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This is a graded discussion: 10 points possible **due Feb 19, 2018**

Is NEPA a paper tiger?

Jan 4, 2018 at 2:51pm

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Having read both *Calvert Cliffs* and *Stryker's* - do you think NEPA is a paper tiger? Is NHPA? Why?

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Reply

Meghan King

(https://uk.instructure.com/courses/1909098/users/6889534)

Feb 17, 2018

I do not believe that the NEPA, or the NHPA, are merely 'paper tigers'. Both have been used

effectually to change and prevent poor decisions from being made. When considering the Strycker's Bay case, it is apparent that NEPA standards were met, and did in fact influence the decision of whether to continue the developments in the current location versus moving to another area. It could be argued, however, that the rejection of the new site by HUD merely because of the impact of the 'time delay' was incomplete (making it seem like the issue, at least in this situation, was the implantation and execution of HUD requirements). NEPA itself was meant to be used as an enforcing act that would prevent lackadaisical information gathering in terms of the impact that a project would have on the area, both socially and environmentally. It was created to encourage 'fully informed decisions', but not to control the factual opinion of the responsible agency. This means that NEPA was not designed to control, by a judges' decision, what could or could not be done. It instead would allow for review by a court to ensure that proper procedures were followed. The intent of NEPA was for the court to not be involved in the substantive fact-finding process. However, this does not mean that NEPA or NHPA are not significant, since they compel that investigation be properly done when considering if environmental consequences had been properly applied.

It seemed to me, from reading these cases, that the court takes it role very seriously. It in fact it states in the opinion that Congress, when drafting the Act, did not consider NEPA a paper tiger (p 5). Instead, it took NEPA's role as a procedural gate keeper seriously. There is a difference between ensuring a process is correctly done versus controlling substantive results. Safe guarding process, in my opinion, seems to be the first step and perhaps the most important. Substantive results, to build or not build in a certain manner, will all be subject to differences of opinion. What NEPA and NHPA provide is a means for ensuring that opinions, though different, are soundly based. I have heard news commentators in talking about various laws and their enforcement discuss the difference between "procedural" and "substantive" due process. To me, this seems to present the same kind of issue; you need the substance of your laws, or your environmental decisions, to be well founded. That is a question of fact, however, that seems not to be reviewed by appellate courts; a court can't hear ALL the evidence that might have been presented, and I do not feel it should substitute its judgement for those examining the proposal. Even the best substance needs to be procedurally proper; there need to be set rules for getting to an opinion and it seems to me that these Acts are the "procedural due process" part of the equation.

Reply

Elise Kline

(https://uk.instructure.com/courses/1909098/users/6901798)

Feb 18, 2018

I like your characterization of NEPA in this case as a "procedural gatekeeper." To its credit, NEPA does ensure that all the facts are collected and considered before a decision is made. Without them, more advantage would surely be taken by organizations without any investment in historical or environmental resources. Still, I wish more could be done to ensure the preservation of historical/environmental resources if it is found that an undertaking would impact them. In Strycker's Bay, the company was fully within its rights to disregard the multiple alternatives presented simply because it would delay the project.

Reply

(http

James Thobaben

(https://uk.instructure.com/courses/1909098/users/5199459)

Feb 18, 2018

Good point on the 'procedural gatekeeping' function. Arguably, if the courts get too involved in 'substantive fact-finding' they will (1) get even more cluttered, (2) assume responsibilities that properly belong to the executive branch (through regulators), and (3) make decisions though having insufficient expertise.

Reply

(http

Krista Richardson-Cline

(https://uk.instructure.com/courses/1909098/users/6901950)

Feb 19, 2018

Yes, I agree that "procedural gatekeeper" is a good term for NEPA or more precisely the NEPA process not necessarily the outcomes. From what I understand, both NEPA and NHPA are methods for the agencies to make better decisions concerning their undertakings/projects.

Reply

(https:/

Elise Kline

(https://uk.instructure.com/courses/1909098/users/6901798)

Feb 18, 2018

Having read the two cases, I believe that NHPA and NEPA do accomplish what they have been

established to do, that is, they ensure that an appropriately thorough examination of the potential impacts of an undertaking on historical/environmental resources. Both are very effective in this respect, and of the cases we have considered in class thus far, it seems like judges are relatively stringent in determining what an appropriate examination is. So, in terms fo accomplishing what they have been designed to do, they are not paper tigers.

However, the fact that they cannot force any action beyond thorough consideration of impacts has always been slightly concerning for me. Even after an environmental assessment finds that resources may be impacted, there is no guaranteeing their safety beyond the consideration of mitigation. Even with potential impacts, an organization may decide to continue with their original plan, as in the Strycker's Bay case. A time delay was deemed a great enough con to convince the organization to disregard the impacts building on Site 9 may cause the local environment. So in this respect, yes, NHPA and NEPA are paper tigers. They can do nothing to protect resources or environments beyond ensuring that their destruction is wrought by very well-informed forces.

Reply

(http

Meghan King

(https://uk.instructure.com/courses/1909098/users/6889534)

Feb 18, 2018

I agree with you that time should not be an acceptable reason to ignore better alternatives (especially when this is most likely based purely on financial considerations). Deciding whether benefits outweigh consequences is always going to be somewhat subjective, based on who is the stakeholder in competing interests. I can't see any way to change the subjectivity of competing interests into one objective right or wrong. It seems you can only hope that the process required by NEPA and NHPA evens the playing field so that all stakeholders have an equal chance to have their opinion heard.

Reply

(http

James Thobaben

(https://uk.instructure.com/courses/1909098/users/5199459)

Feb 18, 2018

Your point seems correct, that "an appropriately thorough examination of the potential impacts of an undertaking on historical/environmental resources" is the main task. Do you think, though, that this fact-finding will led to consensus on the content of a decision? If enough

information is properly gathered, will the 'right and good' choice inevitably be made?

Reply

Elise Kline
(https://uk.instructure.com/courses/1909098/users/6901798)
Feb 19, 2018

Absolutely not. Of course, the "right and good choice" is subjective and probably different for every party involved. This is where I think that NHPA and NEMA could be considered toothless. After all the facts are gathered, regardless of the findings, there is no way to enforce the protection of historic/environmental resources. We cannot trust organizations who stand to make money from an undertaking to make this "right and good" choice on their own.

Reply

James Thobaben
(https://uk.instructure.com/courses/1909098/users/5199459)
Feb 18, 2018

The NEPA, though its impact was significantly altered by Strycker's Bay Neighborhood Council, Inc. v. Karlen, remains potent in shaping outcomes. While "like the NHPA [it legally] is only a mandatory process," in actual practice the NEPA seems to have greater significance than NHPA.

(NHPA is important, but its ferocity is more like that of a wildcat in a small wood than a tiger on the prowl – to use the metaphor provided.)

This seems to be true for four reasons.

1. Social pressure has led to other laws and regulations that are associated with NEPA and have reinforced the original arguments about caring for n/Nature.

2. Unlike the NHPA which deals with specific pieces of property that have 'survived' and need to be preserved, NEPA addresses the protection of n/Nature. When an EIS is required it is less about a specific site (in the minds of the members of the public, at least) than about the inter-connected ecosystem in which all live.

Certainly, someone could argue the same is true of 'history' – but that is far more subjective

(as the debates about statues indicated, though they seem now – more or less – resolved).

In other words, the NEPA operates with a greater cultural consensus than NHPA about its underlying assumptions. Though the legal structures are similar and the processes almost identical, the 'content matter' of what is being regulated differs significantly. More people know or think they know what constitutes n/Nature.

3. In broader ethical terms, this understanding of content makes sense. Historical preservation is about history (even if it includes what is called 'prehistory'). Environmental protection is about that which is prior to history. History belongs to that which can be remembered. The NEPA protects n/Nature which is that (or part of that) which was 'before' – both temporally and ontologically – history.

In the U.S. this means that n/Nature belongs in the same category as negative rights – as a given that exists before the social contract. Indeed, one could claim that the social contract was constituted to protect negative rights and to protect n/Nature to the extent the latter is necessary for those liberty rights.

(Using this argument, positive rights [that is, entitlements] can be granted, but they come subsequent to the social contract).

Now, in the U.S,. given the Lockean-Jeffersonian understanding, one might say that components of n/Nature can become 'property' one owns by having added value via labor; still, n/Nature more broadly is assumed for the existence of history, not the other way around.

(I am aware – and hence my ambiguity on capitalization with 'n/N' – that n/Nature is in some sense a 'construct', but without some *a priori* claim about n/Nature broadly there is no starting point for the consideration of history.)

4. Even with a libertarian understanding of the Lockean-Jeffersonian social contract, a limit on liberty is always 'untoward harm of others'. Unremediated damage to the environment is not a respecter of political boundaries and property lines, so it must be regulated by the state (with not only civil but criminal law). Further, there is a general recognition that harm is not limited to that which is directly inflicted on a neighbor, but can be experienced through damage to the commons (as an externality)

For these cultural reasons, it seems that the NEPA has more 'teeth' than the NHPA.

Reply

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Elise Kline

(https://uk.instructure.com/courses/1909098/users/6901798)

Feb 19, 2018

I would agree with your assessment that NEPA has more teeth than NHPA. I wrote something along these lines during last week's discussion: the broader scope of NEPA's protections requires consideration of greater areas and more resources than NHPA does. As we saw in the June decision regarding DAPL, NEPA did result in mitigation that kept Native burial areas from being impacted. However, this was not enforced in a court of law, but was really the result of the pipeline company's decision to do so. I think that without legal enforcement, both NHPA and NEPA rely largely on social pressures to protect resources, a fact which you refer to in point #1 of your response. Bad press and public opposition can substantially hinder an undertaking. This is one reason why I think many companies prefer to mitigate instead of push through their agenda with no consultation with the public/Native groups. Maintaining good relationships with Native groups can make life much easier for future undertakings. But unfortunately, social pressure is hardly a reliable means of protecting resources.

Reply

(http

Janet Kelly-Scholle

(https://uk.instructure.com/courses/1909098/users/6900715)

Feb 19, 2018

Elise,

Great example with DAPL and using NEPA to diminish the impact to the cultural resources. I'm learning that in order to protect resources, you need more than one trick (or regulation) up your sleeve. Even though an action can't be forced, as you say, regulations give pause to proceedings, which sometimes allows social pressures to accumulate and have the desired impact.

Reply

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Evelyn McGill

(https://uk.instructure.com/courses/1909098/users/5167134)

Feb 19, 2018

Without the legal teeth to force specific actions, the NEPA and NHPA are both toothless tigers. However, both acts are important and do serve the purpose that they were intended to do. This purpose is important, because at least the participants have to stop and weigh the effects of their actions, and to take into consideration the effect upon the other participants. One useful purpose this serves is that often the greater community might not be aware of the significance of a building, site, etc. or the environmental impact of a project. By creating awareness of these factors, there is greater chance that there will be a better outcome than if the project went forward without the legally mandated process. There is not a guaranteed outcome by using this process, as experience demonstrates. However, the public education value may create greater awareness and be useful in future situation. Of course the negotiating during this process is dependent on the good will negotiations of both parties, and I suspect this is not always the case.

I agree with James point about environmental law and the broader societal support for the issue. That has been the impetus for other laws, that have put more "teeth" into the movement.

Reply

Krista Richardson-Cline
(https://uk.instructure.com/courses/1909098/users/6901950)
Feb 19, 2018

In its “procedural” aspects NEPA requires every federal “agency” to examine its major discretionary decisions and decide whether they will significantly affect the quality of the human environment. If the answer is “yes,” that agency must first prepare an “environmental impact statement.” Agencies have implemented this duty to include a variety of other deliverables, including “environmental assessments” (a preliminary determination of probable “significance” where the matter is in doubt), findings of no significant impact (where the foregoing determination is negative), and records of decision (what it sounds like). Each of these deliverables is reviewable in federal court as final agency action. Nevertheless, both NEPA and NHPA are primarily procedural and enforce no substantive outcomes but influences federal project planning. NEPA and NHPA are concerned with the process of how federal agencies gather and share information. If an agency follows the procedures outlined in NEPA and NHPA and the regulations implementing both, courts may find the agency’s NEPA review and NHPA findings adequate. Nevertheless, if an agency does not follow the procedural requirements of either NEPA or NHPA, it may be required to start the process again. Yet, concerning NEPA, courts have offered differing opinions on how thoroughly historic resources and effects upon them must be analyzed. Some

courts suggest that an EIS must include a discussion of the historic and archaeological resources involved in the project. Other courts have held that EISs containing incomplete or no mention of historic and archaeological resources were also adequate. So just the procedural, lacking substantive outcomes, is not necessarily good for historic and archaeological resources.

Reply

Heather Hemmer

(https://uk.instructure.com/courses/1909098/users/5172931)

Feb 19, 2018

I definitely do not think NEPA or the NHPA are 'paper tigers'. I haven't heard much of them until before this class, but they have both proven affective just while reading a few cases brought up in class. The NEPA is here to make sure agencies assess the environmental effects based on their proposed actions, I am sure a lot of less "popular" cases with a lot simpler decisions happen everyday where the NEPA is more prominent. What is hard about this, and why some people think it is a paper tiger, is that it doesn't specifically make you prepare for anything, just what you think might happen to promote better decision making. Can't always judge that, though. However, it generates a lot of feedback from the public. I think NEPA is limiting, but that doesn't mean it is a paper tiger.The NHPA seems like more of a paper tiger than NEPA, although you can see similarities in their wording and their approach to cases: Opinions, better judgement, proper procedures must be followed. It brings attention to the need of knowledge of a case. They each bring attention to a project that needs to be further examined. Whether they have enough power is questionable, but they are fulfilling what their intentions are. At some level, suggestions just aren't acceptable when talking about the planet and the environment.

Reply

Janet Kelly-Scholle

(https://uk.instructure.com/courses/1909098/users/6900715)

Feb 19, 2018

No, they are not paper tigers, but rather compel action by agencies throughout the course of their decision-making process. In the Calvert Cliffs court proceeding reading, the court suggests that an agency's production of a "detailed statement" is evidence the mandated process has been

followed: that alternatives have been considered, input has been requested and received and allows for a balanced review of the environmental impact of a decision.

The key word, "accompany" in Section 102 was interpreted too loosely by the AEC in this case, and environmental impact analysis should have been a part of the process at every step, not only at the end. Possibly due to this loose interpretation, the Calvert Cliffs case was a great catalyst for tightening the definition of Section 102 including references to judicial enforcement of NEPA requirements should the agency fail to comply with the steps of environmental considerations.

After the CEQ was strengthened in 1977, it seems agencies too an all-inclusive (cover your assets?) approach to avoid lawsuits. Carter saw the good in NEPA and wanted to address the problematic areas and make them more useful. By virtue of the time and attention both Carter and the CEQ committed to tightening the scope of NEPA and the overhaul of the regulations, they are certainly not just for show.

In the Strycker case, although the HUD decision was upheld, it seems that a close review of how HUD came to the decision via process was cited. This strikes me as again, placing more emphasis on the steps of the process than the outcome.

If NEPA is meant to act as a checklist of considerations at all stages of an agency's processes and decision making, then yes, it's effective and not simply a paper tiger.

Reply

Sharyn LaCombe
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Feb 22, 2018

Both NEPA and NHPA are processes that are designed to make informed decisions before taking action and as such, are not intended to be paper tigers. The CEQ guidance developed after the cases mentioned above, provides direction that should be followed in preparing NEPA documents. The revisions to the ACHP regulations in 1992 provided more flexibility for federal agencies to combine steps and scale the 106 consultation to the potential adverse effects of the project. Further evolved CEQ regulations, last revised in 2005, state (40 CFR 1500.1 (b)):

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are

truly significant to the action in question, rather than amassing needless detail."

Section 1504.1 is dedicated to reducing paperwork by setting page limits, instructing agencies to prepare "analytic rather than encyclopedic" documents, brief mention of areas that are not expected to have a significant impact, documenting only changes between a draft and final, and so on.

I teach the Managing the Environmental Review Training Course for my agency, Federal Transit Administration/USDOT. The course starts with the history of NEPA and moves to a discussion of the CEQ Guidance. Every time I teach the course, the class is literally amazed that we expect the CEQ guidelines and page limits to be followed. We expect EISs to be no more than 150 pages (double sided) and EA documents to be 25 (double sided) pages or less. Project Sponsors, often cities, state, and transit agencies, are all astonished and yet, we as an agency have changed the culture now to move to easier to read, shorter statements, that focus of the signficant impacts that could result from the project as intended by the regulations and guidance.

We don't have a checklist that allows for someone to easily follow and fill in the blanks. We require that our documents are developed by with a careful evaluation at the start of a project of which technical areas require more detail and which require less. This is indeed the intent of the CEQ designed "scoping" process for a project. It is the way it should be done and we are confident that our policy and standard procedures meet the intent of NEPA.

But, often more than not, it is not the way it is normally done which is why I do feel like NEPA and NHPA have become paper tigers. Other agencies have practiced such a standardized approach that the end result is ginormous documents, if not a set of volumes of documents. Indeed, this too is often the case with the Section 106 documentation. I have seen multiple 5" binders delivered to the SHPO offices. Practitioners have moved away from the regulation and guidance of the CEQ and ACHP in order to document everything under the sun in the event of a law suit, or in response to public outcry or opposition, or sometimes at the request of a consulting party in the 106 process. Or, maybe, just to check a box that says each technical area was studied. Who doesn't love to read a 500 page document that was an EIS, that concludes that there is no impact (but that is another topic)? Sadly, we have created an industry and now, under this current administration, the environmental and preservation community is watching as politicians continue to recommend ways streamline, eliminate, reduce the regulations that have afforded us protection. Whether we believe have created a paper tiger or not, others believe that we have and are eagerly hunting the tiger. Let's hope the original intent of NEPA and NHPA survives. And, we practicioners see the value in the process being carried out in a thoughtful, but swift manner. Otherwise, there will be no forest in which to see through the trees.

Reply

Cameon Eisenzimmer
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Feb 25, 2018

I have the same issue with the concept of integrity as I do with the concept of significance. It is a concept and therefore open to interpretation. The individual surveying a structure or completing historical architecture forms can interpret integrity to fit the narrative they are seeking. While there are seven points to integrity, these points can be weighted to give more value to one point over another. And sometimes, the consultant making the recommendations may have little to no knowledge regarding certain points. They may not be able to tell if openings had been modified (design), had the structure been moved (location and setting), or if the siding is original to the structure (materials). If the consultant lacks this information, they may inaccurately rate a structure as excellent integrity. I realize it would be difficult and probably impractical to create a very narrow or detailed definition of integrity as each property is unique.

Again, I think a lot comes down to politics. Does the entity that hired a consultant to asses a listing want the resource listed or not? I am not saying all consultants are willing to interpreted the definitions to suit the entity paying them, but there are companies and individuals out there. I have found misplaced reports that recommend a neighborhood was eligible for listing. The report was misplaced and not submitted. Within a year, a different contract company assessed the same neighborhood and recommended the neighborhood was not eligible for listing. The report which recommended not eligible was the one submitted. How does a neighborhood change so drastically in under a year? This process easily allows particularly significant sites to be recommended as not eligible and restricts the lists on underrepresented communities.

Are NEPA and NHPA paper tigers? I don't necessarily think they are paper tigers, but more like toothless tigers. Their presence can be intimidating and frightening when someone first stumbles upon them, but as the process continues one finds the tigers have no teeth.

Both of these processed were meant to make sure due diligence was done regarding potential impacts to environmental and cultural resources. And the laws do this very well. Between addressing biological species, wetlands, and cultural resources, NEPA and NHPA do a fantastic job of making sure the majority of resources are appropriately documented and assessed. Unfortunately, that is as far as it goes. These 'tigers' have no teeth. They are advocates for the preservation of biological and cultural resources, but they are not the enforcers. Even if a

significant resource is threatened by the impact of a particular project, as long as alternatives and mitigations procedures were detailed and outlines, the project may still proceed with impacting the resource.

I would like to see an enforcement measure to the recommendations generated by these processes. If a professional determines an impact will occur do to an action, then there should be repercussions for proceeding with the impacting action. Perhaps there might also be an incentive to those who choose an alternative that would not impact the resource. A tax break, easier local/state/federal permitting, something that might motivate an entity to consider the alternatives.

Reply