NEPA at 50

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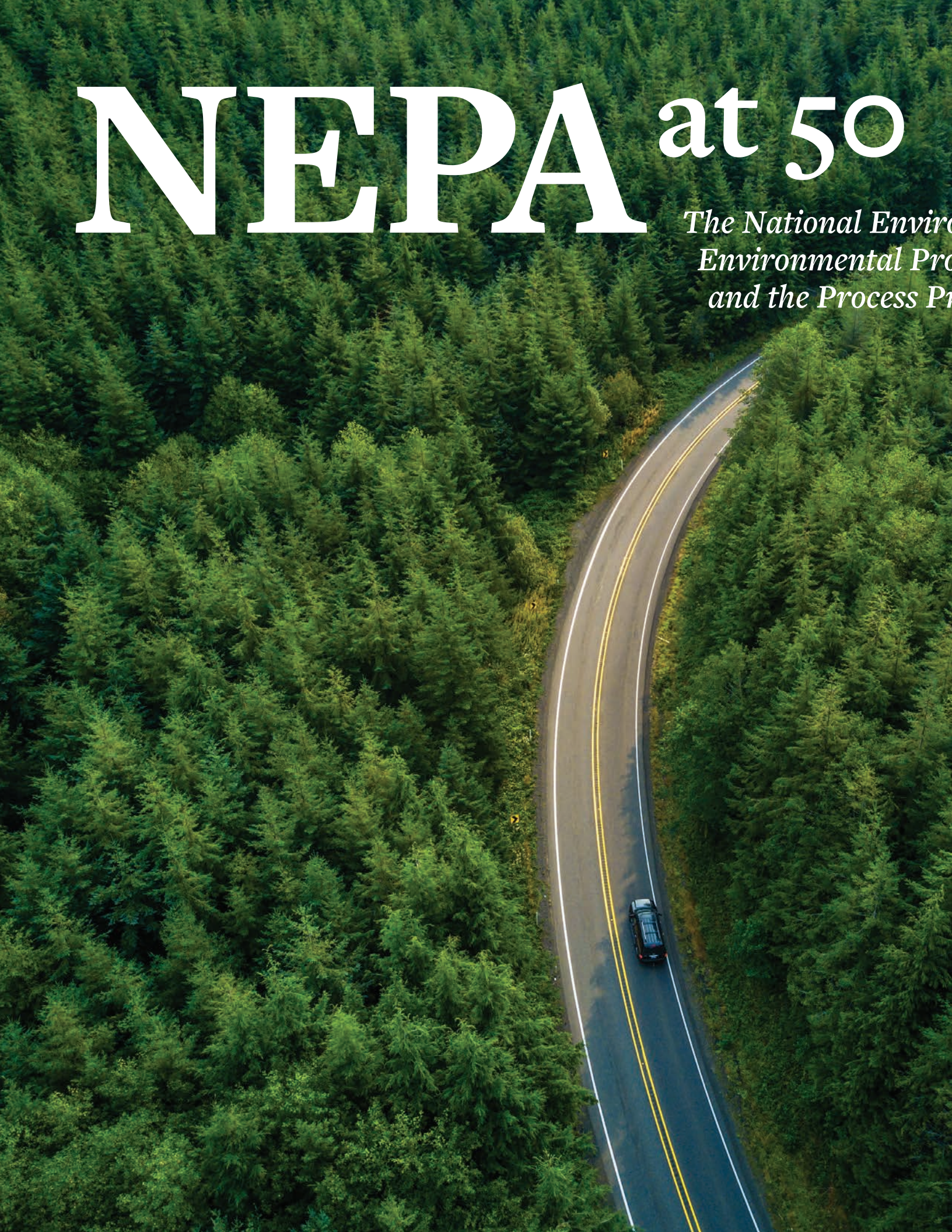

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BY JAMES R. SKILLEN

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Fifty years ago, President Richard Nixon signed the National Environmental Policy Act, one of the most significant federal conservation laws ever passed. Yet few Americans outside of natural resources management understand how the law—which remains the subject of much debate—affects management of federal public lands.

If you have visited a U.S. Forest Service office recently, you know that 2019 was an important anniversary year: Smokey Bear turned 75. To mark the occasion, outfitter and camping stores sold Smokey Bear T-shirts, bandanas, belt buckles, and bumper stickers, all reminding you to protect America's forests from the ravages of anthropogenic wildfires.

Another important anniversary happened concurrently, but you'd have a hard time finding memorabilia to mark the occasion. Fifty years ago, on December 23, 1969, Congress passed the National Environmental Policy Act (NEPA). As interpreted by regulations and judicial decisions, NEPA's primary mandate is for federal agencies to prepare detailed environmental impact statements for major actions that will significantly affect the environment. Although NEPA is one of the most important federal conservation laws ever passed, most Americans have never heard of it because it is hidden behind the veil of bureaucracy and administrative process.

Those who do know NEPA offer mixed reviews. Some praise it as an essential tool for environmental protection; some revile it as an unreasonably time-consuming and expensive roll of red tape. Looking back over the past fifty years, we can see how NEPA marked a new chapter in American environmental governance, transformed federal agencies and land-use planning, and became an ossified feature of federal administration.

LEGISLATIVE HISTORY

The National Environmental Policy Act emerged in a dynamic period in federal land and resource politics. In 1960 Congress passed the Multiple Use–Sustained Yield Act, formalizing the Forest Service's multiple-use mandate and acknowledging changing public demands on the 192 million acres of national forests and grasslands. In 1964 the Wilderness Act protected the value of primitive recreation and undeveloped landscapes. A political compromise behind its passage produced the Public Land Law Review Commission, which challenged prevailing land disposal policies. The commission spent six years reviewing the vast body of contradictory and antiquated federal land law and made legislative recommendations to bring the law into closer alignment with public interests. The commission's 1970 report, *One Third of the Nation's Land*, provided a truly comprehensive assessment, but its recommendations still focused primarily on balancing competing land uses.[1]

The commission's approach did not satisfy one of the environmental movement's core demands: a comprehensive and ecologically oriented environmental policy. Historian Thomas Dunlap writes, "Environmentalism emerged as a movement when people applied an ecological perspective to their lives and society, seeing the world as webs of relationships rather than separate things."[2] Environmental legislation before NEPA had largely addressed separate things—national forest management, wilderness preservation, wild horse protection. The environmental movement demanded new legislation that would address ecological relationships.

Political scientist Lynton Caldwell, who drafted much of NEPA, articulated this demand clearly. He observed that the nation's "tendency is to deal with environmental problems segmentally. . . . The public decision-maker . . . must

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deal with environmental questions without the help of a general body of environmental policy to which he may turn for authoritative guidance." This "practical" approach, he complained, "has again and again produced some very impractical results."[3] Specifically, he argued, federal land and resource policy "is based upon a set of historically derived assumptions—legal, economic, and political—that provide no means for taking the fundamental ecological context of land use into account."[4] The nation, he insisted, needed an ecological approach to land and resource policy, where the scope was determined by the "metes and bounds of ecosystems" rather than jurisdictional boundaries or individual resource programs.[5]

Caldwell worked closely with Senator Henry Jackson (D-WA), Representative George Miller (D-CA), and others to create that broader, ecological framework. For Jackson, the key to environmental protection was landscape-scale land-use planning. A wide enough scale could allow planners to find better opportunities to balance economic development, environmental protection, and social equity. "Intelligent land-use planning and management," Jackson later told the Senate, "provides the single most important institutional device for preserving and enhancing the environment, for ecologically sound development, and for maintaining conditions capable of supporting a quality life and providing the material means necessary to improve the national standard of living."[6] Large-scale planning was not itself novel; indeed, the New Deal had emphasized broad conservation planning. The novelty was Jackson's and Caldwell's ecological orientation: "'Conservation' as a concept," Caldwell allowed, "has been helpful principally as an intermediary proposition, midway between unrestricted competition among resource users and an ecologically based view of public responsibility for the self-renewing capabilities of the ecosystem."[7] The new system of land-use planning that Jackson and Caldwell envisioned would be framed through an ecological lens.

In February 1969 Jackson introduced a bill to deal with federal policy and planning: the National Environmental Policy Act. The bill articulated a substantive and comprehensive environmental policy that would "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." It included additional goals of attaining "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" and assuring "all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."[8] To help advance this policy, the bill would establish a three-person council on environmental quality to advise the president, assess the nation's progress on environmental issues, and provide guidance to federal agencies.

Late in the legislative process, Jackson amended the bill to address an obvious legal concern: the policy statement would be impossible to enforce. Congress could not predetermine and therefore mandate all substantive decisions necessary to "achieve productive harmony" between people and the nonhuman

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environment, so it had to give agencies broad discretion in their planning and management work. But without enforceable mandates or action-forcing mechanisms, NEPA would remain an aspirational statement that federal agencies could functionally ignore. This risk was exacerbated by the fact that Congress layered NEPA on top of existing federal law. The Forest Service, for example, was still mandated to produce timber, and its appropriations were still tied to specific production levels. It was difficult to see how NEPA's exhortation to productive harmony would guide the agency's timber program. The amendment, which became Section 102 of the law, addressed this problem by requiring an enforceable process.

Section 102 of NEPA mandates that federal agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on the environment." Specifically, for every "major Federal action significantly affecting the quality of the human environment," NEPA requires the responsible federal agency to prepare what would become known as an environmental impact statement (EIS).[9]

Reflecting the environmental movement's growing strength, NEPA faced little resistance in Congress and passed over only 15 nay votes in both houses. Political support for the act and for a national environmental policy was so strong that President Nixon chose to sign it on January 1, 1970, as a symbol of Republican commitment to environmental protection: "The nineteen-seventies," the president declared, "absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters, and our living environment . . . the decade of the seventies will be known as the time when this country regained a productive harmony between man and nature."[10]

And legislatively, at least, it was. Virtually all the major pieces of federal environmental legislation in force today were either passed or significantly amended in the seventies—Clean Air Act of 1970, Clean Water Act of 1972, Federal Insecticide, Fungicide, and Rodenticide Act of 1972, Endangered Species Act of 1973, Safe Drinking Water Act of 1974, Toxic Substances Control Act of 1976, National Forest Management Act of 1976, Federal Land Policy and Management Act of 1976, Public Rangeland Improvement Act of 1978. In many ways, NEPA was the prolegomenon for these environmental laws. It was the broad statement of environmental policy that Congress worked out in subsequent legislation.

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IMPLEMENTATION

For a law as sweeping and significant as NEPA, the actual text is remarkably terse. Section 102 describes NEPA's environmental review process in a mere two pages. For each "major Federal [action] significantly affecting the quality of the human environment," the responsible federal agency is mandated to prepare a detailed statement 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.[11]

The process requires consultation with relevant agencies and governments as well as public disclosure. With such general guidelines, the practical meaning of NEPA, as with many federal statutes, fell to administrative regulations and litigation. What, after all, constitutes a major federal action, or a significant environmental impact? How many or what range of alternatives did agencies need to include? How much public disclosure and participation was required? The initial guidelines of the Council on Environmental Quality (CEQ), issued in 1971, hardly answered these questions, and federal agencies were slow to produce robust EISs. They had little incentive to initiate lengthy and expensive review processes, particularly for decisions that until that point had been routine.

The full scope of NEPA evolved through litigation, starting with the Bureau of Land Management. The agency announced a route for the 800-mile Trans-Alaska Pipeline on the same day President Nixon signed NEPA, and one week later, the Interior

secretary approved construction of a utility road along the route. After complaints from environmental groups, BLM prepared an eight-page EIS for the road, concluding that it would have no significant environmental impacts.[12]

Environmentalists sued, arguing that BLM couldn't isolate the utility road from the larger pipeline project. The district court agreed and enjoined road construction until the agency prepared a more comprehensive EIS. In January 1971 BLM released a 246-page EIS for the pipeline project, but the Interior Department's legal review found that even this long EIS was not adequate. The agency spent another year expanding the EIS to six volumes, with three volumes of appendices. The process had taken 175 person-years of work and cost $9 million.

Environmentalists opposed to the pipeline still weren't satisfied, and the Wilderness Society won another injunction. In desperation, and in the midst of an oil crisis, Congress stepped in and exempted the pipeline project from further NEPA review.[13] Nonetheless, the litigation made clear that EIS preparation required detailed consideration of *all* significant environmental impacts, and EISs grew in length and complexity as a result.

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A flurry of NEPA litigation in the early 1970s provided an increasingly expansive interpretation of the statute, particularly Section 102, from what constituted a major federal action to the scope of the impacts and alternatives that an EIS should address. BLM remained on the losing end of many NEPA cases. Courts ruled that the agency needed to prepare detailed EISs for grazing decisions rather than just one programmatic EIS for its grazing program, that it needed to prepare a programmatic coal-leasing EIS rather than just EISs for separate coal leasing decisions, that it needed to consider all reasonable alternatives to a proposed action even if some of the alternatives were beyond its control.[14]

The CEQ captured these interpretations in its 1978 regulations, and it continues to issue guidance documents for various aspects of NEPA implementation, adding a variety of obligations and options not explicitly mandated in the law itself, including categorical exclusions and detailed public participation requirements. And federal land agencies have integrated NEPA with two other land-use planning statutes, the National Forest Management Act and the Federal Land Policy and Management Act. Land-use plans required by these statutes are considered major federal actions significantly affecting the environment, so the agencies go through the formal EIS process as part of their planning.

Today, the EIS process often begins with a much shorter environmental assessment, in which the agency considers the scope and consequences of a proposed action. If it determines that the action does not require an EIS, it will issue a "finding of no significant impact" (FONSI). The agency is likely to issue a FONSI even if the action will have environmental impacts, so long as it can fully mitigate them. No comprehensive data exist showing how often agencies choose this path, but one CEQ report placed the ratio at around one hundred EAs to one EIS.[15]

If the agency determines that an EIS is needed, it begins a process that draws on a diverse range of expertise and invites public input at several points:

- **Scoping.** The agency publishes a notice of intent to prepare an EIS in the *Federal Register* and invites public input at the outset to determine the scope of the issues it should address and the major parties it should consult.
- **Draft EIS.** The agency publishes a draft EIS that includes an interdisciplinary assessment of environmental impacts resulting from a full range of alternative decisions. It then identifies the preferred alternative. The agency announces a period for public comment that lasts at least forty-five days.
- **Final EIS.** After receiving and analyzing public comments, the agency makes any necessary revisions and publishes a final EIS. In it, the agency must respond to every unique, substantive comment it received. The agency must provide a waiting period of at least thirty days for review.
- **Record of Decision.** The agency announces its final decision, ending the NEPA process.
- **Supplemental EIS.** The agency may need to follow up with a supplemental EIS if new information emerges.

It is easy to see why EIS preparation is lengthy and expensive, leading to documents that can run thousands of pages with multiple appendices, well beyond the 150 to 300 pages envisioned in CEQ guidelines. And a single draft EIS may garner tens of thousands of public comments.

As the courts demanded an expansive reading of NEPA's procedural requirements, they

U.S. FOREST SERVICE

NEPA and other environmental laws passed in the 1970s meant that the public had input into forest management plans. Meetings like this one in 1989 are still held today.

simultaneously undercut one of the original intents of NEPA's sponsors: that agencies protect the environment. Agencies must prepare detailed, even exhaustive, environmental impact statements, but they are not required to select the most environmentally sound management option. In an early landmark decision, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Energy Commission* (1971), the D.C. Circuit Court ruled that NEPA's substantive environmental goals were flexible, which "leaves room for a responsible exercise of discretion and may not require particular substantive results."[16]

As a result, NEPA remains a procedural rather than substantive law, reviewed under Administrative Procedures Act standards. Courts rule against an EIS only if the agency's preferred alternative is "arbitrary and capricious," lacking adequate information and rationale. This procedural interpretation has frustrated the law's original authors and environmentalists. Caldwell later wrote, "To regard the action-forcing provision of Section 102 (the so-called NEPA Process) as the essence of the Act is to misinterpret its purpose."[17]

NEPA'S REVOLUTIONARY EFFECTS

Despite the courts' procedural interpretation of NEPA, the law has had dramatic consequences for federal agencies, particularly federal land agencies, pushing them to apply an ecological lens in their planning and management. First, NEPA set new requirements for the use of interdisciplinary science and public participation in agencies' decision-making. Whereas range, forest, and park managers might have made major decisions in the past based on their professional expertise in a particular field, NEPA regulations required them to gather scientific data from a full range of disciplines. And whereas they previously consulted with those directly affected by management decisions, NEPA regulations required them to "seek input from the general public, the mass public, the so-called man in the street . . . to involve everybody.[18] The flood of new information, interests, and values could not help but alter agencies' decisions on balance, and it elevated ecological perspectives.

Second, and closely related, NEPA and later statutes—the National Forest Management Act and the Federal Land Policy and Management Act in particular—fundamentally changed the composition and culture of agency staff. Prior to the 1970s, foresters generally ran Forest Service decision-making, and range conservationists ran BLM decision-making. But to meet the requirements set forth by NEPA regulations, the agencies had to hire biologists, archaeologists, sociologists, and a host of other "ologists." This opened the door for a whole new professional cadre within the agencies, many of whom applied an ecological lens to federal lands and resources. As these new professionals entered the agencies and climbed through the ranks, they reshaped agency cultures. It is striking that in the early 1990s, the Forest Service had two chiefs who came out of research ecology rather than forestry: Jack Ward Thomas and Michael Dombeck. This would have been inconceivable in the 1960s.

Third, when combined with the Endangered Species Act of 1973, NEPA led federal land agencies to adopt a new framework called ecosystem management in the 1990s. Ecosystem management emphasizes ecological rather than political boundaries, ecological processes rather than just resource outputs, and collaborative, interdisciplinary approaches to decision-making. Even as a procedural law, NEPA contributed to the kind of ecologically oriented management that Caldwell, Jackson, and others envisioned.

NEPA OSSIFICATION

NEPA began as a revolutionary law that helped transform federal land-use planning. Over the past twenty-five years, though, the law has ossified as it has been routinized in administrative process. And to some extent, the law is beginning to show its age. One legal scholar writes that "NEPA was born in an era that had faith in bureaucratic comprehensive rationality, the idea that predictive analysis of a broad class of administrative decisions would produce rational decision making that would consider environmental impacts."[19] That faith has been tested sorely by new developments in ecological science, public administration, and political experience.

Critics of NEPA tend to agree that the EIS process has become so lengthy and expensive that it prevents agencies from fulfilling their management responsibilities. It is difficult to assess these complaints in detail, since comprehensive data are lacking. The National Association of Environmental Professionals reported that the nearly 200 EISs completed in 2012 had taken an average of 4.6 years to complete. Cost is even more difficult to assess, since NEPA-related work is distributed widely within federal agencies. The Department of Energy provided one estimate by looking at the amounts paid to outside NEPA contractors. The department reported that between 2003 and 2012, it paid an average of $6.6 million per EIS to contractors; the median cost was $1.7 million.[20]

But even that doesn't capture the full cost of NEPA, since it excludes routine litigation. For example, the Forest Service's multiple-use mandate gives the agency broad management discretion, which it works out through the planning process. When people disagree with the agency's decisions, they often have no substantive legal recourse. As a result, they sue the agency under NEPA, arguing that it has failed to fulfill its procedural obligations. On the one hand, this holds the Forest Service and other agencies accountable, challenging them when they purposefully try to avoid their obligations. On the other hand, the agencies must invest enormous amounts of time and money in litigation even when they have done their due diligence.

NEPA remains part of the bedrock of environmental decision-making for federal land agencies, and both its substantive goal and its planning emphasis remain critical today.

The Forest Service, which prepares a disproportionate number of federal EISs, has regularly expressed frustration with the process, particularly as combined with its planning obligations under the National Forest Management Act. The agency assumes that most of its EISs will be litigated, resulting in a process that is focused on legal defensibility. In one 2002 report, entitled "The Process Predicament," the agency lamented, "Line officers can never be sure when documentation is enough . . . They must constantly assess the risk of failure in the courts . . . They are left with the choice of either spending more time and money on analysis to cover a variety of potential court interpretations, or withdrawing project proposals for fear of adverse court decisions."[21] They can't be sure exactly what information will be required in court, so they err on the side of information quantity over quality, resulting in documents more useful to litigation than to management.[22] Consequently, the process has added years to the period for drafting and issuing forest plans, a phenomenon dubbed "analysis paralysis," by which time many of the recommendations are outdated.[23] Certainly this wasn't the intent of NEPA's authors.

The cost, in time and appropriations, of EIS preparation has led to another concern about NEPA compliance: agencies have incentive to avoid EIS preparation altogether and use other forms of NEPA analysis that have evolved in administrative regulations. According to the Environmental Protection Agency, federal agencies produced thousands of draft and final EISs in the 1970s, but that number plummeted in subsequent decades. One reason, certainly, is that CEQ regulations and court decisions clarified what did and did not require an EIS, but the numbers are still striking. In 1973 federal agencies produced 2,036 draft and final EISs; in 2000 they produced 473.[24]

Rather than preparing EISs, federal agencies rely on two main options. First, they have identified a growing number of what are called categorical exclusions. These are decisions that the agencies decide categorically do not have significant effects on the environment. Second, as noted above, they prepare environmental assessments that result in either a finding of no significant impact or a mitigated FONSI. In the latter, the agency recognizes that its action will have a significant impact on the environment, but it concludes that it can mitigate that impact sufficiently to avoid triggering an EIS.[25]

These and other problems arise because NEPA is primarily an administrative process that has been

increasingly routinized, and even more importantly, professionalized and outsourced. It has become an end in itself, and NEPA compliance therefore runs the risk of being isolated from actual decision-making.[26]

LOOKING AHEAD

NEPA remains part of the bedrock of environmental decision-making for federal land agencies, and both its substantive goal and its planning emphasis remain critical today. The past fifty years and the dramatic changes in federal land management, however, suggest room for improvement. In an ideal world, Congress would update the act so that it once again helps shape federal land and resources management. One notable improvement would be to reduce the burden of EIS preparation on the front end while increasing post-EIS monitoring. Rather than demanding that agencies consider everything up front, ostensibly allowing them to make the one best decision, NEPA could seek more modest initial considerations but require ongoing monitoring to identify emerging environmental impacts, including unanticipated consequences. In other words, NEPA could prescribe an iterative and adaptive process.

Given the current state of Congress, this kind of nuanced amendment is not a realistic hope. Indeed, since NEPA was enacted, Congress' ability to pass meaningful environmental legislation has atrophied.[27] And as I show in a forthcoming book, *The Land Is My Land*,[28] the partisan divide over federal lands has hardened to the point where compromise is all but impossible. Whereas the Sagebrush Rebellion against federal land authority of the late 1970s and early 1980s was a regional, bipartisan challenge waged by those with a material interest in federal lands, the most recent rebellion, evidenced by standoffs at the Bundy ranch in Nevada in 2014 and the Malheur National Wildlife Refuge in 2016, was a national challenge waged by a broad conservative coalition with limited direct ties to federal lands.

So, in the end, beyond all the benefits that NEPA has had on federal land management, the law has another, wider historical legacy. It stands as a reminder that bipartisan work to balance resource production and environmental protection is possible. Critics of NEPA today should call Congress and other decision-makers back to that task, which is essential for Americans, their forests, and their environment.

James R. Skillen is the author of The Nation's Largest Landlord: The Bureau of Land Management in the American West *(2009) and* Federal Ecosystem Management: Its Rise, Fall, and Afterlife, *both from University Press of Kansas. His next book,* This Land Is My Land, *will be published by Oxford University Press in 2020. Sections of this essay have been adapted from* Federal Ecosystem Management.

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