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THE RISE AND DEMISE OF THE NEW MEXICO ENVIRONMENTAL QUALITY ACT, "LITTLE NEPA"

The National Environmental Policy Act of 1969 (NEPA) was signed into law on January 1, 1970.[1] This legislation created the Council on Environmental Quality (CEQ), declared a national policy towards the environment and required federal agencies to prepare environmental impact statements (EIS)[2] on all federal legislation and major actions having a substantial impact on the environment.[3]

New Mexico closely followed this legislation by enacting Senate Bill 92 (Little NEPA) in 1971.[4] It established in New Mexico a Council on Environmental Quality and declared a state policy which

> will encourage productive and enjoyable harmony between man and his environment, promote efforts to prevent or eliminate damage to and improve the environment and biosphere and stimulate the health and welfare of man; . . . [5]

The New Mexico legislation also paralleled Sec. 102 (C) of NEPA by establishing the requirement that:

> to the fullest extent possible . . . all agencies of the state shall:
> C. include in in every recommendation or report on proposals for legislation and other major state actions significantly affecting the quality of the human environment a detailed statement by the responsible official on:
> (1) the environmental impact of the proposed action;
> (2) any adverse environmental effects which cannot be avoided, should the proposal be implemented;
> (3) alternatives to the proposed action;
> (4) the relationship between local and short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
> (5) any irreversible and irretrievable commitments of resources

1. 42 U.S.C. § 4321 *et seq* (1970).
2. An EIS can best be described as an analysis of the effect a proposed action will have on the environment. Agencies would be required to prepare an EIS and use it in their agency review process before any major action which would significantly affect the environment could be taken.
3. National Environmental Policy Act § 102 (C) i to v, 42 U.S.C.A. § 4321 Sec. 102(C).
4. N.M. Stat. Ann. § § 12-20-1 to 12-20-7 (Repl. 1971).
5. N.M. Stat. Ann. § 12-20-1(A) (Repl. 1971).

> which would be involved in the proposed action should it be implemented.[6]

At both the state and the federal levels, the environmental impact statement requirements have proven to be among the most influential and controversial pieces of environmental legislation yet drafted. Opponents of these requirements argue that impact statements are expensive, wasteful and meaningless, while proponents defend them as one reliable method of insuring that federal and state agencies will "on all major actions affecting the environment" evaluate the environmental consequences of their decisions and consider all possible alternative approaches to these actions. As a result, a conflict emerged between a rigorous application of the requirement of 12-20-6 N.M.S.A. (or 102 (C) of NEPA) and a more casual approach which requires only that environmental matters be kept in mind during the consideration and evaluation of agency decisions.

The New Mexico Court of Appeals in *City of Roswell v. New Mexico Water Quality Control Commission*[7] adopted a strict procedural application of Little NEPA.[8]

On August 27, 1971, following an administrative hearing, the New Mexico Water Quality Control Commission adopted amended regulations four and six. Regulation four prohibited the discharge of effluent into water,[9] unless the effluent conformed to quality standards as set forth in the regulation. Regulation six prohibited the discharge of certain identified minerals into water in quantities greater than those set forth within the regulation. The cities of Roswell and Las Vegas, the New Mexico Municipal League, and the Molybdenum Corporation of America appealed the adoption of these regulations.[10]

Appellants contended that the Commission had not complied with the requirements of Little NEPA in that they had not prepared the Environmental Impact Statement (EIS). The New Mexico Court of

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6. N.M. Stat. Ann. § 12-20-6(C) (Repl. 1971).

7. 84 N.M. 561, 505 P.2d 1237 (1972).

8. The New Mexico Court of Appeals decision in *Roswell* did not comment upon the role of the courts in the substantive review of EIS.

9. Water as defined by the Water Quality Act, N.M. Stat. Ann. § 75-39-2(G) (Repl. 1971).

10. This appeal was made pursuant to N.M. Stat. Ann. § 75-39-6 (Repl. 1971) of the Water Quality Act which provides in part:

> "C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:
> (1) arbitrary, capricious or an abuse of discretion;
> (2) not supported by substantial evidence in the record; or reasonably related to the prevention or abatement of water pollution; or
> (3) otherwise not in accordance with the law."

Appeals agreed with appellants and set aside the adopted regulations, remanding the case for further proceedings. The court held that:

> 'To the fullest extent possible' throughout the decision-making process, agencies must consider the environmental consequences of their proposed action and in clear and precise terms, it (Little NEPA) makes environmental protection a part of the mandate of every agency or department and makes every such agency or department subject to its provisions.[11]

According to the court, "an agency or department is exempt from compliance only when there is a clear conflict of statutory mandate and then only to the extent of the conflict."[12]

The question as to which agencies must file impact statements under the federal NEPA legislation has been extensively reviewed in Federal Courts. This is the same question presented in the *Roswell* case, and thus a review of the federal NEPA cases is worthwhile. In *Anaconda Company v. Ruckelshaus* the court held that NEPA "requires the Environmental Protection Agency to prepare an environmental impact statement before promulgating Clean Air Act state implementation plans, since NEPA governs all federal agencies, including those agencies that regulate the environment."[13] In *Kalur v. Rezor* the court held that as to the requirement of Sec. 102(C) impact statements, "There is no exception, as defendants have argued, carved out for those agencies that may be viewed as environmental improvement agencies."[14] Similar decisions have been made in *Davis v. Morton*,[15] which required environmental impact statements from Department of Interior officials prior to the commercial development of Indian land, and *National Helium Corp. v. Morton*,[16] which held that NEPA compels the Interior Department to comply with its provisions when action is being taken with respect to depletable resources.

This position has been contradicted in *Alabama Gas v. FPC*,[17] where the court determined that the Federal Power Commission does not have to file impact statements, since these would violate the commission's duty to act quickly to prevent gas shortages; and in *Ely v. Velde*,[18] where the court held that since NEPA is discretionary

11. City of Roswell v. New Mexico Water Qual. Con. Comm'n. *Supra* note 7, at 564.
12. *Id.*
13. 352 F. Supp. 697 (D. Colo. 1972).
14. 335 F. Supp. 1, 15 (D.C. 1971).
15. 469 F.2d 593 (10th Cir. 1972).
16. 455 F.2d 650 (10th Cir. 1971).
17. 476 F.2d 14 (5th Cir. 1973).
18. 451 F.2d 1130 (4th Cir. 1971).

and the Safe Streets Act is mandatory, the Law Enforcement Assistance Administration (LEAA) is not required to consider the environmental impact of its actions. The *Ely* case clearly seems overly broad and seems to conflict with the majority of court decisions which hold that the provisions of NEPA are not discretionary but are mandatory in all cases except where there is a direct conflict with the pre-existing statutory mandate.

In adopting the language of NEPA, the House of Representatives stated that:

> The purpose of the new language is to make it clear that each agency . . . shall comply with the directives set out . . . unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. . . . Thus it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal Agency as a means of avoiding compliance with the directives set out in Section 102.[19]

It is clear from the legislative history that it was not the congressional intent that NEPA should be avoided by agency discretion, but, rather, in the words of Senator Jackson, "no agency shall seek to construe its existing statutory authorizations in a manner designed to avoid compliance."[20]

The consequences of the New Mexico Court of Appeals holding in *Roswell* were far reaching, including the doubt cast on the validity of all environmental regulations in New Mexico adopted since passage of Little NEPA. An early result of the holding was the enactment of Chapter 310, Laws of 1973 by the New Mexico Legislature.[21] The legislature thereby imposed a suspension of and moritorium on all EIS requirements for one year. The CEQ was handed the responsibility of making a recommendation based on public hearings "as to whether or not full or partial implementation of section 12-20-6 N.M.S.A. (Little NEPA) was in the public interest."[22] If their conclusion was that EIS were in the public interest, then their responsibility extended to the drafting and preparation of guidelines implementing this requirement.

The Council on Environmental Quality consisted of seven members appointed by Governor King: two members each from persons representing industry, the environment, and the public, and

19. House Comm. on Merchant Marine and Fisheries, H.R. Rep. No. 765, 9151 Cong., 1st Sess., 9-10 (1969).

20. 115 Cong. Rec. 40416 (1969).

21. N.M. Laws 1973, Ch. 310.

22. N.M. Stat. Ann. § 12-20-3(I) (Repl. 1973).

one from a state agency. Representatives appointed for the industrialists were Scott Boyd, Mayor of Farmington, and Ben Ormand, a representative of Kennecott. Steve Reynolds as State Engineer ostensibly spoke for state agency interests. Sally Rogers of the Central Clearinghouse and Frank Bond of the Sierra Club were appointed to represent environmentalists. Sandra Cohn from the League of Women Voters and Mike Alarid were representatives of the public.

Unfortunately, the CEQ was irrevocably split 4 to 3 on most issues, with the industry representatives and the state engineer strongly opposed to the EIS requirement. Steve Reynolds was the most vocal opponent throughout the public hearings and continually argued that impact statements would waste time and money, and that "substantive legislation," or laws which apply directly to specific environmental concerns, would be a better method of protecting the overall environment.

Despite the split, the CEQ concluded after extensive hearings that the impact statement requirement was in the public interest, and on January 7, 1974, transmitted the final draft of its recommended legislation to Governor King. The CEQ proposal recommended significant and useful changes in Little NEPA and represented an attempt by members of the Council to meet the problems defined by Steve Reynolds. The following are some of those changes:

Agency "Actions" were defined in Section 2B and specifically exempted were ministerial and emergency actions. Section II (G) required that upon a determination that proposed action would not significantly affect the environment, the agency must file a written declaration of such finding with the CEQ and the Governor. Section 13 provided that agencies might charge applicants for the preparation of impact statements. Section 13 (C) attempted to reduce the number of required statements by allowing preparation of only one statement for actions which can be grouped. Section 14 (B) adopted a Statute of Limits of 90 days after filing of an impact statement.

Governor King in his special message to the legislature failed to limit discussion to the recommended bill and instead opened the door to additional bills for consideration along with the CEQ draft.[23] The object of these bills was to repeal the EIS requirement, either explicitly or impliedly.

Extensive lobbying and political pressure, plus a decision by environmentalists to favor outright repeal rather than passage of a useless or possibly harmful bill, resulted in the final repeal of Little

23. *Cf.* N.M. Const. art. IV, § 7.

NEPA.[24] Thus, at this time New Mexico is left without any comprehensive statutory means of protecting its environment. In view of the present political situation in New Mexico, further review of the EIS concept may be academic; yet some proposals and suggestions might be useful in attempting to draft a more efficient statute that would fill the void left by the repeal of Little NEPA.

These proposals proceed on the assumption, strongly contested by some, that impact statements have beneficial functions that make them worth retaining. These functions are: 1) forcing the agencies to disclose to the public the actions they intend to take; 2) requiring disclosure to the public of the reasoning and information that formed the basis of the decisions regarding the proposed action; 3) allowing for public comment and participation in the decision-making process where there is a substantial environmental effect; and, 4) sensitizing various state agencies to the environmental consequences of agency action.

Four major questions are involved in these suggestions, which were dealt with to some extent by the CEQ. Each of these questions will be discussed individually below. They are:

1. When should an agency be required to prepare an Environmental Impact Statement?
2. What should the procedural process be in the writing and utilizing of the EIS?
3. What should be included in the substantive requirements in preparing an EIS?
4. What should be the channel of review for the completed EIS?

WHEN SHOULD AN AGENCY BE REQUIRED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT?

Initially we must concern ourselves with the question as to when an agency shall be required to prepare an EIS. Under Little NEPA these were required of all "proposals for legislation and other major state actions significantly affecting the quality of the human environment. . . ." The basic problem with this legislation was the failure of the bill to define the terms "major state actions" and "significantly affecting the environment."

Because of the opposition to the EIS requirement and the potential costs of such a requirement, it may be more reasonable to specifically describe the agency actions for which we want to require an EIS with specific concern for New Mexico's environment. In this manner the EIS costs can be limited to projects which are

24. N.M. Laws 1974, Ch. 46.

likely to have sufficient environmental impact to justify the expenditure of the resources needed in preparation of the EIS.

These selected agency actions should include all projects of a type involving strip mining; large scale land development; significant changes in community life patterns; significant changes in land use patterns, such as agricultural to industrial; large scale use of herbicides, pesticides or other toxic environmental chemicals; a change in the quantity or quality of available water resources; significant changes in air quality; widespread changes in flora or wildlife patterns; highly controversial actions; or minor projects whose cumulative impact would be or could be significant in any of the above listed categories. In addition to the specific categories described above, there should be included a general category for large scale state actions which the CEQ should review, and if it is felt that the environmental effects could be significant, the CEQ should have the authority to require preparation of an EIS. The CEQ recommendation to allow agencies to prepare only one impact statement for actions which could be grouped and the provision which specifically excludes ministerial actions and emergency actions should be retained so as to reduce both the number and cost of impact statements.[25]

WHAT SHOULD THE PROCEDURAL PROCESS BE IN WRITING AND UTILIZING THE EIS?

In order to accomplish the goals of informing the public, allowing for public participation and sensitizing the agency to environmental problems, the EIS must be prepared early in the agency review process, before any action is taken, in order to permit meaningful consideration of the environmental issues involved. The EIS should not become merely a written justification for actions already decided upon.

Future legislation should clearly describe the procedure to be followed in preparing the EIS. First, the lead agency or sponsor should prepare a draft statement using its own expertise and information. Review of the draft statement should follow with comments by other agencies having specialized expertise relating to the project and with comments being allowed from the public. Finally, the sponsoring agency should complete the final statement using the comments to modify the plan where appropriate. The EIS need not become an insurmountable barrier to agency action, but should instead become a tool which sensitizes agencies to environmental problems and public concern.

25. CEQ Proposed Legislation. Senate Bill 92, 1974 Legislative Session.

WHAT SHOULD BE INCLUDED IN THE SUBSTANTIVE REQUIREMENTS IN PREPARING THE EIS?

The EIS should cover the following points put forth in the Federal Council on Environmental Quality's guidelines:

> (i) a description of the proposed action including information and technical data adequate to permit careful assessment of impact.
> (ii) the probable impact of the proposed action on the environment.
> (iii) any probable adverse environmental effects which cannot be avoided. (This should be further developed to require agencies to mitigate damage where possible so as to minimize adverse effects and, for an impact that can't be reduced, to explain why the action is being proposed notwithstanding its adverse effects.)
> (iv) alternatives to the proposed action. In future legislation, the extent of consideration of alternatives required in preparing the EIS should be made clear. In order to reduce the burden on the sponsoring agency the discussion need not be exhaustive, speculative, or remote.
> (v) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
> (vi) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented, and
> (vii) where appropriate, a discussion of problems and objections raised by other Federal, State, and local agencies and by private organizations and individuals in the review process and the disposition of the issues involved.[26]

WHAT SHOULD BE THE CHANNEL OF REVIEW FOR THE COMPLETED EIS?

The process of review of the EIS should be clearly stated in any future legislation requiring preparation of an EIS. This issue should be considered so as to prevent small groups of individuals from stalling agency actions, yet the public should still have the right to challenge the state agency's conclusions.

Legislation should clearly indicate the role of the courts in reviewing the EIS. The Federal Courts have adopted several conflicting opinions on this crucial question.

In the case of *Environmental Defense Fund v. Corps of Engineers* it was held that "the courts have an obligation to review substantive

26. Council on Environmental Quality, 1971, statements on proposed Federal actions affecting the environment; Federal Register, v. 36, no. 19, p. 1398-1402 and no. 79, p. 7724-7729.

agency decisions on the merits."[27] This view was also stated by the court in *Sierra Club v. Froehlke,* which held that "the reviewing courts assume a heavy burden as well. They must insure that the final agency decision was not arbitrary and that it clearly gave sufficient weight to environmental values."[28] A conflicting opinion was given in *Jicarilla Apache Tribe of Indians v. Morton* in which the court held that "our scope of review is very narrow. We are limited to the . . . [necessary] procedural requirements.[29] The ultimate resolution of these conflicting opinions will have an immense impact upon the future value and utility of Section 102 (C) of NEPA.

Finally, the legislation should also establish a statute of limitations after which no further objections can be raised to the agency action unless a party could show unusual or mitigating circumstances.

CONCLUSION

Planning in the past has usually required an evaluation of the need for development and a comparison of the costs of the development as opposed to the benefits to be derived. In 1971 the New Mexico Legislature decided that in addition to the customary analysis of benefits and costs there should be a detailed investigation of the environmental consequences of major state actions which might affect the environment. This is little more than an ecological cost/benefit analysis. However, the legislature repealed this requirement in 1974, under heavy pressure from industry and state agency representatives despite a CEQ finding that the EIS requirement is in the best interest of the state.

Perhaps new proposals will be presented to the legislature that will again require state agencies to openly demonstrate the analysis used by them in examining the environmental effects of the projects they plan.

It is hoped that this article will be of some use in preparing legislation specific enough to insure that an agency will fully examine the environmental effects of its actions where such action may appear to have a significant impact upon the New Mexican environment.

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27. 407 F.2d 289 (8th Cir. 1972).
28. 359 F. Supp. 1989 (S.D. Tex. 1973).
29. 41 F.2d 1275 (D.C. Ariz. 1973).