

Question: Do the processes in NEPA apply to state agencies?

Answer: Maybe.

Although it is clear that the National Environmental Policy Act ("NEPA") applies to all agencies of the federal government, the Act sometimes applies to state agencies as well. To determine if NEPA applies to a state agency's decision-making process, follow the money. For example:

1. In Ely v. Velde, 497 F.2d 252 (4th Cir. 1974), the plaintiffs sued to stop the construction of a penal reception and medical center in their neighborhood. The state project was funded, in part, by a federal block grant authorized by the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act. However, as soon as the plaintiffs challenged the state's decision to construct the facility, the state withdrew its request for the federal block grant. The court determined that had construction of the facility started using federal block grant funds, the facility would have been an "irrevocably federal project" and NEPA would have applied. However, since construction had not started and the state was proceeding with solely state moneys, NEPA did not apply. The circuit court then remanded the decision to the district court to ensure that the state fully refunded the federal block grant to the federal government and did not simply use that federal block grant for another purpose.
2. In contrast, in Monarch Chem. Works, Inc. v. Exxon, 452 F. Supp. 493, 502 (D. Neb. 1978) aff'd sub nom. Monarch Chem. Works, Inc. v. Thone, 604 F.2d 1083 (8th Cir. 1979), the State of Nebraska had acquired federal funding to acquire land for a new prison. The plaintiffs in that case did not want to sell, so the State of Nebraska used its state condemnation authority to try to acquire the property. The Court held that the acquisition was subject to NEPA. The Court stated:

The State of Nebraska has sought to remove all traces of federal taint in the acquisition of the plaintiff's property by negotiating a contractual amendment whereby its independent power of eminent domain would be used to condemn the Monarch land. The Court holds that the requirements of NEPA cannot be evaded by such a course of action. Under the National Environmental Policy Act, the act of withdrawing an application for federal funds does not amount to relief from environmental responsibility. If the project has become irrevocably federal, a subsequent attempt to purge the venture of all traces of United States' involvement cannot succeed. Scottsdale Mall v. Indiana, 549 F.2d 484, 489 (7th Cir. 1977), cert. denied 434 U.S. 811, 98 S.Ct. 47, 54 L.Ed.2d 68 (1978); San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971).

3. In Friends of the Earth Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975), the plaintiffs sued the Department of Transportation for failing to require NEPA compliance prior to construction of part of an airport terminal and parking facility. The court

held that for NEPA to apply to state projects, the state project must be “so closely interwoven with those receiving federal funds” that it makes the entire project a “federal action.” In this case, the court said that the FAA approval of an airport development program by itself did not trigger NEPA. This was true, even though the state plan submitted to the FFA complied with federal requirements so that future federal funding could be obtained. While the court recognized that at some point in the future, the nexus between the state plan and the federal funding could subject the state to requirements of NEPA, that nexus had not been reached yet.

4. See also Nat'l Ass'n for Advancement of Colored People v. Med. Ctr., Inc., 584 F.2d 619, 634 (3d Cir. 1978). In that case, the NAACP sued claiming that the approval of a federal agency of a project by the state related to restructuring of hospital services required NEPA compliance. The court disagreed, holding that unless the federal agency has made a direct financial commitment “which will affect significantly the quality of the human environment” or unless the agency has participated directly in the planning or promotion of that project, NEPA does not apply.
5. When it comes to highway construction, even if only a portion of the highway is funded by the federal government, all portions of the highway are likely subject to NEPA. No E.-W. Highway Comm., Inc. v. Whitaker, 403 F. Supp. 260 (D.N.H. 1975)