NEPA – WILL THE CONGRESSIONAL TASK ADVANCE OR SUBVERT NEPA'S GOALS?

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Congress passed the National Environmental Policy Act (NEPA) in 1969, and it provided a model for the California Environmental Quality Act (CEQA), passed the following year. Unlike CEQA, which is now amended almost annually, NEPA has had only two minor amendments since its inception. However, it has been subject to continual legislative erosion in its application to certain areas. For example, legislation such as the so-called Healthy Forests Restoration Act of 2003 and the recently enacted Energy Policy Act of 2005 have limited its application. Further, Congress has passed many provisions in spending bills that declare specific environmental reviews sufficient as a matter of law. For example, Section 115 of the FY '04 Energy & Water appropriations bill mandated construction of a road in a wildlife refuge, short-circuiting the NEPA review.

Not surprisingly, some industries and development interests have attacked NEPA for years, enjoying the support of many conservative Republicans. In 2003, the President's Council on Environmental Quality (CEQ) concluded a multi-year review of the NEPA process (see http://ceq.eh.doe.gov/ntf). The Task Force was composed of various federal agency officials and developed over 50 recommendations, which were presented to CEQ in its report, *Modernizing NEPA Implementation*. (Implementation of the Task Force's recommendations can be tracked at the CEQ website.) The CEQ Task Force did not recommend any amendments to NEPA. However, in April of 2005, the Chair of the House Resources Committee, California Congressman Richard Pombo, established a Congressional Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act ("NEPA Task Force"). The purpose of this article is to describe the Task Force process and the proposed changes, the significance of the proposed changes, and comment upon what impact the amendments would have on achievement of NEPA's goals.

Background on the Task Force

The twenty-member Task Force is composed of eleven Republicans and nine Democrats. Seven members are from California: Republicans Ken Calvert, George Radanovich, Devin Nunes, and Richard Pombo, and Democrats George Miller, Grace Napolitano, and Jim Costa. Many observers would say that, of these, only Miller and Napolitano are considered friends of the environment. For example, the League of Conservation Voters rank all of the Republicans as voting for the environment 8% of the time or less. Between the Spring and the Fall of 2005, the Task Force held six hearings in various parts of the country, but surprisingly, none in California. Sixty-six witnesses, from government, tribes, industry, academia, and environmental groups, presented testimony, and the Task Force received over 3,000 comments by mail, fax, and electronically. The Task Force then proposed a series of modifications to NEPA. Those recommendations were sent out for public comment until February 6, 2006. What ultimately comes of the recommendations could profoundly affect the manner in which NEPA is used to protect the environment. As the report acknowledges, many consider NEPA the "Magna Carta" of environmental laws, and proposals to amend it makes many environmental organizations nervous.

Task Force Findings

The Task Force findings were grouped around nine major themes: what NEPA means; the impact of changing NEPA; litigation; federal, tribal, state and local entities and the NEPA process; NEPA's interaction with other substantive laws; delays with the NEPA process; cost of compliance; public participation; and the adequacy of agency resources. The findings also summarize conflicting testimony. Not surprisingly, the Task Force found, "Litigation was seen by many as the single biggest challenge with the NEPA process – and one of the most

effective tools for ensuring its success. The empirical data paints a picture of few actual lawsuits but it does not address the perception or threat of litigation and the impact it has had on the NEPA process."

The Task Force Report contains statistics showing how rarely Environmental Impact Studies (EISs) are challenged, and how few injunctions are issued:

> In the last year for which CEQ has made public statistics on NEPA litigation dispositions – 2004 -- 156 NEPA cases were filed, and in only 11 of those cases did the judge grant an injunction. In 2002 150 NEPA cases were filed, and injunctions were issued in 27 of them. In 2003 128 NEPA cases were filed, of which 6 resulted in injunctions . . . In summary, with respect to NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, a 99.97% rate of NEPA actions successfully completed without injunctions does not provide a factual basis to prompt an excessive caution on the part of agency personnel. Even looking at the relatively modest number of NEPA cases filed, in 2004 in 93% of them the judge did not issue an injunction.

It was further noted that of the approximately 50,000 EISs filed each year, only 0.2% resulted in litigation. Despite the small amount of litigation, the Task Force concluded that the costs of complying with NEPA are rising, and recommended a series of revisions to reduce perceived delays.

Task Force Recommendations

The Task Force provides numerous recommendations for amending NEPA, but some of these amendments would cause confusion and others would undermine achievement of NEPA's goals and its enforcement.

Streamlining NEPA

- Amend NEPA to define a project subject to NEPA as a "major federal action that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures."

(*Query: Is this limited to federal planning, time, resources or expenditures? What about major private actions for which the federal government has permitting authority? What if the planning is not substantial, but the expenditures are?*)

- Amend NEPA to add mandatory timelines for the completion of NEPA documents: 18 months for completing an Environmental Impact Statement (EIS), and 9 months for an Environmental Assessment (EA). (*Comment: Fortunately, the Task Force realized that these time limits would not always be reasonable, and recommended that CEQ be given the right to approve an extension of time, but limited such an extension to six and three months, respectively. Unfortunately, for a program EIS with major implications and major unknowns, such as an airport expansion project, this, too, may not be sufficient time.*)
- Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CEs), EAs and EISs. In order to encourage the appropriate use of CEs and EAs, the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. Impacts that are clearly minimal or involve a temporary activity would be evaluated under a CE unless the agency has compelling evidence to utilize another process. (*Comment: Imposing a burden of proving "compelling evidence" is unprecedented and would severely limit the public's ability to challenge use of EAs and CEs. This is in stark juxtaposition to California's preference for EIRs over Mitigated Negative Declarations, with application of the "fair argument" standard, and the limitations on use of Categorical Exemptions, where the agency has the burden of to show the exemption applies. Also, many "temporary activities" may have severe environmental consequences. Is timber harvesting a temporary activity? Surely clean up and disposal of a waste site is, but it may have serious environmental consequences. The CEQ regulations already exempt "emergency"*

activities [40 Code of Federal Regulations section 1506.1], but short term actions should be reviewed for their environmental consequences where possible.)

- Codify criteria for the use of supplemental NEPA documentation, limiting the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts. (*Comment: This simply codifies the CEQ regulations, and is similar to California's Public Resources Code section 21166.*)

Enhancing Public Participation

- Direct CEQ to prepare regulations giving weight to localized comments and to give more weight to local comments than comments from outside groups and individuals who are not directly affected by that proposal. (*Comment: This proposed revision appears to be a blatant effort to reduce the impact of national and other "non-local" environmental groups in the commenting process, and is incompatible with the recognition that the public has an interest in protection of our natural resources. Comments should be based upon their substantive content, not the location of the author, though clearly local commentors may have unique insights or specialized knowledge. Further, the way the revision is written, even EPA regulators in Washington or the National Academy of Science might be devalued as an "outside group".*)
- Amend NEPA to codify the EIS page limits set forth in CEQ regulations, 40 CFR section 1502.7, providing an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects. (*Comment: There is no question but that EIRs and EISs have become*

unnecessarily lengthy, and often filled with boiler plate rather than critical analysis. IF the technical appendices are not considered as part of the EIS for purposes of this mandate, it makes considerable sense, but if it does not, then the environmental consequences of major federal actions may not be adequately documented.)

Better Involvement for State, Local and Tribal Stakeholders

- Amend NEPA to grant tribal, state and local stakeholders, including political subdivisions "cooperating agency" status, barring clear and convincing evidence that the request should be denied. (*Comment: Under current 40 CFR section 1508.5, only federal agencies with jurisdiction by law over the resource or special expertise are cooperating agencies, though a tribe or state may by agreement with the lead agency become a cooperating agency. Thus, the amendment would simply increase the likelihood of non-federal entities securing cooperating agency status.*)
- Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements where the state environmental reviews are "functionally equivalent" to NEPA requirements. (*Comment: There are 23 states that have "little NEPA's" of some kind, but many of them are significantly less demanding than NEPA in their application. Few states have "little NEPAs", are regarded as environmentally protective as CEQA. California encourages the preparation of joint EIR/EISs, and it is certainly desirable to avoid duplication, when possible. However, cooperation rather than delegation best fulfills the goal of assuring that federal agencies apply their expertise, understand the environmental consequences of their actions, and that local interests do not dominate when the action has impacts on natural resources or federally funded facilities or operations.*)

Addressing Litigation Issues

- Amend NEPA to create a citizen suit provision that would 1) require appellants to demonstrate that the evaluation was not conducted using the best available information and science; 2) clarify that parties must be involved throughout the process in order to have standing in an appeal; 3) prohibit a federal agency from entering into settlements that forbid or severely limit activities for businesses that were not part of the initial lawsuit; and 4) provide any settlement discussions should include the business and individuals that would be affected by the settlement. (*Comment: NEPA case law already requires a plaintiff to have exhausted its administrative remedies. The other recommendations appear intended to severely limit the ability of environmental protection advocates to successfully litigate under NEPA and to give industry the absolute right to participate in any settlement potentially affecting them. Interestingly, the first recommendation implies an agency must use "the best available information and science" in preparing an EIS or EA.*)
- Establish clear guidelines on who has standing to challenge an agency decision, requiring the plaintiff to be "directly impacted". (*Comment: Case law already establishes reasonable standing requirements, and NEPA's purposes are not well served by interjecting the requirement that a plaintiff be "directly impacted". For example, this could preclude a challenge to a permit to fill a wetland on private land, even though the permit would have significant indirect consequences to the public.*)
- Require that challenges must be filed within 180 days of notice of a final decision on the federal action. (*Comment: Since there is currently no statute of limitation for NEPA actions other than the six year general federal statute, it makes sense to have a shorter statute, but if one is imposed, it would be helpful to have it tolled or the litigation stayed during litigation of the same project under a state statute so that unnecessary and duplicative litigation can be avoided.*)

- Amend NEPA to add a requirement that agencies "pre clear" projects with CEQ. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ would be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability. (*Comment: Though there certainly is merit to one federal agency having oversight responsibility and making recommendations to federal agencies, and to Congress, this would concentrate power in the President's Council on Environmental Quality, and potentially further politicize the environmental review process*.)

Clarifying Alternatives Analysis

- Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents would be limited to those which are economically and technically feasible, and would not have to be considered unless they were supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences. (*Comment: One of the major differences between CEQA and NEPA is the difference in the degree of analysis required of different alternatives—under NEPA alternatives must be analyzed to a degree substantially similar to the proposed action. In fact, some federal agencies do not identify a proposed action in their EISs. This is extremely advantageous in terms of increasing the likelihood that an environmentally preferable action will be adopted. The disadvantage is the amount of time that must be spent in developing all alternatives that are analyzed, and then analyzing their impacts. To add the burden of having feasibility and engineering studies conducted for each alternative is contrary to the objectives of expediting the process, and reducing costs. At the same time, requiring analysis only of feasible alternatives narrows the range of alternatives that would have to be studied, thus expediting the*

NEPA process and reducing the costs, since absent the engineering, the alternatives "would not have to be considered". To eliminate or restrict the range of alternatives analyzed in an EIS this way would eliminate one of the areas that many members of the public view as one of NEPA's strengths: its requirement for consideration of a reasonable range of alternatives.)

- Amend NEPA to clarify that the alternative analysis must include an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR section 1502.14, which allows the "no action alternative" to be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision. (*Comment: Again, this addition seems contrary to the goal of streamlining the process. Further, limiting the discretion of the agency to take "no action" at a particular time is unsound. It is unclear whether the "impacts" to be weighted include costs, but an agency may not have adequate funding at a particular time, or wants to await action because of other contemplated federal actions. The mandate seems especially unreasonable in light of the proposed time limits on environmental review proposed by the Task Force.*)
- Direct CEQ to promulgate regulations to make mitigation proposals mandatory and create binding commitment to proceed with the mitigation. (*Comment: This appears to be the one clear win for the environmentalists, but would not provide a substantive mandate, as CEQA does. Instead, the regulations would only require that a promise made not be broken. A more protective proposal would be something like Public Resources Code section 21002, stating the policy of avoiding significant impacts, and section 21081, allowing an override of significant impacts only when all feasible mitigation measures are imposed, or feasible alternatives adopted, and even then only based upon specific findings.*)

Better Federal Agency Coordination

- Direct CEQ to promulgate regulations to require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process. Amend NEPA to codify CEQ regulation 1501.5 regarding the role of lead agencies and charge the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions.

Additional Authority for the Council on Environmental Quality

- Amend NEPA to create a "NEPA Ombudsman" within the CEQ on Environmental Quality. (*Comment: According to the Task Force, the purpose of this position would be to offset the pressures put on agencies by "stakeholders" and allow the agency to focus on consideration of environmental impacts of the proposed action. Again, it appears to further politicize the process and concentrate power by putting this in CEQ, rather than having a "NEPA Ombudsman" within each federal agency. Also, the term "stakeholders" is not defined, but the emphasis throughout the Report is on local and business interests.*)
- Direct CEQ to control NEPA related costs by assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies. (*Comment: Ironically, some of the Task Force recommendations, such as the requirement for engineering and feasibility reports, will themselves increase costs. However, a study on limiting costs should take into account the real economic and environmental costs of failing to protect the environment. For example, when the Clean Air Act was assailed for costing too much, EPA studies showed the economic costs of emission control was far less than the health related costs of failing to act.)*

Clarify Meaning of "Cumulative Impacts"

- Amend NEPA to clarify how agencies would evaluate the effect of

past actions for assessing cumulative impacts, establishing that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions.

- CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR section 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable." (*Comment: This highly problematic recommendation would encourage segmentation of projects and put blinders on agencies about likely impacts that would result from projects when viewed in conjunction with other "reasonably foreseeable" projects.*)

Studies

The Task Force also recommends a series of studies be conducted by CEQ, including 1) NEPA's interaction with other Federal environmental laws, and how to avoid duplication; 2) Federal agency NEPA staffing issues; 3) NEPA's interaction with state "little-NEPAs", and 4) how to eliminate or minimize duplication. Although it may be desirable to have further study of these issues, a study by a balanced Task Force is more likely to identify politically and environmentally acceptable changes.

Conclusion

In evaluating the need for amendments to NEPA, it is worth recalling the conclusions of the President's Council on Environmental Quality January 1997 report on NEPA, A Study of its Effectiveness After Twenty-Five Years, where then CEQ Chair Kathleen A. McGinty observed:

> Overall, what we found is that NEPA is a success — it has made agencies take a hard look at the potential environmental consequences of their actions, and it has brought the public into the agency decision-making process like no other statute. In a piece of legislation barely three pages long, NEPA gave both a voice to the

> new national consensus to protect and improve the environment, and substance to the determination by many to work together to achieve that goal.

Similarly, Congressman Tom Udall--a member of the Task Force—has said:

> NEPA remains after 35 years one of the nation's most important and vibrant laws. A central tenet of our democracy is that government should be accountable to the people, and NEPA has fundamentally served to make our democracy work better by greatly enhancing citizen participation in the process of federal agency decision-making.

No one is arguing that NEPA should not be "fine tuned" after 35 years. Some of the Task Force's recommendations would simply codify longstanding CEQ regulations. Others, however, would place great authority in CEQ, a result that Republicans might regret when next there is a Democratic President. From the environmental perspective, many of the proposed amendments threaten NEPA's continued efficacy in assuring that the federal government carefully weighs the consequences of its actions with regard to our environmental future, and limits public participation in NEPA's implementation and enforcement.