This is the fifth in a series of posts on the reasons we might have environmental review. The first post is here. The second post is here. The third post is here. The fourth post is here.

Judicial review to enforce NEPA ensures that agencies actually take environmental review requirements seriously, as opposed to producing meaningless, general statements with little or no information. But judicial review of an environmental review statute also creates the possibility that litigation can be used to delay projects strategically. After all, one can always make the argument that some more additional information could have been analyzed, or that some additional environmental impact could be reviewed or considered. And delay for a project can be costly – for instance, private sector projects that depend on federal permits subject to environmental review will often depend on financing that becomes more and more costly as projects are delayed, eventually making projects infeasible. Delay can also mean that changes in economic or political circumstances make projects no longer feasible. The risk of delay over litigation over environmental review documentation can lead agencies to "bullet proof" their NEPA reports in order to minimize the risk of adverse litigation outcomes – but of course, bullet proofing increases the costs of environmental review, perhaps far beyond the benefits we would receive from the additional information produced by the review.

One way for agencies to avoid the risks posed by NEPA litigation is to get buy-in from all major stakeholders that pose a plausible litigation risk for a project. The more important this dynamic is – and it has definitely been present in a range of natural resource management conflicts in the US over the years – the more that NEPA serves as an additional veto point on government agency action.

NEPA in this way serves as an (imperfect) veto point. Imperfect in the sense that agencies may be willing to accept the risk of litigation or delay without doing outreach or consultation to try and avoid conflict, depending on the nature of the project and the political context.

The costs of NEPA as a veto point are fairly obvious: The more consensus you have to get among a wider range of diverse stakeholders, the fewer projects you can pursue. And again, if there are important projects that need to happen to advance societal goals, that comes at a significant cost. And of course, there may be actors who are implacably opposed to certain kinds of projects – those projects will either not occur, or face potentially high litigation costs.

What, if any, benefits are there from NEPA as a veto point? Consider the point I made in a recent blog post – judicial review imposes a moderating effect on the swings of policy from

the executive branch. NEPA as a veto point performs the same function – an executive branch cannot pursue dramatic changes of policy without risking litigation that will slow down what they want to do, or without getting buy in from stakeholders (which likely will moderate any changes of policy). Whether this moderation in executive branch decisionmaking is beneficial for the environment is probably context dependent. For instance in forest management, in an era where the major environmental concern was an overreliance on clearcutting, particularly in old growth forests, restricting affirmative government actions in general, and large swings towards more clearcutting, may be environmentally beneficial. But in an era where we may need to do a range of active management approaches to manage fire risk, restricting the expansion of those activities until a wide range of actors agree (some of whom generally oppose active management in forests) may be environmentally harmful.