The National Environmental Policy Act, which became law on January 1, 1970, is the oldest of the major federal environmental laws. It has been a model for environmental assessment laws in numerous states and other nations, but it still comes in for a lot of criticism at home.

Some criticisms are surely justified. As Dan pointed out here, NEPA has yet to fulfill the promise of its lofty goals. NEPA has never quite managed to make environmental impacts central to federal decisions at the conceptual level, the point where key choices are made about what initiatives to pursue and what priorities to assign. Predictions about environmental impacts or the effectiveness of mitigation are hardly ever later reviewed. And in too many cases, environmental analysis is simply used to paper over decisions that have effectively already been made; in those situations NEPA seems to impose costs and delays without any corresponding improvement in decisionmaking.

Nonetheless, NEPA remains an important and useful law. It drastically changes the political landscape by forcing agencies to publicly reveal the environmental costs of their planned actions. And sometimes delay is a good thing — NEPA can slow down agencies that may be rushing to accomplish their mission-oriented goals with little attention to the collateral impacts on the environment, forcing them to take a closer look. Finally NEPA, for all it's lack of substantive bite, is a great procedural hook for judicial review. That's especially important when, as in the last administration, the president has little interest in environmental protection and is allergic to transparency.

Two recent decisions from different circuits illustrate NEPA's power to rein in environmentally lawless (or just careless) agencies.

In State of New Mexico v. Bureau of Land Management, the Tenth Circuit ruled that BLM could not open New Mexico's Otero Mesa to extensive oil and gas exploration without: considering a full range of alternatives, including closing the entire area to development; fully considering the habitat fragmentation impacts of the alternative it proposed to adopt; and taking a hard look at the possibility of aquifer

contamination. The decision breaks no new legal ground, but it highlights the role of this procedural law (and citizen plaintiffs willing to go to the trouble of enforcing it) in ensuring that the nation's public land management agencies don't simply run roughshod over environmental values that are supposed to be an important aspect of their mission.

The second case, White Tanks Concerned Citizens v. Strock, comes out of the Ninth Circuit. It clarifies what has been a vexing issue for the courts — determining the required scope of environmental analysis when the Corps of Engineers grants a permit for wetlands filling under Clean Water Act section 404 for a development project that will occupy both filled lands and lands that were never wetlands or waters of the United States. The project, planned to house some 60,000 people, would occupy 10,000 acres of land. The site is "traversed by approximately 787 acres of washes." Most of those are part of a floodplain that would not be disturbed by the development. But, this being Arizona, there are some 144 acres of washes, dry most of the year but carrying floodwaters after the infrequent rains, dispersed across the development site. The planned development would would fill about 27 of those acres. You might think there would be an issue about whether these washes qualified as jurisdictional "waters of the United States" (see Sean's post here on the difficulties of that determination), but no one contested federal jurisdiction.

The issue, rather, was whether the NEPA analysis supporting issuance of the 404 permit needed to consider the environmental impacts of the full development or just the impacts of filling those few acres. The court ruled that because the interconnected "master planned community" envisioned by the developer could not be achieved if the wash areas were left undisturbed (and therefore could not be achieved without a section 404 permit), the environmental analysis must include the entire development. The test, the court said, is "whether the waters must be affected to fulfill the project's goals."

That strikes me as precisely the right test, ensuring that NEPA fulfills its goals of making the federal agency look at the environmental consequences of its decision, and reveal those

costs to the public. But it certainly has not been the test routinely applied by the Corps of Engineers, which has consistently adopted the narrowest possible interpretation of the environmental consequences attributable to its permitting decisions.

Both of these cases are leftovers from the Bush administration. Hopefully the current administration is much more commited to environmental protection. But if agencies forget, or when a new administration comes in, it’s nice to know that NEPA is there to make sure environmental values are not ignored.