TRIGGERING THE ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT: DO BENEFICIAL IMPACTS COUNT?

Lucinda Low Swartz, Esq.

This paper will address a recurring legal issue related to compliance with the National Environmental Policy Act (NEPA): Is an environmental impact statement required if the only "significant" environmental impacts are beneficial ones?

Section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)) requires federal agencies to prepare a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment." The Council on Environmental Quality regulations implementing NEPA's statutory provisions require that determinations of "significance" consider both context and intensity (40 CFR § 1508.27). While context refers to the setting of the proposed action, intensity refers to the severity of the impact. The regulation specifically states that impacts may be both beneficial and adverse and that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial" (40 CFR § 1508.27(b)(1)).

This regulation leaves federal agencies in the position of preparing an environmental impact statement even if a thorough analysis of a proposed action reveals only beneficial environmental impacts. Given the time and resources required for the preparation of such a statement, some argue that NEPA Section 102(2)(C) should not be triggered for only significant beneficial environmental impacts. Others argue that the threshold for the preparation of an environmental impact statement is more properly significance, not the advantages or disadvantages of a particular proposal.

At least two courts have addressed the issue and have come to similar conclusions, although using different reasoning. In *Douglas County v. Babbitt* (9th Cir. 1995), the court held that the Department of the Interior was not required to prepare an environmental impact statement under NEPA before designating critical habitat for the northern spotted owl under the Endangered Species Act. Similarly, the court in *Friends of Fiery Gizzard v. Farmers Home Administration* (6th Cir. 1995) ruled that the agency was not required to prepare an environmental impact statement for a water impoundment and treatment project because there would be no significant adverse effects on the human environment.

To examine this legal question, the paper will review NEPA's statutory history related to the environmental impact statement requirement, the Council on Environmental Quality's promulgation of the "significance" regulation, and relevant court cases. The arguments for and against requiring an environmental impact statement for beneficial significant environmental effects will be presented.

INTRODUCTION

"...the law does not require the doing of a useless act"

Harrington v. Heaney,
101 A.2d 838, 840 (D.C. 1953)

Section 102(2)(C) of the National Environmental Policy Act (NEPA) requires federal agencies to:

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (I) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."
>
> 42 U.S.C. § 4332(2)(C)

This paper addresses whether the environmental impact statement (EIS) requirement set forth in NEPA's Section 102(2)(C) is triggered when a proposed federal action will have only **beneficial** impacts.

While the statute itself is silent on this question, Council on Environmental Quality (CEQ) regulations implementing the procedural provisions of the statute state that "[e]ffects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 CFR § 1508.8. The CEQ regulations also assert that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 CFR § 1508.27(b)(1). Several courts have examined the issue, with differing results.

The author submits that, because "the law does not require the doing of a useless act," preparing an EIS to address only beneficial environmental impacts of a proposed federal action is not and should not be required.

HISTORICAL BACKGROUND

The Statute

The National Environmental Policy Act (NEPA) can trace its origins to the late 1950s, when Senator Murray introduced S. 2549, the proposed Resources and Conservation Act of 1960 (86th Cong., 2d Sess.). This bill included a national policy on conservation and the use of natural resources and created a council of presidential environmental advisors.

Although this bill did not pass, the 1960s became a time of intense environmental awareness. Rachel Carson's *Silent Spring*, published in 1962, noted the environmental dangers of DDT. The oil spill off the coast of Santa Barbara, California, killed thousands of marine birds and other wildlife. The polluted Cuyahoga River in Ohio caught fire.

Other bills to establish a national environmental policy on the environment were introduced in 1961, 1963, and 1965. Hearings were held, but the legislation was opposed by several administrations, federal agencies, and organized business. None passed.

In this context, Senator Henry Jackson and Congressman John Dingell introduced bills in 1969 which were similar to the earlier Murray bill and which later became NEPA. Remarkably, given the history of previous bills, this legislation passed easily in both houses of Congress, and was signed by President Nixon on January 1, 1970.

NEPA established a national policy on the environment, required the federal agencies to take environmental factors into account in their decisionmaking and to document that process in a "detailed statement," and created the three-member Council on Environmental Quality. The Council is directed to assist the President with the preparation of an annual environmental quality report to Congress, to make recommendations to the President on national policies for improving environmental quality, to analyze conditions and trends in the environment, and to conduct investigations relating to environmental quality.

The legislative history associated with the passage of NEPA demonstrates a congressional intent to deal with environmental **harms**, particularly those caused by federal activities. For example, the Senate Report accompanying the legislation provides numerous examples of the adverse environmental impacts of specific federal actions. *See* Senate Committee on Interior and Insular Affairs, S. Rep. No. 91-296, 91st Cong., 1st Sess. 4, 8 (July 9, 1969). Describing the need for the Council on Environmental Quality, the House Report found that "[a]n independent review of the

interrelated problems associated with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation" (House Committee on Merchant Marine and Fisheries, H. Rep. No. 91-378, 91st Cong., 1st Sess. (July 11, 1969) [reprinted in U.S. Code Cong. & Admin. News 2753].

CEQ Guidelines (1970, 1973)

In April, 1970, pursuant to Executive Order No. 11514 (Protection and Enhancement of Environmental Quality, March 5, 1970), CEQ issued Interim Guidelines to assist the agencies in the preparation of EISs. *See* 35 Fed. Reg. 7391 (May 12, 1970). The Interim Guidelines also directed the agencies to establish their own internal operating procedures for identifying those agency actions requiring NEPA documentation, obtaining information needed for the documentation, and consulting with other federal, state, and local agencies with expertise and/or jurisdiction by law.

Despite the absence of any statutory language (or even legislative history) on the subject, the Interim Guidelines directed federal agencies to consider beneficial impacts as well as adverse impacts:

> "Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes the effect will be beneficial." *Id*.

The Interim Guidelines were replaced by Guidelines in April, 1971. *See* 36 Fed. Reg. 7724 (April 23, 1971). Then, in 1973, CEQ substantially expanded the guidelines to reflect the experience federal agencies had in preparing and utilizing environmental impact statements. CEQ first published these guidelines in draft form and sought public comment on them. *See* 38 Fed. Reg. 10856 (May 2, 1973). In response to comments, the final guidelines, issued in August 1973, increased the opportunities for public comment in the EIS process and tried to provide more detailed guidance to the federal agencies on their responsibilities in light of court cases interpreting NEPA. *See* 38 Fed. Reg. 20550 (August 1, 1973). Without comment or discussion from CEQ or the public, the language regarding beneficial environmental impacts remained embedded in the guidelines.

CEQ Regulations (40 CFR Parts 1500-1508 (1978))

The guidelines, however, were not directives. Some courts cited the CEQ guidelines as persuasive, while others ignored them. Inconsistent agency practices resulted, making it difficult for those outside the government to understand and to participate in the environmental review process. The EIS process came to be viewed as one which produced unwieldy documents that did not improve decisionmaking.

Thus, in 1977, President Carter issued Executive Order No. 11991 (Protection and Enhancement of Environmental Quality, amending Executive Order No. 11514, May 24, 1977). This Executive Order gave CEQ authority to issue regulations--regulations which would be binding on all federal agencies.

CEQ issued such regulations in 1978 and they became effective in 1979. It is these regulations, which have as their basis the earlier guidelines, that specify the procedural requirements which are only outlined in NEPA. Again without comment or discussion, the provision concerning beneficial environmental impacts contributing to a determination of "significant impacts" remained intact in the CEQ regulations.

JUDICIAL INTERPRETATION

Several courts have examined whether the existence of beneficial environmental impacts will trigger the EIS requirement in Section 102(2)(C). The earliest case, *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973), involved a challenge to a proposed low and moderate income apartment project in Houston, Texas. The plaintiffs argued that the Department of Housing and Urban Development (HUD) was barred from funding the project because the agency had failed to prepare an EIS.

The court concluded, however, that HUD was not required to file an EIS covering the proposed apartment project. According to the court, the plaintiffs "have raised no environmental factors, either beneficial or adverse, that were not considered by HUD before it concluded that this apartment project would produce no significant environmental impact." *Id.* at 426.

Having made that ruling, the court went on to address the plaintiffs' claim that HUD's determination of "significance" improperly focused only on adverse environmental impacts, contrary to the CEQ Guidelines:

> "[Plaintiffs] argue that NEPA requires that an agency file an environmental impact statement if *any* significant environmental effects, whether adverse or beneficial, are forecast. Thus, they argue, by considering only *adverse* effects HUD in effect did but one-half the proper investigation. We think this contention raises serious questions about the adequacy of the investigatory basis underlying the HUD decision not to file an environmental impact statement." *Id.* at 426-27 (emphasis in original).

Without amplification or example, the court expressed its view that "[a] close reading of Section 102(2)(C) in its entirety discloses that Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment." *Id.* at 427 (emphasis in original). Despite this, the court

agreed that the project in question was not a major federal action significantly affecting the quality of the human environment.[1]

The issue of whether beneficial impacts alone should trigger the EIS requirement has come to the fore again recently in cases dealing with the Endangered Species Act (ESA) (16 U.S.C. §§ 1531 *et seq*.). In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3167 (January 8, 1996), the court examined whether the Secretary of the Interior's decision under ESA to designate critical habitat for a threatened or endangered species was subject to NEPA. Holding that NEPA does not apply to such designations, the court found that ESA procedures have displaced NEPA requirements and that ESA furthers the goals of NEPA without requiring an EIS.[2]

Apart from its interpretation of ESA, the court also concluded that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." 48 F.3d at 1505. To clarify this point, the court held that

> "If the purpose of NEPA is to protect the *physical* environment, and the purpose of preparing an EIS is to alert agencies and the public to potential adverse consequences

[1] Later cases used similar reasoning. *See, e.g.*, Environmental Defense Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981) ("a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.") and National Wildlife Federation v. Marsh, 721 F.2d 767, 782-83 (11th Cir. 1983) ("even if post-EIS changes are *beneficial* to the environment or are intended to mitigate environmental impact, if those changes are significant, a supplemental statement is required..."). Both of these cases dealt with the "significance" of new information that became available after completion of an EIS.

[2] The court relied heavily on an earlier case that dealt with the question of whether NEPA applies to the *listing* of a species as threatened or endangered under ESA. In Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981), the court found that applying NEPA to the listing of a species would frustrate the purpose of ESA and would not further the purposes of NEPA. In addition, the court concluded that the agency's action in listing a species furthers the purposes of NEPA by "protecting the environment from exactly the kind of human impacts that NEPA is designed to foreclose." *Id*. at 837. Finally, the court found that the legislative histories of NEPA and ESA indicated that Congress did not intend that the agency prepare an EIS before listing a species.

> to the land, sea or air, then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all." *Id*. (emphasis in original).

However, the United States Court of Appeals for the 10th Circuit, came to a much different conclusion in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, No. 94-2280 (10th Cir. February 2, 1996). Specifically referencing and disagreeing with the *Douglas County* decision from the 9th Circuit, the court held that ESA procedures did not displace NEPA requirements, that there were "actual impact flows from the critical habitat designation," and that compliance with NEPA will further the goals of ESA. Slip op. at 10.

With respect to its factual conclusion that there could be impacts from the critical habitat designation, the court reiterated plaintiffs' claim that the proposed designation "will prevent continued governmental flood control efforts, thereby significantly affecting nearby farms and ranches, other privately owned land, local economies and public roadways and bridges." Slip op. at 12. The court characterized these impacts as "immediate and the consequences could be disastrous." Slip op. at 9. Further, the court stated that:

> "While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure...The short- and long-term effects of the proposed governmental action (and even the governmental action prohibited under the ESA designation) are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful." Slip op. at 11.

Outside the context of ESA, still another recent case dealing with beneficial impacts under NEPA is *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995). In this case, the Farmers Home Administration had prepared an environmental assessment (EA) for the funding of a water impoundment and treatment project in Tracy City, Tennessee. On the basis of the EA, the agency concluded that the project would have no significant environmental impacts. However, the agency also concluded that "'[t]he project will have a positive impact on the living environment of the residents of the area'" because they would be "'provided with a dependable, sanitary water supply.'" *Id*. at 503, quoting the environmental assessment. Plaintiffs sued, claiming that the existence of "significant" beneficial impacts required the preparation of an EIS.

Affirming the lower court decision, the United States Court of Appeals for the Sixth Circuit held that if an agency reasonably concludes on the basis of an environmental

assessment that the project will have no significant adverse environmental consequences, an EIS is not required. *Id*. at 504-505. The court based its conclusion on its reading of NEPA and the CEQ regulations.

First, one of the central purposes of NEPA is to "promote efforts which will stimulate the health and welfare of man" (citing U.S.C. § 4321). The health and welfare of the residents of Tracy City will not be "stimulated" by the delays and costs associated with the preparation of an EIS "that would not even arguably be required were it not for the project's positive impact on health and welfare." *Id*. at 505.

Second, the CEQ regulations implementing NEPA direct federal agencies to make the NEPA process more useful to decisionmakers and the public, to reduce paperwork and the accumulation of extraneous background data, and to emphasize real environmental issues and alternatives (citing 40 CFR § 1500.2(b). "It was in keeping with this philosophy that the environmental assessment process was devised to screen projects where the preparation of an expensive and time-consuming environmental impact statement would serve no useful purpose." *Id*.[3]

However, the court did differentiate between projects where the only "significant" impacts were beneficial ones (the *Fiery Gizzard* case) and projects where there were "significant" beneficial and adverse impacts, but that "on balance" the impacts were beneficial:

> "This is not to say, of course, that the benefits of the project would justify a finding of no significant impact if the project would also produce significant adverse effects. Where such adverse effects can be predicted, and the agency is in the position of having to balance the adverse effects against the projected benefits, the matter must, under NEPA, be decided in light of an environmental impact statement." *Id*.

ANALYSIS

A common thread can be weaved through these seemingly diverse and contradictory cases. The courts' holdings in all of the cases discussed above are consistent with the notion that NEPA is concerned with protecting, preserving, and enhancing the

[3] Over the years, courts have become increasingly aware of the resource-intensive nature of EISs. More than one court noted that EISs had become "formidable" (River Road Alliance v. Corps of Engineers, 764 F.2d 445, 450 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986)) and that "full-scale" EISs could be "very costly and time-consuming to prepare...." (Cronin v. U.S. Department of Agriculture, 919 F.2d 439,443 (7th Cir. 1990). Given this, the court in River Road Alliance commented on a "growing awareness that routinely requiring [EISs] would use up resources better spent in careful study of actions likely to harm the environment substantially." *Id*. at 451.

environment -- that is, preventing environmental harm. This notion is also consistent with NEPA's legislative history.

Thus, if a proposed action would cause "significant" environmental harm, then an EIS is required. The EIS requirement is not loosened or eliminated by the presence of beneficial impacts, even if the benefits may outweigh the "significant" harms. This is consistent with the CEQ regulations implementing NEPA.

However, as the court held in *Fiery Gizzard*, if a proposed action will not cause "significant" harm, then the existence of significant benefits should not trigger the EIS requirement. The *Douglas County* court could accept this reasoning, given its determination that the purpose of an EIS was to alert agencies and the public to potential adverse consequences to the physical environment. Even the court in *Catron County* would appear to be able to accept this reasoning, given its finding that the critical habitat designation could cause environmental harm ("consequences could be disastrous").

This logic would even seem to be consistent with the earlier *Hiram Clarke* and other cases which held that NEPA is concerned with all impacts, not merely adverse ones. An EIS triggered by significant environmental harms should not ignore beneficial impacts. Similarly, an EA prepared to determine whether a proposed action may cause significant adverse environmental impacts should not ignore potential beneficial impacts. None of the cases would appear to suggest that the EIS requirement was triggered by the presence of "significant" environmental benefits in the absence of any "significant" adverse environmental impacts.

In this common thread, however, can be found one knot. An argument can be made that a proposed action with significant beneficial impacts (and no significant adverse impacts) could be made even better with the in-depth analysis demanded in an EIS. While this may be true, it is also true that EISs are resource-intensive. Requiring the preparation of an EIS in an attempt to make a good project better takes finite resources away from efforts to make environmentally adverse projects less so.

The conclusion that NEPA's EIS requirement is not triggered by significant beneficial impacts in the absence of significant adverse impacts is a reasonable one. It is consistent with NEPA, the CEQ regulations, and 25 years of NEPA case law. It is also consistent with common sense.

CONCLUSION

This paper began with the premise that "the law does not require the doing of a useless act." Tracing the legislative history of NEPA, the promulgation of the CEQ regulations, and relevant case law, it was revealed that a reasonable (and utilitarian) interpretation of NEPA does not require the preparation of an EIS for solely beneficial significant impacts

-- a "useless act." Rather, the EIS requirement is triggered only by the existence of significant **adverse** environmental impacts.

Because NEPA is also concerned with beneficial impacts, those should also be addressed in an EA and, if significant, in an EIS. The presence of significant environmental benefits will not negate the requirement for an EIS in the presence of significant adverse impacts. Neither should the presence of significant beneficial impacts trigger an EIS in the absence of significant environmental harm.