

1-1-1973

The (Unhappy) Truth about NEPA

Joseph L. Sax
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>

 Part of the [Law Commons](#)

Recommended Citation

The (Unhappy) Truth about NEPA, 26 Okla. L. Rev. 239 (1973)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

ENRICHMENT SERIES*

THE (UNHAPPY) TRUTH ABOUT NEPA†

JOSEPH L. SAX††

Most regulatory laws fail because the people who write and enforce them seem oblivious to the one matter they should most care about—the behavioral realities that govern the institutions sought to be regulated. The field of administrative law, whose domain this is, seems hopelessly out of touch. Ignoring the real forces that drive institutional beasts hither and thither, it blandly sermonizes about how things ought to be. The following excerpt from a recent court decision illustrates my point. We must, the court opined,

[E]nsure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . [D]ecisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will . . . enhanc[e] the integrity of the administrative process. . . .¹

I cannot imagine a more dubious example of wishful thinking. I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil.

Let me tell you why. The views I am about to express are not by way of proof. They are personal, impressionistic and limited. But I think my experience will ring true to many of you. The setting for my report is personal experience with the National Environmental Policy Act (NEPA),² with specific focus on its application to airport development.

NEPA and its history have been well documented³ and no detailed explication is required here. In essence, the law requires federal agencies to prepare

* The Oklahoma Law Review is publishing the text of addresses delivered in conjunction with the University of Oklahoma College of Law's Enrichment Program.

† This article is an address delivered January 31, 1973, at the University of Oklahoma College of Law in conjunction with the Enrichment Program.

†† A.B. 1957, Harvard; J.D. 1959, University of Chicago; Professor of Law, University of Michigan.

¹ *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

² 83 Stat. 852 (1970), 42 U.S.C. §§ 4331-4335 (1970).

³ See e.g., Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ENVIRONMENTAL L. REP. 50035; Hanks & Hanks, *The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

statements on proposed actions, detailing environmental effects, proposed alternatives, and irreversible resource commitments involved in the proposed action, should it be implemented. The statute arose out of a concern that many agencies had been insufficiently sensitive to the environmental costs of their programs; NEPA's obvious, if unstated, assumption was that by requiring the agencies to explore, consider, and publicly describe the adverse environmental effects of their programs, those programs would undergo revision in favor of less environmentally damaging activities.

How, exactly, was this to come about? Neither the statute nor its history makes this clear, but there are a number of likely hypotheses upon which it is fair to assume that the draftsmen of the law operated:

1. To the extent that agencies had simply not been alerted to environmental problems, NEPA might serve as a sort of road sign warning of dangers ahead.
2. Insofar as NEPA required a study and report, it would require new, environmentally knowledgeable staff and consultants; persons whose own professional perspectives might help revise traditional agency perspectives.
3. To the extent that NEPA statements would be made public, they would alert other interested persons or agencies who could bring their weight to bear in encouraging agencies to modify their actions.
4. Because NEPA articulates a congressional policy, it may induce the agency to shift its emphasis to accord with perceived new congressional goals.
5. Because the NEPA statement will reveal important data, the force of fact will itself induce modifications in traditional agency patterns of behavior.

If these are not all the premises underlying hopes for success of a law like NEPA, they are, I think, at least the major ones. Before turning to examination of the specific operation of NEPA, I pause to note the basis for anticipating that any or all of the five forces just identified are likely to work.

1. The road-sign or "slippery when wet" theory. Road signs work for most situations because they respond to the obvious interest in self-preservation. The driver recognizes that he is the immediate and principal loser if he fails to heed the message. Moreover, there is usually a secondary incentive. If you don't heed the sign, there is likely to be waiting a punitive sanction that significantly outweighs the advantage to be had by disobeying the sign.
2. The expert, "boring-from-within," theory. Some experts have power because their expertise is directly correlated to the continued operations of the employer; if people won't continue to buy bridges that collapse, the bridge builder that wants to stay in business pays attention to his engineer. Some experts are powerful because they hold the key to outside intervention: for example, the lawyer who knows how to keep his client out of antitrust troubles. Other experts, though not appreciated within the organization, have a powerful external constituency. Admiral Hyman

Rickover, the well-known Navy gadfly, exemplifies this species. In some instances, the external support is simply the standards of the profession; some professionals, in response to the ethics of their profession, may feel compelled to be unyielding even to strong indications of their employer's interest, out of stronger loyalty to their profession.

3. The theory of the publicly made decision. Having the relevant data out in the open can be a very powerful lever if there is someone who can both understand and act upon that data. The question is, who reads the environmental impact statements produced pursuant to NEPA? And of those who read and understand the statements, who has the power to effectuate the information the statements provide?
4. The Congressional message theory. Congress, when it has a real message to deliver, is not to be trifled with by any federal agency. But has the Congress done anything to put itself in a posture to respond forcefully and effectively to inadequate compliance with NEPA? The appropriations process is usually a most effective communications device. Is NEPA tied to the appropriations process, or any similar device designed to induce responsiveness?
5. The force of fact theory. It is on this point that much of the debate over reform of agencies revolves. Skeptics, stung by their experience with what they see as the bias of determinedly mission-oriented agencies, doubt that any but coercive external forces can ever bring about significant change. On the other side is the faith that a modicum of self-discipline will bring about the desired results.

These are the questions I hope to explore as I turn to the National Environmental Policy Act and the problem of airport expansion.

By way of introduction, it should be noted that the airport expansion problem is, in many ways, among the more promising targets for the goals of NEPA. It does not, for example, involve agencies like the Bureau of Reclamation, the propriety of whose very survival has been put in question. Nor does it involve an agency, like the typical highway department, whose alignment with powerful interest groups has made it so suspect as to be—in the minds of some—beyond redemption. Nor, finally, as we shall see, are the problems of airport expansion usually as intricately complicated as those involved in the energy crisis, where the potential of a law like NEPA may seem to be stretched almost beyond the point of helpfulness. For example, must one solve the oil import problem before deciding whether to open wells in Alaska, and does that, in turn, depend upon what one does with offshore drilling in the Gulf of Mexico, itself related to the pricing policy of natural gas?

In many respects the airport expansion problem is rather simple and straightforward. While, like any interesting problem, it has deeper and more complex implications, for purposes of this discussion I am going to limit my consideration to the simpler issues, for they adequately demonstrate the concerns about NEPA upon which I wish to focus.

The factual setting of the problem is this. Throughout the United States, air travel has been growing rapidly. Metropolitan airports face the combined

problems of congestion and noise.⁴ The conventional solution to both problems has been the proposed construction of new or enlarged runways. Expanded capacity problems and—at least where the airports are close to major population centers and also border major bodies of water—the proposed new runways, built on fill in the water, are perceived as solutions to the noise problem. New York's Kennedy and Honolulu's International Airport typify this latter situation.

Airport development provides a particularly instructive setting in which to consider the operation of NEPA for several reasons. Unlike relatively unique situations, such as the Alaska Pipeline, the Gulf oil leases, or the Central Arizona project, airport problems throughout the country tend to be quite similar. Thus, from the perspective of economy, the potential of realistic implementation of NEPA should be quite high. Whatever studies, techniques and methodologies are developed for one airport should be adaptable with relative ease to others, though the specific physical settings vary from place to place.

Airports also provide an especially useful setting in which to test NEPA's implicit faith in public participation and in comprehensive planning, for the recent Airport and Airway Development Act⁵ provides for public hearings on the "social, economic and environmental effects"⁶ of proposed airport development, prior to which hearing, the preliminary draft Environmental Impact Statement required by NEPA must be made public. The same Act requires all airport developments to be consistent with a statutorily required National Airport System Plan.⁷

In addition, as I shall explain in a moment, the debate over airport development has not been carried on in terms of great abstraction—contrasting the purported development with a demand for population control, or even with a challenge to the need for the quantum of travel airport authorities forecast. Rather, the debate has been quite neatly confined to a contrast between new construction and a set of non-construction techniques, alleged to be both less expensive and less environmentally threatening than new runways.

Last, but by no means least important, airport authorities have had before them for more than two years a highly detailed model environmental impact statement laying out numerous reasons for the adoption of non-construction alternatives to airport noise and congestion problems.⁸ This model study, the background of which I shall explain presently, is, at best, compelling and, at least, highly provocative as an environmentally attractive solution to airport noise and congestion problems. However, not a single airport NEPA statement that I have seen (and I have studied a good many in recent months) utilizes the model study or any of its major suggestions; needless to say, in every instance that I know, new construction is recommended.

I submit that there must be something quite seriously at fault with the

⁴ Air pollution is also a serious problem, but is less immediately related to proposals for expansion.

⁵ 84 Stat. 219 (1970), 49 U.S.C. §§ 1701-1742 (1972 Supp.)

⁶ 49 U.S.C. § 1716(d)(1).

⁷ *Id.* at § 1716 (a).

⁸ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING, JAMAICA BAY AND KENNEDY AIRPORT: A MULTIDISCIPLINARY ENVIRONMENTAL STUDY (1971).

assumptions under which the NEPA was enacted if it failed to produce even mention of such environmentally attractive alternatives under circumstances where (1) an elaborate model study was available; (2) no threat was even implicit to the mission or function of the sponsoring agency, should the alternatives be adopted; (3) the alternatives were said to be, in at least some instances, a great deal cheaper.

The background of the model airport study to which I have referred is as follows. In December of 1969, the Port of New York Authority approached the Environmental Studies Board (a joint Board of the National Academy of Sciences and the National Academy of Engineering) to undertake a study of the environmental impact an extension of runways at Kennedy International Airport would have upon the adjacent Jamaica Bay and its communities. At this time, the Port Authority appeared to be persuaded that a runway extension was required; the question it posed was not whether a new runway in the Bay was desirable, or whether the Bay would be affected by the runway, but rather "whether through carefully employing the resources involved in an extension of the airport, a program could be developed that would result in a complete redevelopment of the entire Bay to achieve distinct environmental benefits for mankind and wildlife and sustain the region's economy."⁹

The Port authority encouraged the Environmental Studies Board to undertake the project because "a successful solution could establish a valuable national precedent of considerable significance."¹⁰ Similarly, the Secretary of Transportation encouraged the study "because of its potential relevance not only to the immediate New York situation, but to the Nation as a whole."¹¹

The Board undertook the study during the summer of 1970, gathering together a multidisciplinary study team of 25 experts from the physical and biological sciences, engineering, the social and behavioral sciences, and the law. The team was headed by Professor James A. Fay of the Massachusetts Institute of Technology. When the study draft was presented in the fall of 1970, it created something of a stir, for the study group had not simply answered the question posed by the Port Authority. It went on to answer a more interesting question it had discovered for itself: Was a runway expansion needed in the near future at Kennedy Airport? The answer it produced was "no." While this answer was both surprising and, to some, disconcerting, the study with its recommendations was duly published. It received wide publicity in New York, and plans for expansion of the runway were put aside.

The Kennedy Airport study is one of the most fascinating studies of its kind that I have seen. Its essential conclusions are:

1. The Port Authority, in cooperation with the Civil Aeronautics Board and the Federal Aviation Administration, should institute immediately a program of landing fees, consolidation of flight schedules and other administrative devices that will eliminate existing congestion and allow for more efficient utilization of existing system capacity. Only after com-

⁹ *Id.*, Vol. 1, at xi-xii.

¹⁰ *Id.* at xii.

¹¹ *Id.* at ix.

plete implementation of these measures will it be possible to assess fully the need for, and timing of, an airport expansion.

2. Improved air traffic control systems would permit substantial increases in the capacity of the region's airports, and such systems should be developed and adopted as rapidly as possible. If there is a proven need for increased runway capacity after the introduction of these much-needed improvements, then additional runways might be considered.
3. An intensive study should be undertaken of alternative systems for intercity air and ground transport, such as vertical short takeoff and landing aircraft and high speed trains, which might affect future regional jetport needs.
4. Major reductions in noise exposure can come only from use of quieter aircraft. The Port Authority should press for the development and installation of quiet engines on aircraft.

Just to put these bare recommendations in context, I note some of the data on which the Kennedy Airport study relied. As to flight consolidation, the study pointed out that a significant source of airport congestion is the proliferation of flights between the same cities, during the same hours, each carrying substantially less than a full load of passengers. The Kennedy study data indicated that simply consolidating (with a maximum load of 80 per cent, which is considered highly efficient) duplicating flights arriving from the same city within the same hour of the day, during peak hours, would alone reduce peak hour operations by a full 25 per cent. Such a reduction is as desirable as making the airport 25 per cent bigger, without any capital cost, and with obvious efficiencies that should, in fact, be reflected in lower fares, lower fuel expenditure, and less equipment needs.

Another point emphasized in the Kennedy study was the heavy burden imposed on airports in peak hours by general aviation, usually small private planes serving very few passengers per plane, but nonetheless preempting precious airport takeoff and landing facilities during busy times, creating both congestion and heavy delay costs. It was noted that general aviation landing fees were generally set too low to discourage peak hour use, but that general aviation operations were highly sensitive to landing fee prices. It was observed that

[I]mposition of a \$25 minimum landing fee in 1968 reduced general aviation use of the three [New York] airports by 40 per cent in one year. This suggests that a minimum landing fee of \$100 during peak hours would largely eliminate peak-hour general aviation usage of the region's three major airports. A \$100 peak-hour landing fee is far less than the full long-run costs of providing additional runway capacity and a still smaller fraction of the average delay costs imposed on other users by an additional general aviation movement during the peak period.¹²

It was calculated in another study done for the Port Authority that the cost of an additional general aviation aircraft arrival during instrument-flight-rule conditions in a peak-use hour would be as much as \$3,800 in delay costs on other aircraft and their passengers.

¹² *Id.*, Vol. 2, at 24.

As to air traffic control, the Kennedy Study said that "present air traffic control and instrument landing systems are capable of improvements that could increase airport capacity *by a factor of two, with present technology.*"¹³

These are just some of the dramatic findings and conclusions of the Kennedy Airport Study. Yet this study has seemingly disappeared from the face of the earth for all one could tell by reading environmental impact statements prepared by American airports. Not only has it seemed not to have the slightest effect on the planning of airport officials, who quite uniformly go forward with recommendations for new runways, but I see no trace of it in the issues that are discussed in the statements. The typical impact statement identifies only three possibilities: build the proposed new runway; build a new airport elsewhere; or adopt what is usually called, "the do-nothing alternative."

If there is an example of a more perfect failure of the idea of the NEPA than the "disappearance" of the Kennedy Airport model environmental impact statement, I would be hard pressed to identify it. Thus I turn, finally, to the important question: Why do airport authorities behave this way; why does the real intent of NEPA seem to have so little effect on them; why has the hope for environmentally innovative thinking about problems like airport expansion been thus far so dismal a failure?

In my opinion, the answers are rather obvious as a matter of observed institutional behavior patterns, and they make clear that, *as presently structured and enforced*, the NEPA will not lead to significant self-reform by agencies.

The first, and probably most important, explanation is that of operational responsibility. People who run airports have their attention riveted on the day-to-day problems of their airport. Nothing is more important to them professionally than to assure that the airport is not bogged down in chaotic congestion or overwhelmed by noise complaints. From their perspective, there is only one way by which they can have some assurance about, and control over, the prevention of such chaos: that is to get bulldozers moving out on the field to build new or expanded runways.

You will note that most of the ideas suggested in the Kennedy Study, such as flight consolidation, improved air traffic control technology, and quiet engine programs—while they are probably better, more efficient, and cheaper solutions—are not ideas over which airport managers are in a position to exercise decisive control. Those changes must be implemented by the CAB, the FAA, NASA, or some other agency. Thus, the airport manager can have no confidence that the changes will come about in time to solve his problems, and he can't feel comfortable sitting back and waiting for some other agency to come up with a solution to *his* urgent problem.

The moral is that the man on the spot is going to opt for the more tangible, more certain solution over which he has control, regardless of the apparent merits of other alternatives. It doesn't take much imagination to apply this rule to electric generating company managers and new power plants, or farmers and pesticides, or traffic managers and new highways. So long as alternative solutions, of the kind NEPA is designed to elicit, lack the certainty of the traditional

¹³ *Id.* at 111 (emphasis added).

solution, agencies with operative responsibility are not going to recommend them.

A correlative point is that an agency with operative responsibility is going to favor the solution where the financing is the most certain. In the airport context, Congress has—unwittingly, perhaps—itself undermined the success of NEPA by enacting the Airport and Airways Development Act. That Act provides a federal trust fund to pay for a substantial share of new airport construction. Conversely, quiet engine programs, air traffic control improvements and other such technological alternatives depend on uncertain appropriations from time to time. Moral: Count on the person with operative responsibility to go where the firm money is.

Another behavioral characteristic of major operative enterprises is a high degree of political sensitivity. They have friends and constituents, and they want to keep them as happy and friendly as possible. Proposals for flight consolidation, rescheduling and imposition of high fees for general aviation have a potential for alienating traditional allies, the airlines and private fliers.

Conversely, new construction generally provokes intense hostility from only a small group of persons who live quite close to the airport and are usually already unhappy; it frequently pleases nearby business property owners and labor unions, who see new construction as jobs; and the out-of-pocket costs of construction are diffused among a very broad taxpaying population that has only a dim awareness of the issues or alternatives that are available. Moral: Expect a decision that will bring the decision maker the largest number of powerful friends and the smallest number of powerful adversaries.

The behavioral characteristics I have already cited suggest the limitations of staff or consultants, however environmentally well informed. It soon becomes obvious to such an employee or consultant that there is likely to be a strong inclination toward new construction as the favored solution. The favored solution is rarely likely to be so insupportable that it would rub against the expert's ethical responsibilities to his profession. Indeed, I have seen no instance—with the single exceptional example of the Kennedy Airport Study—in which experts were hired whose focus seemed more on their scientific peers than on their employer. In the two recent airport situations with which I am most familiar, Detroit and Honolulu, the consultants hired to prepare the environmental impact statement were, in one instance, a professional airport consulting firm, and in the other, a contracting firm involved in construction at the airport.

Insofar as environmental impact statements are made public, and even—in the airport situation—subjected to public hearings, the story is a familiar one. Airport development hearings tend to draw large crowds, particularly in communities where there are serious noise problems. But ordinary householders have no expertise, little money, and even less knowledge as to where to find experts or even the literature upon which to raise appropriate questions. This is by now an old story. We have accepted the principle of public participation, but we have no established mechanisms to assure that members of the public have the professional resources to operate as knowledgeable and informed participants.

As to government agencies, if they have an interest in the airport development question, they have kept it very quiet. I know of no public hearing in which

a federal agency with responsibility for scheduling of flights, for noise suppression, or air traffic control improvements, has come forward to explore the relationship of these issues to the proposed construction project.

As for the Council on Environmental Quality,¹⁴ which presumably plays the watchdog over environmental impact statements, perhaps someone reads the airport statements, or skims through them. But the Council, as usual, sits quietly in its elegantly restored Washington townhouse, silent as the night.

Another obvious behavioral phenomenon notable in the airport development area is what may be called the "adhesion syndrome." This is the familiar bureaucratic principle: Let's all stick together and tell the same story. Thus, despite laws that require the presumably independent approval of many different authorities, one who follows these matters can discern a powerful tendency for each agency to go along with whatever proposal everyone else seems to be going along with. Despite common knowledge of this protective device,¹⁵ one continually finds courts upholding decisions with the bland observation that three, or five, or eleven separate agencies independently gave their approval; the implication is that they can't all independently be wrong, crazy, or corrupt.

The loss engendered by this way of institutional life is well demonstrated in the area of airport development. The airport authorities must submit their proposals to the FAA for approval. The FAA, presumably, is to exercise supervision and leadership. Yet, so far as I can tell, the FAA, whenever called upon, takes a quite defensive position toward airport authorities, rather than using its authority and prestige to lead and upgrade the quality of airport decision making.¹⁶

The FAA attitude is best expressed by quoting from a speech that FAA reproduced and sent to all airports as "an excellent example of a simple straightforward explanation of what (an airport) needs to do to comply with the public hearing requirement" of the law governing airport developments. "It is recommended for guidance and use . . ."¹⁷

Here is the FAA's guidance to airports:

[T]his requirement for affording the opportunity for a public hearing will not cause the end of the world, or, the ball game is not over. If you have had previous bad experience with a public hearing, please take heart, for if you prepare carefully and proceed cautiously you can achieve the results that you desire.

. . . .

Properly utilized, the public hearing procedure is a most effective means of selling your airport development to the community. With the ever-enlarging

¹⁴ Created by NEPA; see note 2, *supra*.

¹⁵ I have discussed this problem in my book, *Defending the Environment*, at 67, '78 (Vintage paperback, 1972).

¹⁶ This was certainly the situation in the Honolulu airport case, *Life of the Land v. Volpe*, No. 72-3683, *denying preliminary injunction* (D. Hawaii, April 12, 1973), No. 73-1784, *motion for injunction pending appeal* (9th Cir. filed April 27, 1973). For an example of the federal role in a reported case, see *Citizens Airport Comm. v. Volpe*, 351 F. Supp. 52 (E.D. Va. 1972).

¹⁷ DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Notice No. 5100.141 (March 9, 1972).

means of communication and the increased emphasis on citizen involvement in ecology and the environment today, there is little hope of avoiding a discussion of any airport development with knowledgeable citizens. The secret is to use the public hearing to present your case so as to guide the public involvement and channel it into constructive activities and thereby both inform and gain public acceptance.¹⁸

This is the advice of the federal agency that has the legal responsibility for deciding whether to approve or reject airport applications for development projects.

Is the situation hopeless? No. Conduct can be modified as long as we understand the forces that impel it. We must begin by rooting out legal sentimentality and revising our legal structure to reflect behavioral realities. Here are the five basic rules of the game as I see them.

1. Don't expect hired experts to undermine their employers.
2. Don't expect people to believe legislative declarations of policy. The practical working rule is that what the legislature will fund is what the legislature's policy is.
3. Don't expect agencies to abandon their traditional friends.
4. Expect agencies to back up their subordinates and professional colleagues.
5. Expect agencies to go for the least risky option (where risk means chance of failing to perform their mission).

These rules tell us that it is nearly certain that airport authorities will continue recommending and building new runways as the solution to their noise and congestion problems, whether or not there is a NEPA and whether or not courts require them to file elaborate, multi-volume impact statements.

If we want them to change their behavior, we must give them signals that will register. If, for example, we really want them to choose between new runways and flight consolidation, we must make it as easy for them to effectuate one solution as the other. If we want a choice to be made between investment in engine retrofit and new runways, we must make money as freely available for one purpose as the other.

If we want the interests of people who live near the airports to get as much consideration as the interests of contractors who build airports, we must assure each equivalent degrees of political and economic power. We can make these adjustments, for example, by direct money subsidies, by the grant of enforceable legal rights, or even by extensive public opinion campaigns.

If we want the fullest data to be presented, we must ensure that the data gatherers have no incentives that bind them regularly to any particular client group. Obviously NEPA is now producing exactly the opposite development.

Until we are ready to face these hard realities, we can expect laws like NEPA to produce little except fodder for law review writers and contracts for that newest of growth industries, environmental consulting.

¹⁸ *Id.* at Appendix 1, p. 1.