

Committee on Natural Resources

Rob Bishop Chairman
Hearing Memorandum

November 27, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff—Chris Esparza (x5-2761)

Hearing: Full Committee Oversight hearing titled “*Modernizing NEPA for the 21st Century*”

The Committee on Natural Resources will hold an oversight hearing on **November 29, 2017, at 10:00 am in 1324 Longworth HOB**, regarding the National Environmental Policy Act (NEPA). Nearly five decades since its enactment, the hearing will examine recent developments within NEPA’s regulatory framework, present certain case studies representative of current inefficiencies, and allow members to consider potential legislative improvements to enable the law to best serve its intended purpose.

Policy Overview

- Enacted in 1970, NEPA requires federal agencies to consider environmental impacts for any major federal action that affects the quality of the human environment.¹ Although no comprehensive data from decades of such efforts appears to be available government-wide, hundreds of environmental impact statements (EIS) and hundreds of thousands of other environmental assessments continue to be conducted, or are in process, each year by federal agencies under NEPA.²
- These reviews can be very costly, time-consuming and ultimately, a magnet for litigation. Despite being on the books for nearly five decades, NEPA was only recently amended in 2015 by the passage of H.R. 22 – Fixing America’s Surface Transportation Act.³ A section in the Act, the Federal Permitting Improvement section, created a new provision within NEPA to establish best practices among federal agencies, require coordination of federal agency review of projects, and shorten the time period for challenges to final decisions for issuing project permits.⁴
- On August 5, 2016, the Obama Administration White House issued sweeping Council on Environmental Quality (CEQ) NEPA guidance that could force all federal agencies to consider effects of a host of economic and energy-related activities’ “reasonably foreseeable” climate change impacts arising from greenhouse gases.⁵ While the Obama CEQ claimed the guidance was not binding or legally enforceable, many continue to be

¹ 42 U.S.C. § 4331.

² See: General Accounting Office Report 14-370 (2014) <http://www.gao.gov/assets/670/662546.pdf>

³ Pub.L. 114–94.

⁴ 42 U.S.C. § 4370m – 4370m12.

⁵ <https://www.gpo.gov/fdsys/pkg/FR-2016-08-05/pdf/2016-18620.pdf>

concerned the NEPA guidance, interpreted by federal agencies, would result in significant delays or blocking projects and increased litigation, and that the guidance would be given greater legal authority by courts responding to lawsuits filed by litigious groups challenging federal agencies' NEPA environmental reviews.

- In 2017, President Trump issued multiple executive orders intended to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent, including rescinding the 2016 CEQ guidance.⁶ The CEQ, under the Trump Administration, rescinded the previous administration's NEPA climate change guidance on April 5, 2017.⁷
- Despite the 2015 amendment to NEPA, and the Trump executive orders, some still question whether the original sections within NEPA are the best process to evaluate environmental impacts or the best framework for demonstrating compliance with all other regulatory requirements, and whether additional legislative improvements should be made.

Witnesses Invited

Mr. Philip K. Howard
Chairman
Common Good
New York, New York

Mr. Mike Bridges
President of the Longview/Kelso Building and Construction Trades Council
Business Rep. IBEW 48
Portland, Oregon

Mr. Jim Willox
Converse County Commissioner
Wyoming County Commissioners Association
Douglas, Wyoming

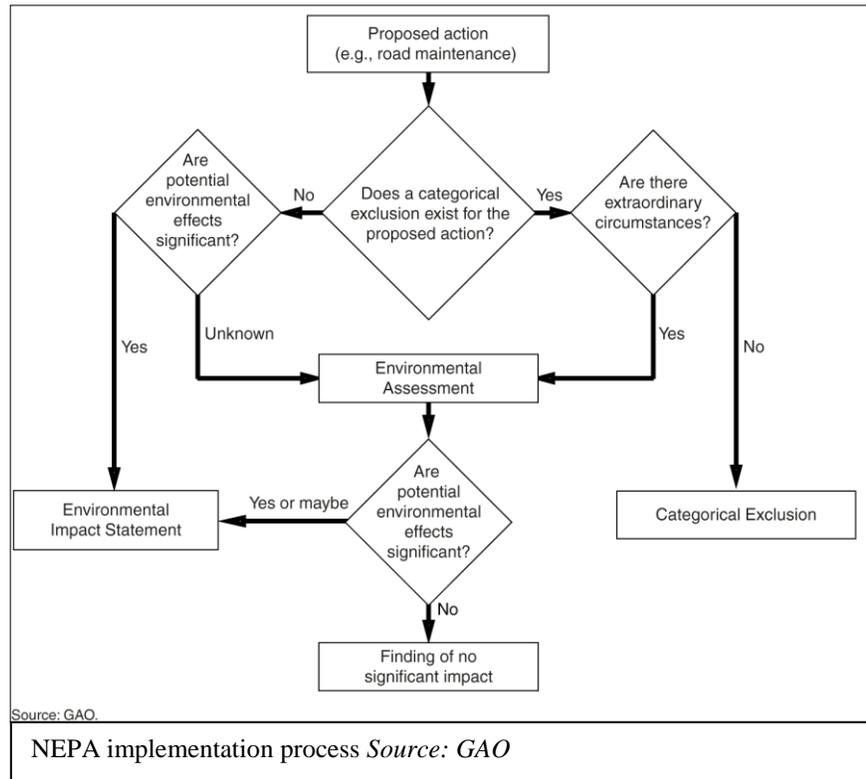
Ms. Dinah Bear
Former General Counsel
White House Council on Environmental Quality
Tucson, Arizona

⁶ Exec. Order Nos. 13766 & 13807.

⁷ <https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas>

Background

The National Environmental Policy Act of 1969 (NEPA) has been called the “Magna Carta” of environmental laws,⁸ ushering in a wide range of environmental regulations and requirements since its enactment in 1970. Over the years, NEPA has been interpreted to require federal agencies to take a hard look at the environmental impacts on literally any action that has a federal nexus, including actions requiring a federal permit, license, or funding, such as, mining, grazing, or timber activities on federal lands; as well as oil and gas extraction, dredging, highway and dam construction, to name just a few. Specifically, agencies require the preparation of a detailed document, referred to as an Environmental Impact Statement (EIS), for every federal action that significantly impacts the quality of the human environment.⁹ (see chart above)



In addition to declaring a national policy on the environment, NEPA also created the Council on Environmental Quality (CEQ) within the Executive Office of the President. In 1979, CEQ issued regulations that helped establish the intensive NEPA process in effect today. These regulations established the procedural requirements of NEPA and included: requiring agencies to conduct a scoping process, requiring an EIS be conducted in draft and final stages, determining the criteria of what constituted a “federal action,” defining the roles of “lead agencies” and “cooperating agencies,” and defining the public’s role and public comment process.¹⁰ Individual agencies are charged with creating their own, agency-specific, regulations and processes for implementing CEQ regulations, within the parameters of their own jurisdiction, to implement the NEPA process. However, agency regulations are bound by the CEQ regulations.

⁸ Council on Environmental Quality Executive Office of the President. “A Citizen’s Guide to the NEPA Having Your Voice Heard.” (Dec 2007), accessed at https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf

⁹ 40 C.F.R. § 1502.

¹⁰ 42 U.S.C. 4321

CEQ regulations require that federal agencies prepare the EIS “concurrently with and integrated with” all other environmental requirements.¹¹ Many complex actions require compliance with literally dozens of other federal, state, tribal, and local laws, and thus, the NEPA process is intended to act as an “umbrella” with the EIS forming the overarching framework “to coordinate and demonstrate compliance with these requirements.”¹² In addition, NEPA requires an open and transparent process that considers an array of interest factors, and provides for extensive public involvement for all permitting decisions.

The NEPA process can be very expensive and time consuming for private entities seeking federal permits. According to the U.S. General Accounting Office, the average time to complete an EIS was over 4 ½ years.¹³ In addition, NEPA has become a magnet for litigation, with hundreds of NEPA-related lawsuits against the federal government filed or open each year.¹⁴

Recent Developments

In recent years, permit streamlining efforts have continued to gain broad support from a wide cross-section of constituencies. While these efforts vary from agency to agency, they usually involve the following elements: designating a specific agency as the lead agency responsible for ensuring compliance with applicable requirements, directing the lead agency to develop a coordinated environmental review process, specifying certain lead agency authority (e.g., to establish project deadlines or develop dispute resolution procedures), codifying existing regulations, delegating specific federal authority to states, designating specific activities as being categorically excluded or exempt from certain elements of NEPA, and establishing limits on judicial review.¹⁵

In 2015, Congress passed the *Fixing America’s Surface Transportation Act* (FAST Act) which included a section amending NEPA.¹⁶ The NEPA amendment, the Federal Permitting Improvement section, incorporated many of the same streamlining efforts individual agencies had adopted on their own up to that point.¹⁷ These reforms included a host of process streamlining efforts for a targeted subset of projects that meet outlined requirements.¹⁸ One of these reforms included the creation of a Permitting Dashboard to allow for the monitoring of infrastructure projects which met the Act’s requirements.¹⁹

¹¹ 40 C.F.R. § 1502.25

¹² Linda Luther, *The National Environmental Policy Act: Background and Implementation* (CRS Report RL33152) (Washington, DC: Congressional Research Service, 2005), 28, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33152.pdf>

¹³ See p. 14, GAO Report: “National Environmental Policy Act: Little Information Exists on NEPA Analyses” <http://www.gao.gov/assets/670/662546.pdf>

¹⁴ Though the GAO in a recent report found little agency litigation data, CEQ found at least 70 NEPA lawsuits filed against Department of the Interior agencies, NOAA, Forest Service, and U.S. Army Corps in FY 2013 alone. (See: [https://ceq.doe.gov/legal_corner/docs/2013%20NEPA%20Litigation%20Survey%20\(without%20dispositions\).pdf](https://ceq.doe.gov/legal_corner/docs/2013%20NEPA%20Litigation%20Survey%20(without%20dispositions).pdf))

¹⁵ Linda Luther, *The National Environmental Policy Act: Streamlining NEPA* (CRS Report RL33267) (Washington DC: Congressional Research Service, 2007) <https://fas.org/sgp/crs/misc/RL33267.pdf>

¹⁶ Pub.L. 114–94.

¹⁷ 42 U.S.C. § 4370m – 4370m12.

¹⁸ 42 U.S.C. § 4370m(6).

¹⁹ 42 U.S.C. § 4370m-1.

Although passage of the FAST Act brought about the first real substantive amendment to NEPA, the new provision itself did not modify any previous NEPA statutory requirements. Rather than changing the way NEPA environmental reviews are conducted, that amendment granted a host of new authorities to agencies for monitoring and potentially expediting permitting decisions.

In January of this year, President Trump issued the first of the White House’s executive orders expediting environmental reviews for high priority infrastructure projects.²⁰ It called for collaboration with stakeholders to identify high priority infrastructure projects.²¹ Once identified, these high priority infrastructure projects would be monitored by the CEQ²² which would then develop a timeline for permitting approval alongside involved agencies, and monitor a project’s progress.²³ However, the executive orders did not relegate any authority within CEQ or other agencies, to enforce these new directives—a significant and important departure from the previous administration’s policy.

In April 2017, the Trump Administration’s CEQ rescinded the Obama CEQ’s 2016 sweeping NEPA guidance²⁴ that could force all federal agencies to consider effects of a host of economic and energy-related activities’ “reasonably foreseeable” climate change impacts arising from greenhouse gases.²⁵ While the Obama CEQ claimed the guidance was not binding or legally enforceable, many continue to be concerned the NEPA guidance, interpreted by federal agencies, would result in significant delays or blocking projects and increased litigation, and that the guidance would be given greater legal authority by courts responding to lawsuits filed by litigious groups challenging federal agencies’ NEPA environmental reviews.

In August of this year, President Trump issued a subsequent executive order to streamline the approval process for infrastructure projects.²⁶ Among other process reforms addressed in this subsequent executive order is the directive to achieve a two-year timetable for all permitting decisions.²⁷ Additionally, the executive order directs the Office of Management and Budget (OMB) to establish specific goals for permitting decisions and track the progress of each permitting decision.²⁸ The data collected is intended to be used to allow agency officials to identify when projects overrun their anticipated timelines, and elevate such projects to senior officials for corrective action.

²⁰ Exec. Order No. 13766 (2017)

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ <https://www.gpo.gov/fdsys/pkg/FR-2016-08-05/pdf/2016-18620.pdf>

²⁵ <https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas>

²⁶ Exec. Order No. 13807 (2017)

²⁷ *Id.*

²⁸ *Id.*

Conclusion

As other environmental laws and regulations continue to expand, NEPA, intended to provide a framework to navigate all other environmental laws and regulations, has seen very few changes in almost five decades. While the amendments to NEPA in the FAST Act of 2015 provided new authorities intended to streamline infrastructure permitting decisions, these new authorities do not address the Act's underlying structural inefficiencies.

President Trump's executive orders rescinding the previous administration's NEPA climate change guidance and on infrastructure permitting are positive steps forward, and follow Congress' FAST Act authority to provide clear direction to agencies to immediately take advantage of all available streamlining tools. However, additional legislation to clarify the NEPA framework would provide more longer-term certainty going forward.

Witnesses will provide specific examples of the impacts of NEPA's permitting process and potential improvements with the administration's executive orders and possible legislative or statutory changes.