A SIMPLE BUT FUNDAMENTAL STEP:
PUT ALL EISs & EAs ON THE WEB

Testimony for the President’s Council on Environmental Quality &
The U.S. Institute for Environmental Conflict Resolution

April 15, 2010

Dan Farber*
Marc Miller**

NEPA provides the basic federal process for illuminating the environmental costs and benefits of “proposals for legislation and other major Federal actions.” 42 U.S.C. 4332 (C). We have a simple suggestion, and one that we believe is in the interest of good and democratic government, but otherwise politically neutral: put the essential and already public documents of NEPA assessment on the web.

The essential tools of NEPA are notice, assessment, input and a record of decision. Notice must go to relevant federal, state and local agencies and the public. Assessment requires a set of tiered judgments including whether the proposed action is subject to “categorical exclusion,” “scoping” of issues that should inform an initial Environmental Assessment (EA), the determination in an EA whether a proposed action is a “major Federal action significantly affecting the quality of the human environment” and therefore requiring a full Environmental Impact Statement (EIS), and the production of Environmental Impact Statements. Input includes government (federal agency, state, tribal and local) and public comment. While the overwhelming consensus is that NEPA is primarily a procedural statute—meaning that it is a statute that requires that identification of environmental impacts and alternatives to the proposed action, but not any particular outcome—the statute and its implementing regulations require a final EIS and a record of decision after the initial steps of notice, assessment and input are complete.

* Sho Sato Professor of Law and Chair, Energy and Resources Group, University of California, Berkeley

** Ralph W. Bilby Professor, University of Arizona James E. Rogers College of Law
The National Environmental Policy Act of 1969 is a notably short piece of legislation. But short as it is, NEPA reveals a belief that encouraging more complete information on the environmental costs and benefits of government actions will lead to better decisions. NEPA embodies a basic faith that better information and knowledge about environmental consequences will produce better decisions. Implicit as well is a belief that government and public participation will lead to more accountable and hence more democratic decision-making.

Astoundingly the basic documents of environmental assessment under NEPA—Environmental Assessments (EAs) (including so-called “FONSIs”—findings of no significant impact) and Environmental Impact Statements (EISs) are not readily and universally available to the public. The Environmental Protection Agency NEPA web site provides the following information about how to obtain EISs:

EPA does not have copies of Environmental Impact Statements (EISs) available for public distribution. Instead, we recommend that you request a copy directly from the agency that prepared the EIS. A good place to start is to telephone the agency "contact person" listed in EPA's weekly Notice of Availability of EISs. In addition, several agencies are publishing entire copies of EISs on the internet (check each agency's website to determine on-line availability).1

Other alternatives include interlibrary loan, or purchase from a commercial entity for EISs after 2003. Equally astounding, the scholarly and policy criticism of this gap has been minimal.2

There is no question that EISs, EAs and FONSIs are public documents. 42 U.S.C. 4332(C) requires that Federal agencies makes comments available “to the public as provided by” 5 U.S.C. 552 (the Freedom of Information Act (FOIA)).3 Implementing regulations have reaffirmed that EISs, EAs, and FONSIs are public documents. See, e.g, CEQ Regulations, 40 C.F.R. 1506.6(b).4

1 http://www.epa.gov/compliance/nepa/obtainEIS/index.html


3 The Freedom of Information Act was expanded by Congress to increase digital access to relevant government information in 1996.

4 40 C.F.R. 1506(f):

Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be
What it means for something to be a public document has changed and continues to change in this information age. Neither the Freedom of Information Act of 1966, nor NEPA in 1969, nor the FOIA amendments in 1974 mentioned public access to computers or databases, much less the publication of information in electronic format. This is hardly surprising: in the mid to late 1960s computers were still a relatively rare and odd presence in government, much less in general public life. The World Wide Web would not emerge until the 1990s.

But if NEPA were enacted in 2010—indeed if it had been enacted at any point after the internet has become a central method of information exchange—there is little doubt the Congress would have required that all assessment documents be made available on the internet. It is time to take a simple but fundamental step and bring NEPA into the internet age. Every EA and every EIS should be placed on line.

The decisions made under NEPA are important not only at the time those decisions are made, and for governments, agencies, institutions and individuals immediately connected with the proposed action, but over time. Documents may contain important information about a project or the environment at the sites under consideration (or for categorical exclusions or systematic EISs at multiple sites). In addition, all documents should be available in searchable form. Providing documents only as images provides a transparent cover for opaque substance.

In matter after matter, NEPA has proven to be a very important statute. A hearty embrace of greater transparency in NEPA process would include placing as much historical material as possible on the web. Participants in individual actions, and students, critics and supporters of NEPA process as a whole and its relationship to environmental protection and sound government will be able to speak more wisely if they can look across cases, and at similar and different cases. The best transparency in government decision-making is transparency in facts and decisions over geographic and political scales, and transparency in each decision and in patterns of decisions over time.

We have one final point: the recommendation we make here is part of a larger contemporary discussion about the role of transparent documents, data and decision-making in a democratic society. There are many critical environmental documents, data and decisions by federal and other actors that should be more transparent then they are now. There are many documents, data and decisions beyond the environmental field that should be more transparent as well.

provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

President Obama has said that “transparency and the rule of law will be the touchstones” of his presidency. On January 21, 2009, in his first full day as President and as his first Presidential Executive Order, President Obama issued a pair of memoranda for heads of executive departments and agencies on “Transparency and Open Government,” 74 Fed. Reg. 4685, and on the “Freedom of Information Act.” 74 Fed. Reg. 4683. The memorandum on transparency and open government embraces the use of information technology to make information more accessible.

**Government should be transparent.** Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

We believe that the essential documents underlying NEPA are a great place to start.