Taking Stock of NEPA at 48

Thomas Russo

The National Environmental Policy Act (NEPA) turned 48 with the new year. I thought it would be a good idea to sit back and ponder whether NEPA has resulted in "environmentally responsible projects" or is just a long-winded compliance exercise, and an expensive one at that.

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IS NEPA WORKING?

Let me spell out what I mean by an "environmentally responsible project."

The term is applied to a project proposal whose goal is to incorporate and implement mitigation to reduce or eliminate a majority of adverse impacts. That's not to say that there are no unavoidable adverse impacts. Such a project would incorporate mitigation as a result of consultation during the NEPA process and/or required by federal and state agencies and implement it in good faith when the project was approved.

Those who advocate rolling back regulation have not yet taken a hard look at NEPA (**Exhibit 1**), even though the Trump administration would like to get to a yes or no on infrastructure projects in two years instead of 10. An executive order (EO) has directed federal agencies to coordinate decisions and complete all federal environmental reviews and authorization decisions for "major infrastructure projects" within two years.[1]

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However, the key question is "When does the clock start?" Some energy project proposals may take years to put together from concept to an application that federal, state, and other stakeholders can make sense of and evaluate. Two years from an acceptable application being formulated may appear reasonable, while 10 is absolutely ridiculous for a typical energy project subject to NEPA.

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ENERGY PROJECTS SUBJECT TO NEPA

Not every energy project is subject to NEPA. In fact, the vast majority of coal- and gas-fired power plants, wind, solar, biomass, electric trans-

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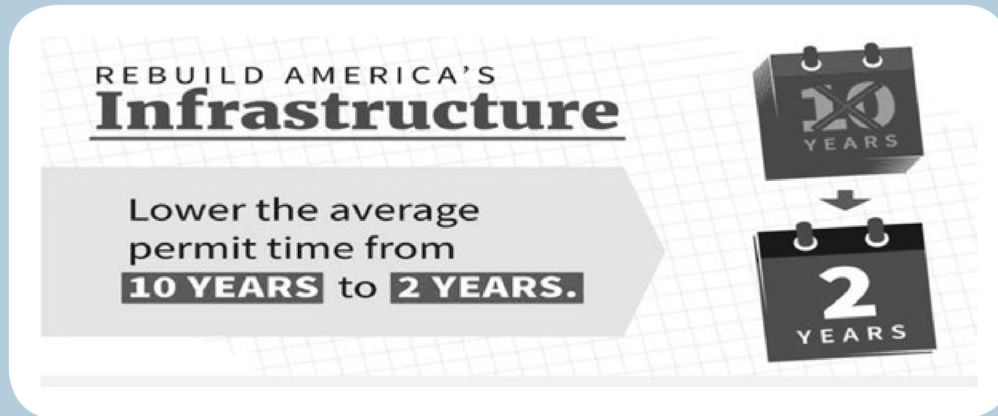
Exhibit 1. Lowering Amount of Time



mission, oil and gas drilling, and oil/refined petroleum pipeline projects don't undergo a NEPA review. However, NEPA is triggered if these projects are sited on federal land or financed by the federal government.

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NEPA is triggered whenever a project applicant applies for a federal permit for a nuclear power plant at the Nuclear Regulatory Commission (NRC) and for hydropower and natural gas facilities (interstate natural gas pipeline, storage and liquefied natural gas) at the Federal Energy Regulatory Commission (FERC). Cross-border electric transmission and natural gas/oil pipelines are also subject to NEPA as part of the presidential permit process.

Wind and solar projects sited in the western United States are more likely to trigger NEPA.

Wind and solar projects sited in the western United States are more likely to trigger NEPA, because they will be sited on federal lands (**Exhibit 2**). These lands are primarily administered by the Bureau of Land Management (BLM) and the US Forest Service.

POINT OF THE SPEAR SINCE INCEPTION

NEPA was signed into law by Pres. Richard Nixon on January 1, 1970. Since then, NEPA has been copied by many countries, produced tons of paper, and helped to create a global environmental consulting industry. In the United States, NEPA has also been the point of the spear for countless environmental groups and lawyers who threaten or bring lawsuits when they believe federal agencies are not complying with the statute.

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Congress stated the purposes of NEPA quite succinctly, and the entire statute is just six pages long:[2]

- To declare a national policy that will encourage productive and enjoyable harmony between man and his environment
- To promote efforts that 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

While NEPA did create the President's Council on Environmental Quality (CEQ), which has issued guidelines for NEPA implementation, it did

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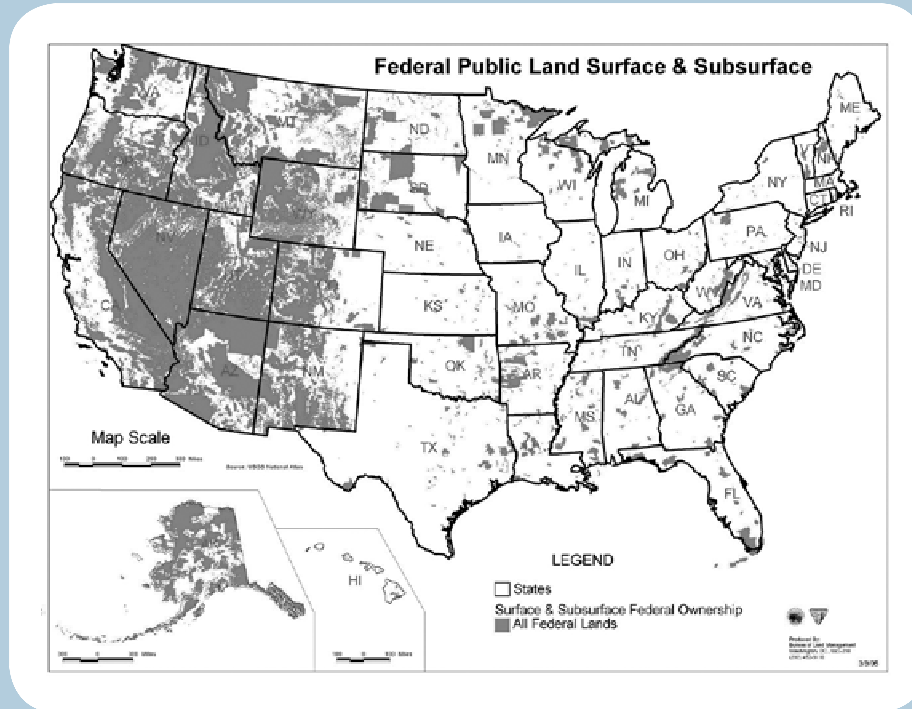
Exhibit 2. Federal Public Land Surface and Subsurface



not create the Environmental Protection Agency (EPA) or designate it as the administrative agency to resolve NEPA disputes. The EPA was established in July 1970 after President Nixon signed Reorganization Plan No. 3 calling for the establishment of the agency. The EPA does rate the environmental impact statements (EISs) of other agencies and can find the preferred agency alternative environmentally unacceptable or unsatisfactory.[3]

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NEPA BENEFITS

NEPA has produced mixed results. One of the benefits is that economic and safety regulators like FERC, the Department of Energy (DOE), and the NRC have produced documents that consider the environment and require mitigation to reduce or avoid adverse impacts. The NEPA process also prevents poorly designed projects from moving forward.

With few exceptions, FERC, DOE, and the NRC do not reject or disapprove projects, but those projects that are approved contain numerous conditions that developers must comply with over the life of the project or license. Wind and solar projects and the aforementioned projects that are located on federal lands are similarly analyzed and mitigated accordingly under the Federal Land Management Policy Act. Pipelines such as the Dakota Access crude oil pipeline triggered NEPA and a Clean Water Act (CWA) Section 408 permit from the US Army Corps of Engineers to go under the Missouri River. That project was also subject to the National Historic Preservation Act.

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NEPA has also produced some negative effects:

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- Lots of paper and bloated environmental reviews—as where in one case a joint DOE and BLM Solar Energy Development Programmatic EIS[4] (PEIS) of five western states was 3,288

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pages long plus 308 pages of comments and responses in response to growing interest in developing solar energy projects on BLM land
- The Solar Energy Development Programmatic EIS started in May 2008, and the final PEIS was completed July 2012
- A brake on renewable energy development even when many acknowledge climate change and the need to build more renewable energy projects
- An environmental consulting industry
- A process designed to delay and discourage oil and gas infrastructure and hydropower development
- High costs (e.g., federal agencies are not keeping track of costs, but DOE estimates $1 million for a project-specific EIS)

FORM OVER SUBSTANCE

Let's not forget that the courts and federal agencies view NEPA as a "procedural statute," something environmentalists have been taking issue with in the courts on a routine basis.

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Federal agencies are required to consider the environmental impacts of their actions, in other words to make what I call a "knowing decision." Agency decision-makers are not required to select the action that has the least environmental impact (i.e., the No Action alternative (do nothing)). The latter notion is especially offensive to environmentalists acting against oil and natural gas infrastructure projects and climate change advocates worrying about global warming. In reality, a NEPA analysis identifies impacts and mitigation measures that can avoid or reduce environmental impacts. Then the agency decision-maker decides on whether to approve the project and, more important, what environmental conditions to include in the permit that will be enforceable.

There is a great deal of litigation challenging NEPA compliance for all kinds of projects. Even wind and solar projects are not given a pass when it comes to building a project near communities that profess to strong commitments to the environment. Of course, opponents always claim there is a better place to build such projects.

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The main reason for so much NEPA litigation is the failure to stop, delay, or attain the required relief at the project at the federal agency level (Department of the Interior, Corps of Engineers, FERC, the NRC, and other bodies). The relief sought is not generally over specific mitigation but entails allegations that the federal agency did not do a broad enough or proper analysis or demonstrate the need for the project. Hence, lawsuits are often expected and integrated into project planning.

NEW YORK IS GOOD AT SIDE-STEPPING NEPA

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However, they have delayed projects, discouraged investors from funding some kinds of projects like hydropower, and made NEPA compliance costly for the federal government and energy project proponents. Environmental groups still take federal agencies to court but seem to recognize that challenging an agency's NEPA compliance is at most a delaying tactic. Still, they try even as some courts express impatience and remind them that the issue they raised was decided in a previous case.

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Environmental groups have shifted their attention to states like New York and have moved on to other federal laws that give the states veto

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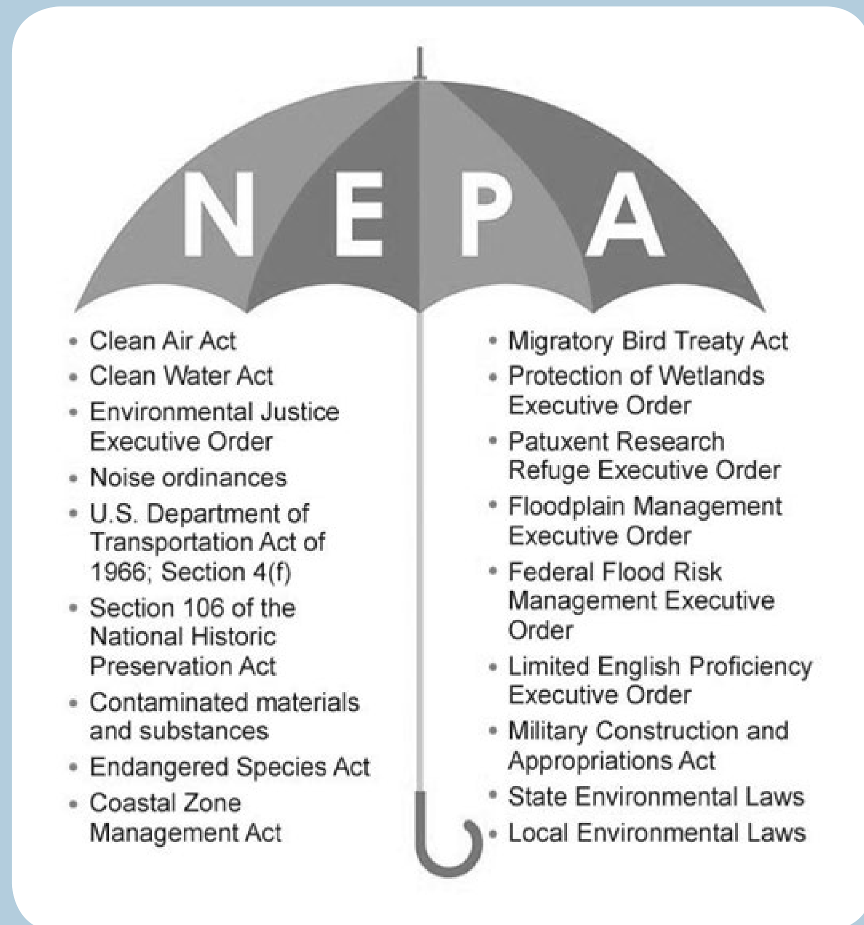
power over whether an energy project is ever built. Fortunately for those states, Congress has passed laws giving the states a say in such matters and allowed federal agencies to delegate their authority to the states under the Coastal Zone Management Act (CZMA), CWA, and Deepwater Port Act, to name a few (**Exhibit 3**). I know of no control or performance requirements associated with such delegation.

Environmental groups have shifted their attention to states like New York.

Several examples will give you a good idea of how this works. In each case, politics and not consensus are the primary decision-making mechanism, with a generous helping of delegated federal authority. The US Departments of the Interior and Commerce delegated their CZMA authority to the states to make coastal determinations on whether or not a project is consistent with coastal zone goals. In 2015, New York asserted that it had CZMA authority over Entergy's 2,000-megawatt Indian Point Nuclear plant located less than 30 miles to the north of New York City. The project was undergoing relicensing at the NRC. The state threatened to not issue permits and block the continued operation of the project. Under an agreement with New York and Entergy, the plant will be shut down by 2021, unless the state can't find replacement energy.[5]

Similarly, the EPA has delegated CWA Section 401 permitting authority to the states. One of the more recent casualties of the CWA Section 401 permit was the Williams Company's proposed

Exhibit 3. NEPA Coverage



Constitution natural gas pipeline. FERC has completed a NEPA EIS on the project and approved it, but New York has denied the CWA Section 401 permit and prevented construction of the project in the state. Williams claimed New York did not issue the permit in a timely manner, but FERC didn't overturn New York's denial of a CWA Section 401 permit. Williams has now petitioned the US Supreme Court to hear the case.

Politics and not consensus are the primary decision-making mechanism.

New York Gov. Andrew Cuomo vetoed the Port Ambrose Liquefied Natural Gas Deepwater Port, citing security and economic concerns, along with the potential to negatively impact offshore wind development.[6] The project, which had been proposed by Liberty Natural Gas LLC, required approval from both Governor Cuomo and New Jersey Gov. Chris Christie under the federal Deepwater Port Act. The project proposed was a Floating Storage Regasification Unit, a vessel that would have received liquefied natural gas and regasified it for use by New York customers, who have some of the highest natural gas prices in the region.

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WHAT NEPA DOESN'T DO WELL

While the goals of NEPA are admirable, Congress clearly did not envision the gaming of NEPA and other federal environmental laws that play out each day across the United States. Not even renewable energy projects like wind and solar are immune to public opposition, delays in preparing environmental assessment (EAs) and EISs, and litigation. While renewables like solar and wind are generally supported overwhelmingly by the public, that support diminishes significantly when wind and solar projects are planned near one's own community.

NEPA does bring people together, but unfortunately it is not to resolve disputes and determine what constitutes an environmentally acceptable project. The face of NEPA in many cases attracts proponents of NIMBY (Not in My Backyard) or NIMSBY (Not in My Second Backyard). This is increasingly prevalent by environmentalists who resist natural gas and oil pipeline projects, who advocate keeping fossil fuels in the ground.

Generally, stakeholders often align themselves at the points of a regulatory triad—law, markets, and politics (**Exhibit 4)**. Regulators, lead agencies, and energy project proponents congregate toward

Exhibit 4. Law, Markets, and Politics

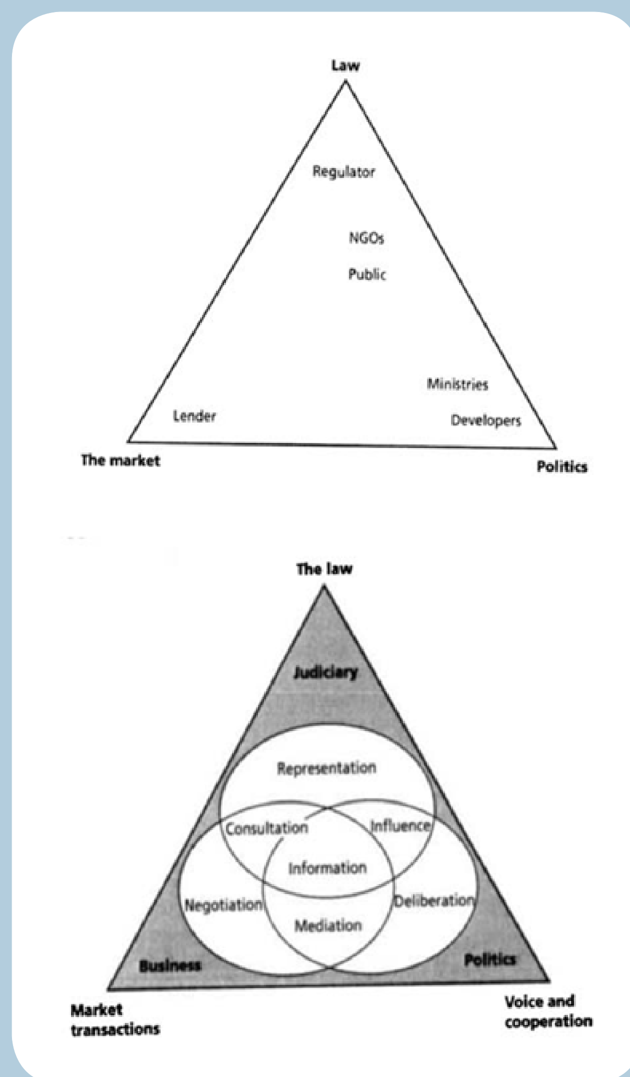

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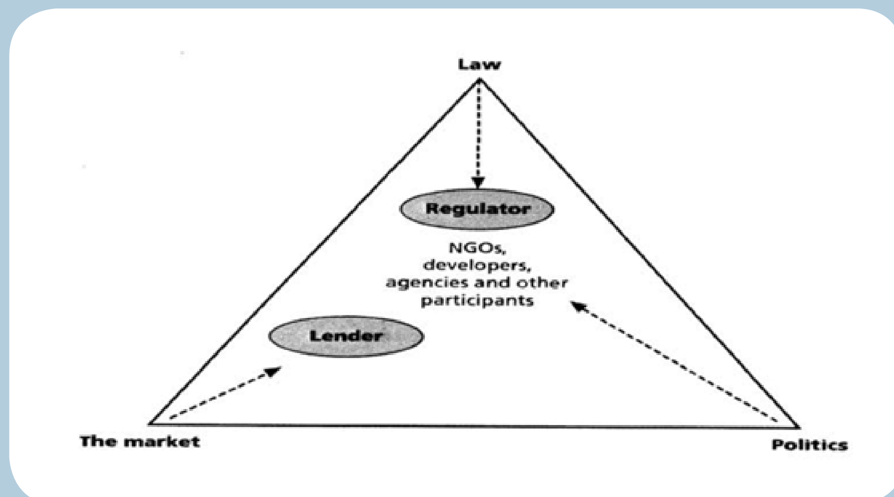
Exhibit 5. Coordinated Approach



the law and investors toward the market, while environmental groups, the public, and agencies are more toward the center or, in New York's case, politics. There is essentially nothing in NEPA that requires these separate groups to resolve disputes through mediation and negotiation.

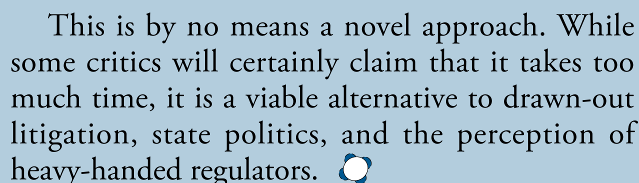
As noted earlier, environmentalists threaten litigation, and the general public calls their politicians, who have little idea of what is going on other than that their constituents are unhappy.

WHAT NEEDS TO CHANGE IN NEPA

Several things would dramatically benefit the current NEPA process played out at many agencies.

1. The first thing to do is to require every federal agency that has to issue a permit or comply with other environmental laws passed over the years to rely on and use the EIS or EA of the lead federal agency. We can no longer afford every agency having their own process. Federal agencies that deal with energy and environmental matters should mimic the increased cooperation between federal homeland security agencies that exists today. The president's CEQ that used to survey[7] federal agencies to determine their level of cooperation in relying on a single EIS could do much more in this area.
2. The Trump administration through EO or the lead agency for an EIS could require a cooling-off period to allow stakeholders the opportunity to resolve their disputes. This policy would discourage the tendency to litigate differences in the courts and determine what mitigation is needed to allow for an environmentally responsible project. The lead agency action would in effect bring everyone toward the middle of the triad as shown in **Exhibit 5**.

This is by no means a novel approach. While some critics will certainly claim that it takes too much time, it is a viable alternative to drawn-out litigation, state politics, and the perception of heavy-handed regulators.



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