NEPA IN AN AGE OF TERRORISM

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ABSTRACT

The direct and indirect effects of the events of September 11, 2001 are widespread. One of the lesser-known indirect effects is a perceptible shift in federal agency compliance with the National Environmental Policy Act (NEPA). Some federal agencies have acted to limit the availability of NEPA documents after they have been released to avoid the dissemination of information thought to be of use to potential terrorists. Others have redacted information deemed to be "sensitive" from NEPA documents prior to their public release. Still others have doubted the need for a NEPA document given "national security" implications.

This paper will review the legal requirements regarding public disclosure of NEPA documents and the application of NEPA to actions involving national security, including the application of NEPA in emergency situations. In the author's view, actions other than full compliance with the terms of the regulations is not only ineffective, but also short-sighted.

INTRODUCTION

> "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."
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> Benjamin Franklin, *Historical Review of Pennsylvania*, 1759

Within the last few years, several federal agencies have worked to put National Environmental Policy Act (NEPA) documents on the Internet, as well as providing hard copies to commenters and those who request them. Internet access has greatly added to the public's ability to obtain information on the proposed actions of the federal government and on the environmental impacts of those actions. This approach is in keeping with NEPA, the Council on Environmental Quality regulations implementing NEPA, and our democratic system of government.

Yet in the days following September 11, 2001, many federal agencies – most notably the U.S. Department of Energy (DOE) – have taken steps to restrict access to NEPA documents by eliminating public access to their web pages where the documents could be read and downloaded as desired. Some agencies have started to redact "sensitive" information in NEPA documents, and others questioned the need to even prepare NEPA documents in the face of "national security" demands.

While protecting national security information is vital and the desire to "do something" following September 11th is understandable, the restriction of access to already published environmental documentation and the redaction of information necessary to the understanding of potential environmental impacts is an extreme, knee-jerk reaction that must be reversed by clearer heads. Further, there is no "national security" exemption for compliance with NEPA, although there are provisions for reacting in an emergency and for preparing a classified appendix to a NEPA document when necessary.

LEGAL ANALYSIS

NEPA envisions that federal agencies will analyze and disclose the potential environmental impacts of all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In particular, "[c]opies of such [environmental impact statements] and the comments and views of the appropriate federal, state, and local agencies, which are authorized to develop and enforce environmental

standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [the Freedom of Information Act] …." *Id*.

The regulations promulgated by the Council on Environmental Quality (CEQ) to implement the procedural provisions of NEPA also emphasize that NEPA documents are to be readily accessible by the public:

> "Agencies shall … [m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other federal agencies, including the Council." 40 CFR 1506.6(f).

However, the CEQ regulations also recognize that there are situations in which some information should not be released, even though the information is important to decisionmakers:

> "Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public." 40 CFR 1507.3(c).

This issue was addressed by the U.S. Supreme Court in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981). The Court recognized that NEPA Section 102(2)(C) "contemplates that in a given situation a Federal agency might have to include environmental considerations in its decisionmaking process, yet withhold pubic disclosure of any NEPA documents, in whole or in part, under the authority of a [Freedom of Information Act] exemption." *Id*. at 201. "Congress intended that the public's interest in ensuring that Federal agencies comply with NEPA must give way to the Government's need to preserve military secrets." *Id*. The national security exemption under the Freedom of Information Act, however, only applies to matters that are specifically authorized by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to that Executive Order. *See* 5 U.S.C. 552(b)(1).

Related to whether the information in a NEPA document may be properly withheld is the issue of whether NEPA applies in matters of national security. As the *Weinberger* case made clear, there is no national security exemption from NEPA, although in appropriate circumstances information presented to an agency decisionmaker in a NEPA document may be withheld from the public in whole or in part.

Nor do emergencies allow an agency to forego compliance with NEPA. Rather, the CEQ regulations allow an agency that must take an action with significant environmental impacts without observing the provisions of the regulations to consult with CEQ regarding alternative arrangements. The alternative arrangements are limited to actions necessary to control the immediate impacts of the emergency. 40 CFR 1506.11. CEQ has defined an emergency as a dire situation involving, for example, imminent loss of life or property. Agencies generally consult with CEQ prior to taking an emergency action to obtain concurrence that the situation warrants the imposition of alternative arrangements.

DISCUSSION

The policy that removes already published NEPA documents from the Internet is ludicrous. Because the information remains in published form, would-be wrongdoers continue to have access to the information, but interested law-abiding citizens who are trying to keep track of what their government is doing are denied ready access to needed information.

Equally silly is the idea that the locations of proposed actions such as transmission lines or gas pipelines should not be published in NEPA documents. Affected members of the public need enough information to determine, in the first instance, whether they would be affected and, if so, the extent of the environmental

impacts that may occur. Indeed, any member of the public is entitled to know what activities his or her government is proposing to implement and the effects on the environment those activities may impose.

Further, the information being withheld is not "classified" and thus is not subject to the Freedom of Information Act exemption. If it were, it never should have been included in the NEPA document in the first place. Indeed, agencies such as DOE routinely put all their documents through a security review to ensure that classified information is not inadvertently released. Thus, redacting information someone deems "sensitive" (not "classified") violates both the spirit and the law of NEPA.

This is not to say that NEPA preparers should not be sensitive to the fact that we do now live in a different world. Exacting detail about proposed facilities and the precise methods that could be used to destroy them or cause extensive environmental damage are not required by the statute or the regulations, do not add to the understanding of the potential environmental impacts of the proposal as a whole, and are best not included. The consequences of a potential event are important to understanding the extent of environmental impacts; the causes of such events are not. Avoiding unnecessary detail goes as much to the need to prepare simpler, shorter NEPA documents as it does to the need to make it more difficult for bad actors to succeed.

CONCLUSION

NEPA practitioners must work to see that clearer heads prevail. Providing CEQ with examples of unreasonable restrictions on the contents or dissemination of NEPA documents, as well as documents that provide too much detailed information that is not needed to evaluate potential environmental impacts, is a good place to start. Unfortunately, restricting information is not limited to the NEPA field and is recognized by the American Bar Association as a significant challenge to the entire U.S. legal system (*see, e.g.*, "Standing Alert: The Committee on Law and National Security is Dealing with Terrorism Issues," *The ABA Journal*, March 2002, at page 69.) It would do us all well to remember Benjamin Franklin's words regarding liberty and safety and to act so as to deserve both.