Fulfilling NEPA's Fundamental Goal:
Ensuring Informed and Transparent Decision Making At the Right Time

Roger R. Martella, Jr. Sidley Austin LLP[1]

Chairman Bishop, Ranking Member Grijalva, and Members of the Committee:

Thank you for providing me the opportunity and the honor to appear before you again today regarding this Committees' ongoing efforts to focus on how to ensure the National Environmental Policy Act (NEPA) is being implemented in a manner that properly fulfills its purpose as the nation's bedrock law furthering both environmental protection and informed decision making.

NEPA was signed into law on January 1, 1970 as the first official act of the environmental decade that quickly ushered in the comprehensive laws that since have set the standard for the world in protecting human health and the environment. As it enters middle age forty five years later, NEPA remains the first statute that students learn in their environmental law classes and that other nations replicate as they enact their own environmental regimes. Unlike most other environmental statutes, it is a short, simple and straightforward law that may be responsible for more environmental benefits per word of statutory text than any other.

In my most recent appearance before this Committee, I focused on how, despite the extraordinary contributions NEPA has made to informed decision making over 45 years, NEPA also is at risk for being hijacked as a tool of obstructionism by providing for unnecessarily broad review. Improperly stretching NEPA's reach can lead to vast delays and uncertainty before agencies and the courts. Such delays and uncertainty, in turn, can paralyze or kill important projects that are critical to the nation's economic growth and energy independence.

Today, I focus my comments on a danger that lurks on the opposite side of this coin: the critical importance of engaging in NEPA analysis at the outset of and simultaneous to other appropriate requirements when decision makers consider major federal actions such as permits. Although there are established exceptions to the applicability of NEPA, outside those circumstances NEPA provides agencies one of the most essential and powerful tools to guarantee informed decision making, public participation and transparency necessary to avoid a premature, arbitrary and preordained outcome. Critical in this context, agencies should not reject, dismiss, or veto a permit—or even prejudge the outcome or merits of a decision—prior to

[1] The views expressed here are that of the author and are not intended to represent the views of Sidley Austin LLP or its clients.

fulfilling their obligation to engage in NEPA review and to ensure public participation in decision making. To arbitrarily decline to follow NEPA prior to making a decision in such contexts not only violates the law, but importantly denies both the decision makers and the public the significant benefits that come with knowledge of the full range of environmental considerations associated with a project. Put simply, if all agree that NEPA requires compliance prior to the issuance of a permit, it should be evident that NEPA compliance is also required if the agency decides that it will not issue a permit or entertain an application for one.

Background

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth Circuit Court of Appeals. At the Justice Department, I served as the Principal Counsel for Complex Litigation where I was responsible for leading the teams that defended the government's highest profile and most controversial NEPA decisions. I worked closely with the agencies in assessing the necessary scope of NEPA documents and maintained a 100 percent success rate defending NEPA documents in the courts.

In my current capacity as a private practitioner, I am privileged to work collaboratively with a number of stakeholders, including private companies and trade associations, environmental organizations, and the government. My work has included developing regulatory solutions that advance environmental protection and address climate change while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls. In 2015, Who's Who Legal named me "Lawyer of the Year" based on a survey of global international environmental lawyers.

In both my government and private careers, I also am very proud of the opportunities I have to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. Recently, I served as one of two vice-chairs in the United States of the International Bar Association's Climate Change Justice and Human Rights Task Force, which released a landmark report regarding international legal mechanisms to address climate change. I am also honored to serve on the American Bar Association's President's Sustainable Development Task Force, Rule of Law Initiative, and as a delegate to the United Nations at the Rio+20 sustainable development conference in Brazil and the World Justice Forum at the Hague. Among other publications, I

recently authored the chapter on international environmental ethics for the ABA's upcoming environmental ethics book and the Federal Bar Association's guide to international environmental law for federal judges.

NEPA's Core Formula:

Broad Environmental Impacts Review
+
Public Participation
=
Sound and Rational Decision Making

While NEPA is unique among most federal environmental laws in that it does not impose substantive requirements on the decision making agency, its reach and influence may be the broadest of any environmental statute. NEPA applies to any proposed federal agency action that could have a significant impact on the environment. Importantly, NEPA does not mandate any particular outcome or require an agency to select an alternative that has the lowest environmental consequences or GHG emissions. NEPA simply requires that an agency take a "hard look" at the environmental consequences of any major federal action it is undertaking. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Once the procedural elements of NEPA have been satisfied and the environmental consequences of a proposed action have been given the required scrutiny, an agency may issue its decision relying on the factors and considerations specified in the statute under which it is acting.

First, NEPA Requires a Hard Look at a Wide Range of Relevant Environmental Impacts

The scope of issues considered in a NEPA review is appropriately broad to ensure informed decision making. When evaluating a proposed agency action under NEPA, an agency can begin by conducting an Environmental Assessment (EA), which is a concise environmental analysis that allows an agency to evaluate the significance of any potential environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.9. If the agency determines that the environmental impacts of a proposed action will not be significant, it can issue a Finding of No Significant Impact (FONSI) and conclude its NEPA obligations. *Id.* §§ 1508.9, 13. However, if an agency determines—either before or after conducting an EA—that a project's environmental impacts will be significant, it must prepare an EIS that addresses, among other things, "the environmental impact of the proposed action" and "alternatives to the proposed action." 42 U.S.C. § 4332(C).

To complete this analysis, an agency must simultaneously consider the direct, indirect, and cumulative effects of the proposed action 40 C.F.R. §§ 1508.7, 8. However, the scope of such a review is appropriately limited by the requirement that such effects be "reasonably foreseeable" and, for indirect effects, proximately caused by the proposed action under review. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). In addition, the agency must evaluate mitigation measures which, if implemented, could reduce the environmental impact of the proposed action. *Id.* §§ 1508.20, 25.

At the same time, the scope of a NEPA analysis is not unlimited, and only that information that is useful to the environmental decision maker need be presented. *See Dep't. of Trans. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) ("Rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision maker). For example, an agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." *Id.* Thus, despite its lack of substantive requirements, these procedural obligations, coupled with opportunities for public involvement, *see* 40 C.F.R. Part 1503, ensure that agencies are fully informed of potential environmental impacts before taking final action with respect to a proposed federal action.

This now famous "hard look" at a wide range of relevant environmental impacts is thus at the core of all NEPA analysis and, in turn, all decision making that should be consider environmental impacts. This defined scope of review serves two simultaneous purposes that are key to sound decision making in the United States: (1) ensuring that the government actors are fully informed of the consequences and impacts of a decision *prior* to choosing an outcome; and (2) educating the public on the full range of impacts so they can assess how a decision among alternative proposals might impact them, their communities, their environment, and other socio economic considerations. Thus, NEPA's hard look requirement, when properly employed, strengthens the ability of the government and the public collectively to proceed in the most informed and rational way forward. It is also an essential safeguard in avoiding pre-ordained decision making that does not take into consideration the full suite of relevant facts.

Second, NEPA Promotes Transparency and Public Participation in Decision Making

Transparency and public participation are just as important to informed decision making as the scope of the review. Like all environmental laws in the United States, NEPA promotes public participation through comments on key NEPA documents and promotes transparency through the creation of an administrative record. These opportunities function simultaneously both to inform the government of key

considerations that the public uniquely can bring to the review and to inform the public of the basis for the government's decision making. Arbitrarily and prematurely eliminating these opportunities thus not only significantly weakens the quality of the final agency action, but also is at odds with our nation's system of open government and rational decision making that permeates throughout our entire governance system. Indeed, the need to ensure a full range of stakeholder input into decisions is so important that Congress amended NEPA to ensure that the Environmental Protection Agency itself is provided an opportunity to comment on other agencies' NEPA documents and share its views of the science and other considerations. *See* Clean Air Action § 309.

As discussed above, I am fortunate to have the opportunities to study and help advance environmental laws around the world which, in turn, enables me to reflect on the strengths of our systems and areas that create risks for us. In 2014, I co-edited the American Bar Association's first International Environmental Law book, which surveyed the environmental laws of more than 25 nations. In that experience, I observed an important dichotomy between two types of nations' regulatory regimes: those, like the United States, that have enacted NEPA type process laws to promote reasoned decision making, transparency, and public participation; and, in contrast, nations that have purported to enact environmental statutes, but without the process for public participation and transparency that NEPA provides in major decisions. In this latter group of nations, a trend emerges where seemingly protective laws "on the books" lack opportunities for transparency and public participation. This leads to arbitrary decision making and enforcement, and leaves the public in the dark and insecure about how the government operates to protect the environment and public health. The experience in editing this book reinforced to me the importance of NEPA, transparency and public participation in environmental decision making. At core, NEPA functions not only to protect the environment, but just as importantly protect the informed and transparent type of decision making integral to our democratic government.

Third, NEPA Analysis Must Precede Final Permitting Decisions to Avoid Arbitrary Outcomes

It is axiomatic that given the breadth of NEPA review and the opportunity for public participation, the NEPA process should proceed *prior* to any decision denying a request, permit, or project. To make such a decision without the benefit of the information provided through NEPA and without the role of the public is the very definition of pre-ordained, outcome-oriented arbitrary and capricious decision making that NEPA was enacted to avoid. Indeed, NEPA's own implementing regulations, at Section 1502.25, provide that "to the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with

environmental impact analyses and related surveys and studies" required under other environmental review laws and executive orders. The regulations further provide that the NEPA review itself concurrently should list other applicable federal requirements necessary to issue a decision.

For decision makers entrusted to consider major federal decisions such as permits, it seems virtually impossible to articulate a rational basis for avoiding NEPA prior to a decision to deny a permit. In the absence of a NEPA review, who is to say that there are no environmental impacts arising from an agency's determination not to provide a permit, or from a decision that declares a proposed action ineligible for consideration of such a permit. The goals of NEPA, discussed above, inherently are designed to promote better informed decision making regarding environmental impacts, and to ensure the government is properly transparent with the public and cognizant of their views. In other contexts, some say a decision not to decide is itself a decision. We don't need to resolve that dispute here. But, it is fair to conclude that an agency's determination to exclude a proposed action from the benefits of a federal permit or license is, in the words of the statute, also a "major federal action" that could significantly affect the quality of the human environment. To ignore NEPA prior to deciding against a permit is to engage in arbitrary and capricious decision making that is the essence of pre-disposed decision making. Thus, to ignore NEPA at this stage not only fundamentally violates the principles promoted by the bedrock environmental statute to fairly assess and consider relevant facts and the public prior to rendering a decision, but corrupts broader precedent of rational decision making and public participation that are proudly inherent to our decision making process.

Conclusion

As an attorney and a litigator who has an unbroken record defending dozens of NEPA decisions and determinations, I am intimately familiar with the well deserved NEPA criticisms of today: the extraordinary delays, uncertainties, and litigation risk that have become associated with NEPA in modern times to the extent that the NEPA process itself can become the determinative factor for the success of failure of a project. But those fair critiques—which are properly a focus of reform before this Committee—do not distract from an equally important principle that decision making, regardless of the outcome, must be well informed, have a rational basis, and involve the public. This means that decision makers cannot choose to take a NEPA off ramp when they may initially view a permit request unfavorably. To the contrary, Congress enacted NEPA precisely to avoid that kind of pre-ordained decision making.