 U.S.C. § 662(a)


4. If Fish & Wildlife Coordination Act not satisfied, can private individuals bring lawsuit (the issue of "standing"); compare Trinity County v. Andrus, 438 F. Supp. 1368 (E.D. Cal. 1977) with EDF v. Andrus, 596 F.2d 848 (9th Cir. 1979)


1. When are licenses under § 4(e) of the FPA (16 U.S.C. § 797(e)) needed from the Federal Energy Regulatory Commission (in addition to § 404 licenses from the Corps of Engineers)?

2. Are EISs needed to make the "public interest" finding required under § 4(e), supra? The "best adapted" determination under § 10(a) (16 U.S.C. § 803(a))? 

3. Do EISs have to be prepared by FERC in issuing "preliminary (study) permits" under § 4(f) (16 U.S.C. § 797(f))?
V. Conclusion—prospects for litigation under NEPA in the West

A. Where the action will be coming from—energy development

B. The Energy Mobilization Board: how will it lessen developers' burdens under NEPA (and increase the need for vigilance by resource protectionists)?

C. Is there a way to resolve NEPA issues without courtroom litigation—the need for an alternative mechanism for environmental conflict-solving