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The National Environmental Policy Act: An Argument Against Repeal or Legislative Reform 541
Scott Hudson

The National Environmental Policy Act (NEPA), the foundational statute of environmental law, is under intense scrutiny with calls from critics on both sides of the political spectrum for repeal or reform. Although calls for NEPA reform are not new, they have intensified recently as the United States attempts to build renewable energy infrastructure to combat climate change. The recent passage of the Inflation Reduction Act highlighted this scrutiny. In order to secure enough votes to pass the bill, Senate Majority Leader Chuck Schumer (D-N.Y.) agreed to submit a series of NEPA and federal permitting reforms authored by Senator Joe Manchin (D-W. Va.) to Congress for a vote.

The clamor for reform is based on a popular misconception that NEPA review causes delay in large infrastructure projects. This Article uses several recent analytical studies to show that this popular perception is incorrect and obscures the real reasons for federal project delays. The article shows that Environmental Impact Statements (EIS) are not that common and that NEPA analyses do not take an inordinate amount of time. It also reveals that NEPA reviews are not litigated often nor does NEPA litigation result in significant delays. It argues that NEPA analyses provide essential benefits that would be reduced or lost if NEPA were reformed. Finally, the paper recommends actions that agencies, the Council on Environmental Quality (CEQ), and Congress can implement, using tools, techniques, and resources currently at their disposal to decrease the burden of NEPA review without requiring an overhaul of the statute.

Diminished Access to Judicial Review is an Unacceptable Consequence of EPA's Delegation of its Responsibilities to States 571
Jaclyn Lopez

The delegation of federal authority over national resources can, in theory, present conservation opportunities, but in fact has entrenched grave pitfalls. This Article explores a significant consequence of federal delegation that has received little serious consideration by courts, agencies, and scholarship: how the Environmental Protection Agency's delegation of federal bedrock environmental laws subverts Congress's intent to empower citizens to enforce these statutes when agencies will not. There are substantial differences between federal and state judicial review, specifically with respect to standing and fee shifting, which effectively limit which kinds of plaintiffs can challenge decisions that impact natural resources. This Article explores the regulatory framework of delegation, and by focusing on the Environmental Protection Agency's recent delegation of 404 permitting to the state of Florida, provides a case study for how delegation can undermine Congress's intent to provide citizens access to judicial review. The analysis presented here, and the recommended remedies, may aid in identifying and addressing similar injustices in other state regulatory frameworks.

Prosecuting Companies for Environmental Crimes Under the Toxic Substances Control Act: Implications for Environmental Justice Communities 623
Joshua Ozymy & Melissa Jarrell Ozymy

Chemical substance crimes that involve significant harm or culpable conduct impact marginalized communities at a much greater rate than the general population. While the Biden Administration has made historic commitments to fund enhanced enforcement efforts in environmental justice communities to protect them from toxic exposures, we still know very little about how companies have been criminally prosecuted for violations of the Toxic Substances Control Act (TSCA) and how TSCA criminal enforcement might be applied to marginalized communities. Using content analysis of 2,728 environmental crime prosecutions derived from U.S. Environmental Protection Agency (EPA) criminal investigations, 1983–2021, we analyzed all criminal prosecutions of companies under TSCA. Results show that EPA adjudicated twenty-six prosecutions, with fifty-six years of probation and over $33 million assessed to companies at sentencing, but a few large-penalty outliers considerably impacted total monetary penalties. Forty-six percent of prosecutions involved polychlorinated biphenyls (PCBs), 30% involved asbestos, and 23% involved lead-based paint. We conclude by discussing the value of TSCA criminal enforcement for criminal deterrence and the necessity of additional resources for expanding prosecutions under TSCA, as well as offering prescriptions for increasing TSCA criminal enforcement as part of a broader enforcement strategy to mitigate environmental harm in marginalized communities.

Accounting for Climate Impacts in Decision Making..... 649
Mark Squillace

Every significant decision made by government agencies, and many made by private organizations, impacts climate change. Ignoring those impacts is increasingly unacceptable. But how to account for a decision's impact on the climate is far from clear. This article seeks to answer that question in the context of the greenhouse gas (GHG) emissions that will likely result from a proposed action and begins with a detailed description of the environmental impact assessment (EIA) process. EIA is crucial to understanding the likely consequences of a proposed action, including the climate-related consequences. EIA also serves as the primary vehicle for estimating GHG emissions and assessing the social cost associated with those emissions. While EIA is most commonly used by government decision makers, tools like EIA work equally well, and are at least as useful in evaluating private actions and their climate impacts.

The article then considers how the environmental assessment should address the difficult questions associated with quantifying GHG emissions. To what extent, for example, should indirect emissions count, and how should decision makers calculate them? Once decision makers quantify GHG emissions, they must quantify their cost to society. The social cost of carbon or, more specifically, the "social cost of greenhouse gases" (SC-GHG), is an increasingly popular tool that provides an estimate of that cost and helps ensure that cost receives fair consideration when an agency is choosing among available options.

Finally, the article considers the growing movement towards corporate social responsibility as reflected in the push for investment firms and corporations to adopt environment, social, and governance (ESG) policies. While ESG standards are currently lacking clear definition, and while the idea that corporations would follow ESG policies is controversial within some conservative circles, the movement towards ESG policies in the private sector offers an excellent opportunity to focus organizations on their responsibility to account for the climate impacts associated with every important decision that they make.

How Much Land Can Be Included in a National Monument?—Analyzing the "Smallest Area Compatible" Requirement in the Antiquities Act..... 707
Levi Tenen

The Antiquities Act allows the President to designate "objects of historic or scientific interest" as "national monuments," so long as the reserve is confined to the "smallest area compatible with the proper care and management of the objects." Presidents have used this power expansively, protecting massive tracts of federal land, often by claiming that very large things, such as the Grand Canyon,

or even entire landscapes, are "objects" in the requisite sense. Much legal debate has focused on whether these interpretations of "object" are justified. There remains a different issue, however, that has received considerably less attention: what is the smallest area compatible with the proper care and management of the objects? Does the Act, for instance, only allow presidents to protect the object of interest and not much more, or does it allow presidents to protect a substantial amount of land beyond an object of interest? I draw from language in the Act and existing case law to develop a framework for answering these questions. At bottom, properly caring for objects of "historic or scientific interest" can involve protecting features of the landscape if those features contribute to the historic or scientific interest of the objects, or to their study. This supports larger protections than some have thought, but it also places limits on the size of a given monument. The result is a principled framework for determining how large national monuments can be. More broadly, the discussion illustrates the usefulness of a value-focused analysis of environmental laws.

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