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Just Two Looks, That's All It Took: Cutting Off the NEPA Mobius Loop

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On Feb. 15, the state of New Jersey appealed a recent decision that allowed the Army Corps of Engineers to deepen the main channel of the Delaware River.

According to press reports, New Jersey Gov. Chris Christie said the Army Corps would be "irresponsible" to move toward the dredging without reviewing its impact on the environment.

That statement highlights a difficult problem under the National Environmental Policy Act and other programs that require a "thorough review of environmental impact" — reviews take time. By the time an agency completes a review and decides to move forward with a project, some of the analysis may be dated.

Does that mean that the agency then has to re-do its review?

If so, it might never have a study current enough to support a decision, and would be frozen into inaction. If not, it may be considering environmental impact based on conditions that have changed. This is an instance of the never-ending "hard look."

The National Environmental Policy Act, also known as NEPA, requires federal government entities undertaking a "major federal action" that would significantly affect the quality of the human environment to assess the impact of that action on the environment beforehand. NEPA does not limit the impact that the government may tolerate. NEPA merely sets up a procedure under which agencies must think about the environmental consequences of what they do before they take action.

An environmental impact statement, or EIS, provides the primary vehicle to accomplish this "hard look." An EIS is simply a document that examines a broad range of impacts and alternatives.

Many expected the statements, also known as EISs, to be brief when Congress enacted NEPA in 1969, but they have grown into long documents full of detailed consideration of the direct and indirect effects of a major federal action. As long as the agency uses the EIS to take a "hard look" at environmental consequences, the choice of what to do after that hard look is left to the government's reasonable discretion.

But in the case of a major action on the scale and with the complexity of the Delaware River Deepening Project, it can take a really long time to take the requisite hard look.

In fact, it sometimes takes so long to complete a NEPA review that, before the review is even finished, either the major action as originally conceived or the environment itself has changed to such an extent that a supplemental NEPA review is arguably warranted.

Under NEPA, agencies must supplement an environmental impact statement with additional analyses when there are "substantial changes in the proposed action" or "significant new circumstances or information" relevant to environmental concerns.

But if it takes long enough to complete a supplement that conditions have arguably changed yet again, the end result can be either an infinite loop of continuous NEPA review or perpetual opportunity for litigants opposed to the project to stall it in litigation claiming supplemental review is necessary. And often, at least in the case of large capital projects dependent upon institutional investment, delay and litigation effectively mean the death of the project.

Environmental groups have taken full advantage of the opportunity NEPA presents to stall major projects and have had notable success in this regard. To take one recent example, the Sierra Club sued Sunflower Electric Power Corp. in connection with that company's proposed expansion of its coal-fired plant in Kansas, alleging failure to undertake an EIS analyzing, inter alia, global warming impacts. Indeed, the Sierra Club publicly stated in an April 14, 2008, *Los Angeles Times* article that, with respect to the siting of new coal-fired plants, its goal is to "clog up the system."

The Delaware River deepening case represents a deft handling of this problem by the federal court in New Jersey.

For decades, proponents have sought to deepen the main channel of the Delaware River by an additional five feet from its present depth of 40 feet. The Delaware provides a commercial waterway from Trenton, N.J., to the Atlantic Ocean and includes the major ports of Philadelphia, Camden, N.J., and Wilmington, Del. The original purpose of the project, as envisioned in the early 1980s, was to accommodate larger cargo vessels and to facilitate use of the waterway as a major shipping route.

In 1983, Congress charged the corps with the task of determining whether it was in the federal interest to deepen the Delaware River channel in light of the increasing size and weight of cargo vessels. After studying the issue for nearly a decade, the corps in 1992 issued its "Final Interim Feasibility Report and Environmental Impact Statement," allowing the project to move forward. The EIS recommended that a depth of 45 feet was necessary to accommodate the current trend of vessel drafts. Congress accepted the recommendation of the corps and, by statute, authorized the corps to deepen to 45 feet a 102-mile stretch of the Delaware from the Philadelphia and Camden ports to the Atlantic Ocean.

In light of the fact that the corps has engaged in regular dredging of the Delaware since World War II in order to maintain its present 40-foot depth, one would think the project would be relatively uncontroversial. In fact, the opposite is true and there were a number of reasons that the project never quite got off the ground.

Despite the availability of federal and state funding for the project and the support of Pennsylvania and related port constituencies, the project faced fierce resistance on a number of different fronts from the beginning. Several groups opposed the project from the get-go on environmental grounds and used all available means to stop it, including administrative and permit appeals. Ultimately, they persuaded Delaware and New Jersey to withdraw prior approvals and to object to the dredging.

The opposition and other complications resulted in delay.

After issuing the 1992 EIS, the corps coordinated further with federal and state environmental agencies and addressed concerns raised by the EIS and subsequent environmental investigations in a 1997 supplemental EIS. A notice and comment period followed and, in 1998, the corps issued a new decision document for the project. Over the next decade, the corps continued to study potential environmental impacts of the project on the ecology of the Delaware River and issue periodic reports updating the conclusions and of the EIS and supplemental EIS.

In 2008, the Philadelphia Regional Port Authority partnered with the corps as the new non-federal project sponsor. The corps noticed a 30-day public comment period for a new Environmental Assessment on project changes and new environmental information.

Many comments were received from environmental groups, citizens and the affected states (New Jersey, Delaware and Pennsylvania) and state agencies. Virtually all of the commenters opposed initiation of the project without additional environmental study and protections and expressed concern about potential environmental impacts. Several commenters called for a new supplemental EIS in light of the more than 10 years that had elapsed since the last one.

In April, 2009, the corps issued its final EA and updated several environmental studies. The EA concluded that any changes to the project were not substantial enough, and any new information was not significant enough, to warrant another supplemental EIS. The project was shovel-ready.

Delaware and New Jersey each challenged the project separately. The Delaware court originally allowed the first phase of the project, located entirely in Delaware, to proceed, but enjoined the rest of the project, a decision it later reversed. Three days after initiation of the Delaware action, the New Jersey Department of Environmental Protection filed suit in federal court in New Jersey against the corps, challenging the project under a number of federal laws, including NEPA.

The deepening project is a quintessential example of a major federal action that implicates the NEPA review mobius loop. The sheer physical scope of the project, combined with its glacial pace and the complexity and dynamism of the Delaware River system, populated with many and varied species of life and subject to substantial commercial traffic, require a lengthy NEPA review and virtually ensure "substantial and significant" changes along the way that, in turn, may warrant their own review.

The Jan. 13 decision endorsed the corps' solution — using an abbreviated process in 2009 to decide not to conduct yet another Supplemental EIS. It also refused to vacate the decision itself.

By reading NEPA narrowly and giving primacy to the procedural nature of the statute, the court's opinion provides a framework for other major projects for which EISs and Supplemental EISs have already issued to escape the endless NEPA review problem and cut off at least one means of attack available to project opponents under NEPA. On appeal, we shall see whether it was correct. •

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