



Great Basin Resource Watch

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Working with Communities to Protect Their Land, Air, and Water

ASSEMBLY LEGISLATIVE OPERATIONS AND ELECTIONS

March 16, 2021

RE: Assembly Concurrent Resolution NO. 3 (ACR3) - Requires the Legislative Commission to appoint an interim committee to conduct a study concerning environmental justice.

What ACR3 will Require and Provide for Nevada

Passing ACR3 will require the formation of an interim committee to conduct an interim study concerning the development of a Nevada-based environmental justice-environmental quality review process. The interim committee will facilitate a series of broadly advertised public hearings and gather information about the various aspects to consider in the development of a Nevada Environmental Justice and Quality Act (NEJQA) or other statutes as determined to be needed.

ACR3 will provide an opportunity to consider how to incorporate an in-state environmental justice and quality review process. Nevadans should see this as an open and inclusive path to update our statutes. We can draw on many examples from other states and adjust existing laws to fit the dynamic demographic profile of Nevada, and provide for flexibility as Nevada changes.

Why Nevada Needs to pass ACR3 and Develop NEJQA

ACR3 and subsequent NEJQA would improve the health and culture of Nevadans and protect Nevada's land, air, water, plants, animals, and historical and cultural sites by requiring that state and local agencies consider and mitigate potential adverse effects before permitting significant projects.

ACR3 would explore how to provide a framework under Nevada law to determine if a governmental action has the potential to affect the environment, and disproportionately affect certain peoples and communities. The resolution will move Nevada towards expanding the public right to participate in the decisions of government, and require thoughtful, informed, and deliberate consideration of the consequences and impacts of in-state actions. In essence, Nevada would be developing an in-state National Environmental Policy Act (NEPA) with special attention on environmental justice for our state's communities.

Support of the resolution is needed:

- To provide coherent and uniform public process for permitting and other governmental actions
- For increased transparency on project and permitting - full understanding of the consequences of the governmental action

- To ensure that cumulative impacts are incorporated into the permitting process
- To mandate an explicit effort to include underrepresented and disproportionately affected communities
- To create clear environmental justice and quality triggers for prescriptive government action
- To provide a comprehensive environmental justice and quality review process for state, county and local level actions where NEPA does not apply
- Serve as a compliment to NEPA where deficiencies exist

Who is affected: A NEJQA would ensure that agencies consider potential adverse effects on all individuals and communities, and Nevada’s flora and fauna before permitting major projects; that they are responsive to public input about their projects, and that they consider alternatives to their proposals which may accomplish the same ends with fewer negative outcomes.

Environmental Justice: How a major project can disproportionately affect unique communities should be a central aspect in permitting. For example, the Dakota Keystone Pipeline which would destroy a cultural landscape thousands of years old and threaten a regional water supply, the rollback of protections for the Bears Ear Monument that also threatened culturally significant landscapes, and most recently, the federal government and the State of Nevada permitted a project that allowed a unique Western Shoshone cultural and spiritual area at Mt Tenabo in Eureka County to be destroyed: “When the Earth Mother, your land, is gone, your walking towards a slow spiritual death” - Western Shoshone Elder Carrie Dann

Nevada Regulations

NEPA only applies to federal actions, so all other state and local actions receive no similar comprehensive environmental review. Our lives are greatly affected by these local governmental actions and often result in disproportionate effects on certain populations. Nevada has no state-NEPA law, so the only environmental review for non-federal projects is the state or local permitting processes. The Nevada permitting process is not a highly inclusive public process nor does it evaluate cumulative impacts. For example, Comstock Mining Inc’s (CMI) operation in Lyon County, Nevada has never had a NEPA-style environmental review, largely because it’s not on federal public land. This is despite the clear community impacts of CMI’s operations. The residents would have benefited greatly from a NEPA-style review. Under NEPA, CMI would have had to submit a Plan of Operations, including projections of future actions, which CMI has kept shrouded to avoid undermining its public relations campaign.

Hydraulic fracturing or fracking is another example of the need for state-based environmental justice and quality review. Fracking was new to Nevada about ten years ago and our unique geology and hydrology must be factored into decisions about how to site and regulate it. New York State used its authority under its State Environmental Quality Review Act, passed in 1975, to analyze the potential impacts of fracking on lands in the state. The New York Department of Environmental Conservation officially prohibited the practice of high-volume hydraulic fracturing in 2015, and Governor Andrew M. Cuomo announced legislation in the FY 2021 Executive Budget to make New York's fracking ban permanent. Nevada would also benefit from a similar process since federal agencies have not provided an adequate analysis of how fracking will affect Nevada.

GBRW believes that it is past time for Nevada to consider a state-based law mandating in-state environmental justice-environmental quality reviews. We need to instill in our state agencies the

same environmental ethic that drove the crafting of NEPA decades ago, and ensure that environmental justice is front and center in decision-making. Too often people who are disproportionately affected by government actions and are not included or marginalized in the decision making process. We only have to look towards the various lands bills that have been in the works to illustrate how directly affected people have not had a seat at the table. GBRW sees this consistently in decisions involving mining projects where only those who have political clout or enough money to finance independent analysis of mining proposals and legal fees can typically affect a mine plan.

Support Assembly Continuing Resolution 3 as a first step in creating a just, consistent, and transparent in-state process for the engagement of the public and effective decision making on projects that affect the health, well being and environment of Nevadans.

Sincerely,

A handwritten signature in black ink that reads "John Hadder". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish extending across the middle of the name.

John Hadder

Appendix A

In what follows is background information about the origins and process of NEPA which is the genesis of ACR3.

Background on NEPA

Forty years ago, the authors of the National Environmental Policy Act (NEPA) responded to a groundswell of public concern about air and water pollution and destruction of ecosystems by development and industry. The act was signed in 1970 with the intent "...to establish, by congressional action, a national policy to guide federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment."¹

At the time there was a growing understanding that an acceptance of ecology and promotion of an environmental ethic in public policy was needed at the federal level. Lynton Keith Caldwell, professor of Public and Environmental Affairs at Indiana University and a prominent participant in the development of NEPA, observed that prior to NEPA, decisions were often at cross-purposes and uncoordinated, with no "well-defined and generally accepted doctrine governing man's behavior toward his biophysical environment...."² The incorporation of ecological principles into the actions of the government was the philosophical goal, but it has yet to be fully realized.

The NEPA process is driven by a federal governmental agency environmental analysis, which is either an environmental assessment (EA), or a more in depth environmental impact statement (EIS), which requires all information used in the analysis to be in the public record. There is also a public engagement component with two important opportunities to comment on a project. First, there is scoping period is how the agency gathers input from the public about what is needed in the analysis, and then comes a comment period for the draft EIS or draft EA often followed by a comment period on the final EIS (rarely a final comment for the final EA).

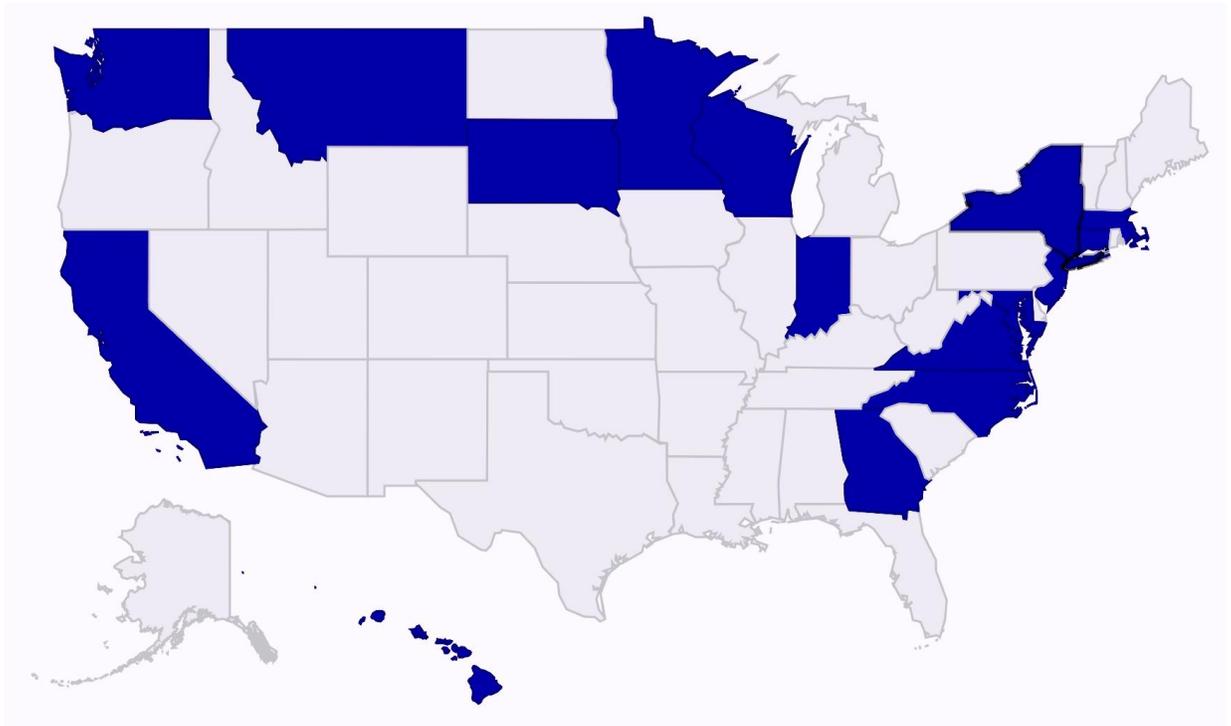
The public has the greatest chance of influencing the outcome during the first two comment periods. During the scoping period, the agency learns about local environmental aspects that may be known best by people who live in the region where the project is proposed. The analysis also examines how the effects from the project under review will combine with other regional activities, including those that are predictable in the future. This analysis is called the Cumulative Impact Assessment.

Sixteen states (see below) mostly during the 1970's have passed laws that reflect the goal and process encoded in the federal NEPA. California was the first with the California Environmental Quality Act in 1970, and Montana was soon after with the Montana Environmental Quality Act in 1971. These "state-NEPA's" typically allow for an environmental review of non-Federal actions.

¹ Senate Report (Committee on Interior and Insular Affairs) NO. 91-296, at 8.

² CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT, supra note 72, at 651.

States with state environmental policy acts



Discussion of state-NEPA's

There are four examples of text from state-NEPA's below to provide some perspective on some aspects that we may wish for Nevada statutes. The state-NEPA's follow a common procedural thread of NEPA requiring an evaluation of the significance of a proposed government action and whether an environmental review is warranted. If the environmental review proceeds then there is a scoping process, and some kind of EIS is developed upon which the decision by the government is based. This is all open to the public.

California Example

Even a project proposed on private land could fall under the jurisdiction of the California Council of Environmental Quality (CEQA) with the county or state leading the environmental analysis to assure "maintenance of a quality environment for the people of this state [California]."³ The CEQA applies to governmental action, including:

- (1) activities directly undertaken by a governmental agency,
- (2) activities financed in whole or in part by a governmental agency, or
- (3) private activities which require approval from a governmental agency.

³ California Environmental Quality Act, Chapter 1, § 21000. (a).

Washington Example

The Washington State Environmental Policy Act (SEPA) is required for any state or local agency decision that meets the definition of an “action” and is not categorically exempt. Actions are divided into two categories, “project actions” and “nonproject actions”. Project actions are agency decisions to license, fund, or undertake a specific project.

For example, project actions include construction or alternation of:

- Public buildings such as city or county offices, jail facilities, public libraries, and school buildings;
- Public facilities such as water and sewer lines, electrical lines, and roads; and
- Private projects such as subdivisions, shopping centers, other commercial buildings, and industrial facilities.

Nonproject actions are agency decisions on policies, plans, and programs, including adoption or amendment of:

- Rules, ordinances, or regulations that will regulate future projects, such as water quality rules, critical area ordinances, and other state and local regulations;
- Comprehensive plans and zoning codes;
- Capital budgets; and
- Road and highway plans;

If an agency action is not required for a proposal, SEPA environmental review is not required.

Montana Example

Montana’s Environmental Quality Act (MEQA) provides an instructive example, which was passed with bipartisan support by a Republican House (99-0), a Democratically controlled Senate (51-1), and a Democrat in the Governor's Office. The legislation was sponsored by George Darrow, a Republican representative and petroleum engineer from Billings, MT. some quotes from the legislative record illustrate the perspectives for passage:⁴

- "each citizen is entitled to a healthy environment"
- "The intent of the bill is to establish a working partnership between the Executive and Legislative Branch of state government concerning the protection of the environment."
- "A major conservation challenge today is to achieve needed development and use of our natural resources while concurrently protecting and enhancing the quality of our environment."
- "As we guide Montana's development, we must use all of the scientific, technological, and sociological expertise available to us. This is our responsibility We must avoid creating emotionally explosive situations that have occurred in the past and, indeed, are present right now in some of our communities We must establish a state policy for the environment."
- "Include people in the decisionmaking."

⁴ Montana State Legislature, “A Guide to the MONTANA ENVIRONMENTAL POLICY ACT, “ Revised 2013, Legislative Environmental Policy Office, Environmental Quality Council, P.O. Box 201704, Helena, MT 59620-1704, <http://leg.mt.gov/eqc>

In a forward to the MEPA Handbook:

MEPA significantly expanded the public right to participate in the decisions of government. Such impact statements were in effect deeply conservative provisions requiring thoughtful, informed, and deliberate consideration of the consequences and impacts of state actions. Simply expressed, they mandated, "Look before you leap."

MEPA was purposeful in establishing a process whereby Montana can anticipate and prevent unexamined, unintended, and unwanted consequences rather than continuing to stumble into circumstances or cumulative crises that the state can only react to and mitigate. Again, simply expressed in country vernacular, "An ounce of prevention is worth a pound of cure."

Since its passage, MEPA has undoubtedly saved the State of Montana from proceeding with hasty, ill-considered, and costly actions that may have foreclosed future opportunities or cost tens of millions of dollars to mitigate, restore, or repair.

- *MEPA sponsor Rep. George Darrow, Republican*

Georgia Example

The state of Georgia is one of the few states to pass an environmental review act (Georgia Environmental Policy Act, GEPA) after the 1970's in 1991. In passing GEPA, the General Assembly found that:⁵

1. The protection and preservation of Georgia's diverse environment is necessary for the maintenance of the public health and welfare and the continued viability of the economy of the state and is a matter of the highest public priority;
2. State agencies should conduct their affairs with an awareness that they are stewards of the air, land, water, plants, animals, and environmental, **historical, and cultural resources** [emphasis added];
3. Environmental evaluation should be a part of the decision-making processes of the state; and
4. Environmental effects reports can facilitate the fullest practicable provision of the timely public information, understanding, and participation in the decision-making process of the state."

Significant is the inclusion in subparagraph 3 of historical and cultural resources, which moved state environmental policy acts closer to the view today, where the environment is broadly defined, and the need to include principles of environmental justice.

⁵ The Georgia Environmental Policy Act of 1991 (GEPA) (O.C.G.A. 12-16-1).

Appendix B

Examples of NEPA Successes

Below are two examples of the effectiveness and importance of NEPA. The kinds of actions taken to protect communities and their environment under NEPA can also be available to Nevadans for state and local government action if we pass similar statutes

PROTECTING DRINKING WATER FROM URANIUM MILL WASTES

AVOIDING RISKS OF MASSIVE DRINKING WATER CONTAMINATION VIA A SUGGESTED ALTERNATIVE

Decisions that adversely affect the natural environment may also create potential adverse public health impacts. NEPA's purpose is to not only protect the environment but also to protect and promote public health. This case shows how a robust NEPA review can achieve more productive results.

The Moab Uranium Millsite site is located on the west bank of the Colorado River near Moab, Utah and adjacent to Arches National Park. The site covers approximately 400 acres and contains almost 16 millions tons of uranium mill tailings, the radioactive residue from processing uranium. The uranium mill tailings are piled within the floodplain of the Colorado River, which serves as a primary drinking water supply for Phoenix, Las Vegas, San Diego and Los Angeles, raising concerns of contaminating the drinking water of millions of people.

In 1986 the Nuclear Regulatory Commission (NRC) issued a single-alternative Environmental Assessment (EA) approving mill-owner Atlas Minerals' plan to cap the tailings in place on the riverbank. The EA only contained one alternative because the NRC asserted that they could not evaluate alternatives not proposed by their licensee. In 1993 NRC issued a Finding of No Significant Impact (FONSI) on Atlas' plans to cap the tailings pile. The EA did not take into account geometric considerations at the site which required steeper sideslopes than allowed by regulation. The local county government wrote a letter of protest stating that the cap-in-place option met none of the long term objectives for tailings disposal and did not include an alternative of moving the wastes to a safer site away from the river. Convinced by the letter, Senator Orrin Hatch intervened, requesting NRC to prepare a full Environmental Impact Statement (EIS) on disposal options.

Still constrained by its interpretation that it could only analyze alternatives proposed by its licensee, NRC again prepared an EIS with just one alternative. The EIS noted that relocating the tailings would

be preferable in every respect except it would cost more. The EIS did not address ground and surface water contamination because the NRC determined there was no risk of contamination.

This final EIS position was contradicted by the Utah Division of Drinking Water, which measured high levels of contaminants in the Colorado River in direct association with the tailings pile. Oak Ridge National Lab next confirmed extreme contamination of groundwater at the site, and the U.S. Geological Service demonstrated that near shore waters in the river were lethal to fish. This compelled the U.S. Fish and Wildlife Service to issue a "biological opinion" after issuance of the final EIS, stating that the plan to cap the tailings in place would jeopardize the endangered Colorado pikeminnow. Atlas, which had never planned any groundwater remediation, filed for bankruptcy, leaving behind a reclamation bond worth just \$4.25 million.

The Atlas bankruptcy left the site in a legal void. In 2001, Congress assigned responsibility for cleanup at Moab to the Department of Energy (DOE). DOE, as the lead agency, held public scoping meetings for the EIS in January 2003 and issued a draft EIS in November 2004 for public comment. The draft EIS explored whether the tailings should be moved or stored in place, but did not include a preferred alternative. On April 6, 2005, DOE announced that the final EIS would recommend moving the 12 million tons of radioactive waste by train to Crescent Junction, thirty miles north of Colorado River. The final EIS was published in July 2005, and the Record of Decision was issued in September 2005. In 2008 the EIS was amended to allow a change in transportation options to provide greater flexibility.

During the public comment period on the draft EIS, diverse stakeholders submitted comments on the proposals for final storage of the tailings. Comments were submitted by a bipartisan coalition of governors from Arizona, California, New Mexico,

Nevada and Utah, as well as a bipartisan western congressional coalition, which included members of the House Resources Committee. The U.S. EPA also filed comments stating that storing the waste onsite would be environmentally unacceptable and should be dropped from consideration in the final EIS. The National Park Service and U.S. Fish and Wildlife Service also participated in the NEPA process, recommending that the waste to be moved to a safer place. DOE heard from 12 cooperating federal agencies, states, and several local units of government, as well as the Ute Mountain Ute Tribe. Many individuals and conservation groups filed comments as well.

Because of NEPA's requirement for review of reasonable alternatives and consideration of environmental consequences of the alternatives, citizens and other governmental commenters were successful in encouraging careful consideration of the alternatives of mine tailings removal and capping the tailings in place, including consideration of the

comparative environmental and public health risks, as well as costs. The cooperative work between all the parties involved ultimately led to better analysis and decision making. Based on the public input it received during the NEPA process, DOE decided to give greater weight to risks of drinking water contamination, alternatives for active ground water remediation, and the benefits and risks of off-site disposal of the tailings pile using predominantly rail transportation.

For more information, contact:

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The final EIS and ROD can be found at: http://www.gjem.energy.gov/moab/eis/eis_info.htm



Train moves Atlas tailings from Moab to Crescent Junction.



Aerial view of Atlas tailings pile next to Colorado River.

PRESERVING A HISTORIC BRICK HIGHWAY

PUBLIC INPUT HELPS PRESERVE THE HISTORICAL INTEGRITY OF A COMMUNITY

This case demonstrated how a NEPA process may begin with uncomfortable distance between a federal agency and a local community and end with agreement and lasting, mutually-supportive relationships between the same agency and community. A U.S. highway made out of bricks led one agency and community down this path.

U.S. 180 in Breckenridge, Texas is one of the few remaining brick roadways located on the U.S. highway system across the United States. The section of U.S. 180 between McAmis Avenue and Gonzales Creek bridge was paved in 1923 with bricks produced locally in Thurber, Texas.

Beginning in the early 1960s, local officials began to hold meetings to discuss concerns with the brick highway. The first several meetings between Texas Department of Transportation (TxDOT) and concerned citizens were not congenial, with TxDOT officials attending these meetings being booed. TxDOT engineers were concerned that the bricks were too slick to allow for safe stopping distances, that numerous utility cuts had caused the surface to be very rough and the sub-grade under the bricks was unstable. TxDOT recommended overlaying the roadway with modern asphalt pavement for proper ride quality and safety. Local residents did not support this idea, feeling the historic bricks needed to remain.

TxDOT undertook a NEPA scoping period to analyze alternatives and recognized that the community's participation was paramount, both because of the historic nature of the bricks and the potential disruption to the community's daily lives and businesses during any construction. TxDOT involved the city administration, business owners, and other concerned citizens in the scoping period, which resulted in productive discussions of construction alternatives. After TxDOT determined that the skid factor was not as bad as originally thought, they were able to select an alternative that would rehabilitate this section of roadway instead of replacing the brick highway.

The final proposal was for rehabilitation of this section of deteriorated brick roadway. This achieved roadway rehabilitation and preserved the integrity of the brick street so that it met eligibility criteria for the National Register of Historic Places through a process that fostered a partnership between TxDOT and the City of Breckenridge. The result was a plan that improved safety and preserved the history and nostalgia of the old brick street.

After selection of the rehabilitation alternative, officials from TxDOT and other agencies continued to involve the public in this project. For example, TxDOT met with business owners to discuss how the construction project might affect each business. City officials kept the public informed about the latest project information through public meetings, newspaper articles, and radio addresses. Discussions and coordination with the Texas Historical Commission ensured that the project would be sensitive to the preservation of historic buildings adjacent to the roadway and that the bricks and their removal and replacement would be acceptable to the historic context of downtown Breckenridge.

The concerns that were voiced by the community regarding this project chiefly related to historic preservation, but time, safety, and money were also concerns. It was unknown whether enough of the bricks could structurally withstand the removal, cleaning, and storage process in a condition that permitted them to be reused, which was necessary for a successful project. The overall economic impact of the project on the local community was of great concern because the time and disruption of the construction could be devastating to some businesses located in the main district section of the town, which was on the highway. Interruption of transportation services and the safety of workers in the construction zone during the construction were also of concern.

Eventually the Federal Highway Administration, TxDOT, the City of Breckenridge, the Texas Historical

Commission, local utilities, local business owners and the contractor, J.L. Steel, L.P., all contributed to the rehabilitation of the brick roadway.

At each phase, TxDOT employees involved with the project gained greater appreciation for the importance of public participation and stakeholder collaboration. Innovative ideas were developed and implemented in the project's design and construction. The result was a low maintenance roadway with improved longevity, increased safety and better ride quality.

Through the NEPA processes (including scoping, public participation, and alternative analysis), TxDOT selected an alternative that would not have a significant negative effect on the human environment. Because of NEPA, a new level of trust between all of the stakeholders was formed. In the end, much-needed upgrade of the downtown Breckenridge area was achieved while preserving the integrity of the antique brick street that was so important to local residents and was a historical landmark of the Texas State Highway System.

TxDOT received recognition through awards from the Associated General Contractors of Texas for design and construction and also received the highest agency award (Environmental Achievement Award) presented annually by TxDOT's Environmental Affairs Division.

For more information, please contact:

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Photos courtesy of the Texas Department of Transportation.