This is the seventh 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. The fifth post is here. The sixth post is here.

Which of the various reasons that we might have NEPA are more persuasive today, especially given over five decades of experience under the statute? The challenge is that many of the benefits are hard to measure – for instance, assessing how agency decisionmaking would have been different with and without NEPA, given incentives and changes in agency culture, is a difficult task. But the costs of NEPA, in terms of paperwork and individual projects that may have (rightly or wrongly) been stopped because of public opposition or judicial review, are obvious. In this post, I'll give my own take on what rationales are most persuasive to me, all things considered.

NEPA as a back-stop for environmental harms not covered by other statutes remains an important goal – new forms of environmental harms will continue to emerge as both our understanding of the world changes, and as new technologies and new human activities develop. In addition, the cumulative, cross-cutting component of NEPA analysis is, in theory, extremely important, as that kind of analysis is less relevant for most other environmental statutes. Of course, the analytic and informational challenges of that analysis remain, though there is also the potential for tools such as AI to make cumulative analysis much easier going forward. This back-stop role is perhaps more important as Congress has become much less active over the past thirty years in updating environmental legislation to address new problems.

NEPA still remains an important driver of agency decisions – in large part because of the incentives it creates for agencies to avoid some kinds actions, or adjust those actions, to avoid NEPA review. And here I think the dynamics are different now than when NEPA was first enacted, when there was perhaps a stronger belief that the environment would benefit if we mostly avoided doing major development projects. But today, there are a lot of affirmative actions we need to take, from expanding clean energy production to managing fire risks in forests, to help advance environmental goals. We want to give agencies incentives to do these actions (and to do them right), but NEPA provides a blanket incentive to avoid actions that produce significant environmental impacts, regardless of the benefits. (The Biden Administration sought to reduce these incentives somewhat by changing the CEQ regulations to redefine when environmental impacts trigger NEPA review, but those regulations are now being repealed by the Trump Administration.)

NEPA as a veto point raises similar issues. Veto points make it harder to take actions, and that is more problematic in a world in which environmental protection requires affirmative actions. On the other hand, as I noted in a recent post, the extreme nature of the actions under the new administration highlights the benefits of legal frameworks that moderate the large swings that can occur in executive branch decisionmaking. One key benefit that reducing policy swings can provide is encouraging investment, which is also needed to advance the affirmative actions we need to address issues like climate change.

I am more skeptical of NEPA as a tool to advance participatory democracy. It is unclear to me that public participation in environmental review processes truly represents a cross-section of the relevant public. Moreover, a range of other statutes, including the Administrative Procedure Act, already impose significant public participation components for actions such as rulemaking or public land management plans. NEPA thus mostly imposes public participation requirements for individual agency actions that do not count as rulemaking. Think of actions such as individual timber sales, prescribed burns, leasing lands for renewable energy or oil and gas drilling, and so on. It is not clear that these are the kinds of decisions which participatory democracy is most suited for. A better rationale for public participation in these kinds of decisions might be to provide information that the agency does not have that might be useful in decisionmaking. But that rationale might lead us to limit or exclude public participation from decisions where we believe adequate information has already been collected at an earlier or different stage (such as when environmental review has already been done for land-use planning and we are now considering individual management decisions).

Overall, my takeaway is not that we should repeal NEPA – it can provide important benefits, including allowing us to consider nascent or cross-cutting environmental issues not considered by existing statutes. But, as I've discussed earlier in the context of permitting reform, we should seriously examine revising how NEPA applies to individual projects that are net beneficial to the environment. I've also noted that we should consider ways to focus NEPA review more at the planning stage, when cumulative impact analysis is more useful, and when public participation might be more appropriate. Of course, given the current political context, any revisions to NEPA might require doing other types of deals to facilitate other projects, deals that may or may not be worth it from an environmental perspective.