Reworking NEPA in the Age of Uncertainty

Thomas N. Russo

Implementation of the National Environmental Policy Act (NEPA) has over the years produced a lot of paper, delays, and a propensity to resolve disputes in the courts rather than through mediation. Current attempts by the Council on Environmental Quality (CEQ) to revise the NEPA regulations and procedures will fail unless a cooling-off period coupled with dispute resolution with state agencies is established.

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In March 2018, I wrote a piece, "Taking Stock of NEPA at 48," that provided a snapshot of the law and regulations.[1] NEPA in its present form and practice is not achieving its goals. Both NEPA advocates and opponents have lost sight of the goals of the statute and how their current positions are eroding what little value remains. Now that CEQ has decided to revise the regulations, lines are being drawn in what many consider a life-and-death battle between the forces who wish to save the earth and those who wish to develop its resources.

At first blush, the above statement may sound farfetched, but NEPA is not just a law peculiar to the United States. In reality, many developed and developing nations, international development organizations like the World Bank, and nongovernmental organizations like the World Resources Institute and the Sierra Club use NEPA when working with developing nations to improve environmental quality.

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This role is important, but I believe NEPA has failed to live up to its goals and now merely is a process that infrastructure developers must endure if they ever want to break ground on new projects. Likewise, environmental groups and local citizens groups rely on NEPA to force federal agency decision-makers to examine the environmental effects of proposed actions, even on projects that supposedly have an overall beneficial environmental effect on climate change and economic development.

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Renewable energy projects don't get a free pass either, despite the fact that climate change advocates

[1] Russo, T. (2018 March). Taking stock of NEPA at 48. *Natural Gas & Electricity, 34*(8), 26–32.

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insist these projects are the answer if we are to avoid global warming.

THERE'S MORE TO NEPA THAN PRODUCING "GOOD PAPER"

Today's NEPA documents do one thing very well—they produce a great deal of paper. They cover all aspects of a proposed project, not just the most important topics that the original law contemplated. NEPA "scope creep" for all projects has evolved into a "sprint," which results in environmental impact statements that are thousands of pages long, including detailed appendices. The only people who understand these documents are the consultants and staff that actually write the documents. Developers and agency decision-makers reluctantly agree to expand the scope of their NEPA reviews and more detailed analyses merely to develop a record to demonstrate to the courts that they have complied with the statute.

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Unfortunately, in developing countries these voluminous environmental assessments are soon forgotten by government sponsors of the project as soon as the project funding is approved. As a result, the necessary mitigations required to avoid or reduce the environmental effects of the project are never implemented or enforced. In my opinion, funds that could be used to mitigate environmental impacts are unwisely spent, producing a spectacular environmental review instead.

The biggest loser in these cases is the environment and people who live in the project area.

STOPPING THE PROJECT, NOT MITIGATING ENVIRONMENTAL IMPACTS, NOW THE OBJECTIVE

As a NEPA practitioner, I'd prefer to conduct rigorous scoping to identify the most important resources to analyze and then concentrate on the mitigation needed to reduce those impacts to an acceptable level. In practice, though, everything is important, and a great deal of effort is spent on trying to discourage, delay, and litigate. The last part is most problematic, often because to environmental groups and local citizens groups, NEPA is merely a tool to stop projects or the government from pursuing policies they fundamentally disagree with.

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These policies include expanding natural gas and oil pipelines, liquefied natural gas (LNG) terminals, and hydropower and coal projects. Congress has spoken on many of these issues over the years through amendments to the Energy Policy Act, Natural Gas Act, Natural Gas Policy Act, and Federal Power Act. Neither political party has revised NEPA or the aforementioned laws, let alone the Clean Water Act (CWA) and Coastal Zone Management Act (CZMA), which come into play when infrastructure projects are proposed. Nevertheless, these "life-and-death" minidramas are acted out across the United States in numerous environmental reviews of natural gas, oil, LNG, and hydropower project proposals.

Opposition groups, federal and state agencies, and project proponents often overlook the fact that natural gas, LNG, and hydropower projects are long-lived assets. It may take several years to construct a project, and the project may be operating for more than 50 years. Mitigation is required during construction and over the life of the project.

Federal decision-makers must make sure that mitigation is carried out properly according to the terms of the permit and not just assume that a project developer will implement the measures. Thus, a federal decision-making agency must play a significant role not only during the preparation of a NEPA review document, but also during construction and operation. The Federal Energy Regulatory Commission recently announced it had hired an environmental contractor to oversee construction of LNG projects.

NIMBY AND WE-KNOW-BETTER CROWD

NIMBY (Not in My Back Yard) is alive and well in 2018.

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It's nondiscriminatory in that it thwarts renewable energy projects as well as fossil fuel infrastructure projects. For environmental groups and local citizens directly affected by a proposed project, NEPA is merely a tool to stop projects or the government from pursuing policies these groups fundamentally disagree with. This often results in the politicization of NEPA. These policies include expanding natural gas and oil pipelines, LNG terminals, and hydropower and coal projects.

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Congress has spoken on many of these issues over the years through amendments and passage of the Energy Policy Act, Natural Gas Act, Natural Gas Policy Act and Federal Power Act. Neither political party has revised NEPA, but both parties have tried to make the siting and NEPA process more transparent and efficient to balance developers' and the general public's interests.

No one can predict the future exactly, but opponents of energy projects often question the need for energy infrastructure projects, as if these opponents had perfect knowledge of the complexities of energy markets, technology, and economics, which may be based on sketchy evidence and fake news. While the need for a project is important, most natural gas and electricity professionals will tell you that this is not easy to do and is often fraught with risk. These same groups who claim to have 20–20 vision on energy are nowhere to be found if things don't turn out as they predicted.

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Energy markets are complex, and the analysis of project need will always be done without perfect information.

STATE PUBLIC UTILITY COMMISSIONS ARE NOWHERE TO BE FOUND

Today's natural gas and electricity system and the benefits it provided in the form of low rates, energy security, and a greener power sector, which have reduced CO_2 levels and benefited the climate, are either ignored or condemned. Nevertheless, these "life-and-death" minidramas are acted out across the United States in numerous environmental reviews of natural gas, oil, LNG, and hydropower project proposals.

State fish and wildlife and water quality agencies participate in the NEPA process, but the state public utility commissions or other government bodies that regulate retail rates as a rule are silent in FERC proceedings on natural gas, LNG, and hydropower proceedings. This lack of input has never made sense to me, because natural gas utilities and load-serving entities will often benefit from greater availability of natural gas supplies and/or the renewable energy from nonfederal hydropower.

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The vacuum created by the absence of state PUCs leaves state environmental agencies in the dark about their respective states' energy plans or goals. Instead, they focus exclusively on environmental issues and are subject to local politicians or the governor's office who are either supporting or opposing the projects. State PUCs don't necessarily have to support projects unless they have specifically approved rates. However, they can provide insights and information on how a project's energy would be used in their state, along with any benefits.

CEQ IS ASKING THE RIGHT QUESTIONS

CEQ has made a good start on posing 20 questions to stakeholders on provisions of the regulations related to the NEPA process and the scope of NEPA review. CEQ has received 12,515 comments.[2]

[2] See https://www.regulations.gov/docket?D=CEQ-2018-0001.

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Aside from reviewing the numerous comments, CEQ will have to determine the merit of the comments, and which warrant changes to the existing regulations. CEQ should draw on the insights of other lead federal agencies or, at a minimum, should insist that these agencies comment on any proposals in either a technical workshop or in writing (**Figure 1**).

Even if CEQ manages to issue final regulations, it must ensure that lead federal agencies do not have to revise their current regulations by going through a separate rulemaking process. The latter occurred after CEQ issued its original regulations in November 1978. For example, FERC implemented its NEPA regulations in December 1987 and has revised these several times over the years.[3]

ACTIONS SPEAK LOUDER THAN WORDS

Stakeholders should not focus on CEQ's initiative exclusively or ignore Executive Order 13807—Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects. The executive order is forcing federal agencies to coordinate their reviews and work more efficiently to arrive at project decisions faster, and is showing some progress.

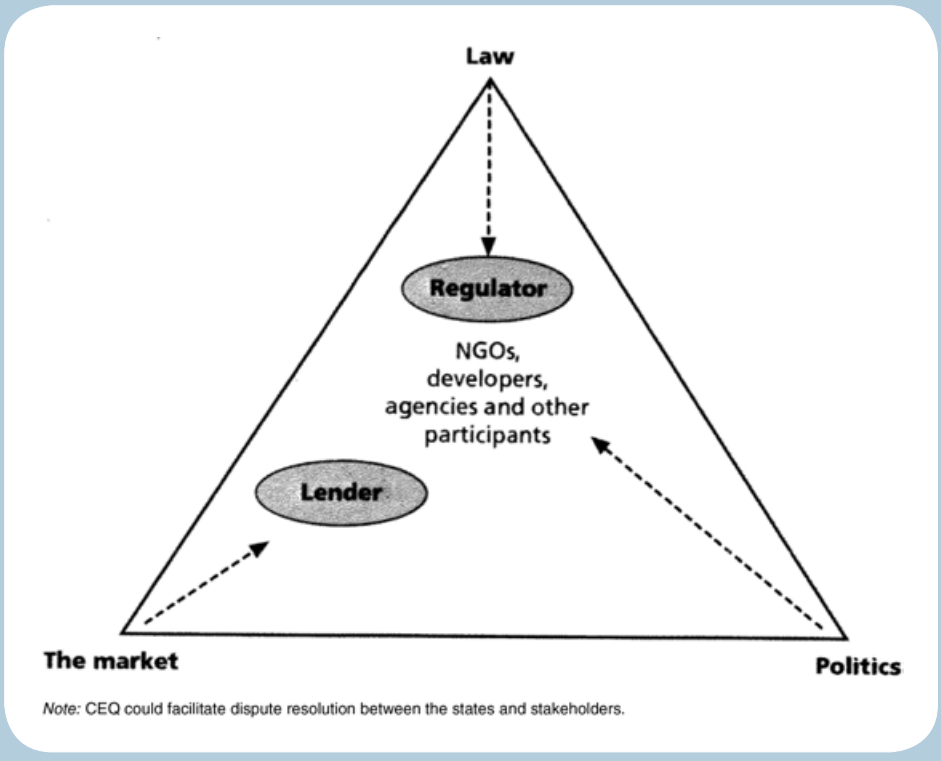
FERC is very engaged in expediting reviews of LNG terminals.[4] This engagement is not surprising given the ongoing criticism by members of Congress and industry stakeholders about the timeliness of the FERC's reviews. FERC has signed a Memorandum of Understanding (MOU) with the Pipeline and Hazardous Materials Safety Administration (PHMSA). The key provision of the MOU is that PHMSA will issue a "Letter of Determination" that FERC can rely on "as the authoritative determination of a proposed LNG facility's ability to comply with the requirements" of PHMSA's LNG facility safety regulations.[5] This letter is to be issued before the final FERC environmental document; thus, FERC can rely on it for its public interest determination instead of doing its own safety analysis.

[3] See Order 486, 52 FR 47910, Dec. 17, 1987.

[4] Lovells, H. (2018, September 5). FERC announces steps to streamline LNG permitting. *Lexology.* Retrieved from http://bit.ly/2NooVhn.

[5] 49 CFR Part 193.

Figure 1. CEQ Role



Note: CEQ could facilitate dispute resolution between the states and stakeholders.

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The MOU and other coordinating efforts should shorten LNG terminal review timelines "in some cases by nine to 12 months," according to FERC. The agency also announced environmental review schedules for 12 LNG projects, providing the vast majority of them environmental document issuance dates in the first half of 2019.

FERC should engage in similar discussions with other federal agencies to expedite the review of brand-new hydropower projects or existing projects that propose additional generating capacity.

GETTING THE STATES ON BOARD WILL BE CHALLENGING

Both the CEQ initiative and Executive Order 13807 can adequately help to improve the NEPA regulations. Unfortunately, they have little effect on the states.

Once a lead federal agency decides on the proposed project, construction of an LNG terminal or natural gas pipeline may not begin until the project applicant receives a Section 401 CWA water quality certificate, or it is waived.[6] For projects sited in coastal areas, the state must also issue a coastal zone management determination pursuant to the CZMA. In the absence of timely issuances of these permits, project construction delays will be inevitable and the effort by CEQ and federal agencies to expedite review and make the process more efficient will fail. This amounts to the tail wagging the dog.

There are several options available to address this issue:

1. Legislative action on amending Section 401 of the CWA and CZMA
2. Amending the regulations that deal with the CWA and CZMA
3. Building a dispute-resolution process into CEQ's initiative to revise the existing NEPA regulations

Given the divisions in Congress, it is very unlikely that amending the CWA and CZMA can be accomplished. Also, it would take a great deal of time to revise the regulations implementing CWA Section 401 and the CZMA.

Building in a dispute-resolution process into CEQ's initiative is more likely to succeed. I believe CEQ could facilitate dispute resolution in a similar manner, as these disputes are required to do in Executive Order 13807 under Section 5(e)(ii).[7] The objective would be to give the stakeholders an opportunity to resolve their disputes in a nonlitigious manner. Any dispute-resolution process would have to be voluntary with the states.

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Nevertheless, on many proposed energy projects, a "cooling-off period" followed by an attempt to resolve disputes that pertain to CWA Section 401 and the CZMA and other matters would be preferable to not being able to begin construction of the project. Dispute resolution would also discourage litigation that is costly and delays projects even more. Most state agencies and environmental groups are usually willing to meet with project proponents and other stakeholders to determine if they can only narrow down the list of disputes and resolve their differences.

At a minimum, CEQ could reach out and explore this idea with state PUCs, the National Association of Regulatory Utility Commissioners, and the National Association of State Energy Officials. In addition, CEQ should consult with the Environmental Protection Agency, which delegates CWA Section 401 authority to the states, the Army Corps of Engineers, and the Department of Commerce on CZMA matters.

While these steps would not always produce the intended results, the steps would short-circuit the tendency of stakeholders to resolve project-specific disputes and policy differences in the courts, which focus on stopping a project. The shift could result in getting the states and other stakeholders to focus on the mitigation necessary to avoid and reduce impacts so that if constructed, the project would be environmentally sound, with emphasis on implementing the necessary mitigation to reduce environmental and people impacts to a minimum.

[6] For nonfederal hydropower projects, FERC won't even issue a license until it has evidenced the water quality certificate and CZMA determination are issued or waived by the states.

[7] Executive Order 13807: Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (2017), http://bit.ly/2MdWkXs.

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