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Climate Change Proponents Meet NEPA Opponents: The Case for Reforming America's Bedrock Environmental Law

The National Environmental Policy Act ("NEPA") was enacted in 1970, fifty years ago, during the Nixon Administration. It is often described as the bedrock environmental law. Unlike the Clean Air Act, the Clean Water Act and other substantive environmental laws, NEPA is a procedural statute. It is meant to ensure that environmental impacts are taken into account by federal agencies in reviewing applications to permit public and private projects with a federal nexus.

NEPA, being procedural and not substantive, is a hefty sword. It stops the projects many groups do like, along with the ones they don't like. It has been used to oppose coal plant expansions, but also wind power expansions. Thousands of NEPA cases have been filed in the federal courts. A recent survey listed over 100 NEPA cases filed each year between 2001 and 2013.[1] While not all of these cases involve energy projects, many do and many others address other "infrastructure" projects, such as roadways and bridges that the new Biden Administration favors. This article discusses some of the challenges that the existing NEPA statute and regulations have posed for large-scale infrastructure projects, including clean energy projects. It goes on to discuss some of the efforts that have been made, and proposed, to reform NEPA.

Near-Term Prospects for Addressing Infrastructure Needs and Climate Change

The Biden Administration has linked its climate change agenda to increased spending on clean energy and other infrastructure. The Biden-Harris website states that the new Administration will:

> "Create millions of good, union jobs rebuilding America's crumbling infrastructure – from roads and bridges to green spaces and water systems to electricity grids and universal broadband – to lay a new foundation for sustainable growth, compete in the global economy, withstand the impacts of climate change, and improve public health, including access to clean air and clean water."[2]

Much of our "crumbling infrastructure" was built following the Great Depression, and in the 1950s, before the environmental laws we have today were enacted. Indeed, the roads and bridges and water systems built during that era created a considerable amount of the environmental damage that NEPA and other federal environmental laws that followed it were designed to curtail.

There has been very little federal environmental legislation enacted in the past 30 years. Most of our laws have remained unchanged since the Nixon era, or have seen relatively minor modifications only. Hence the need to "modernize" NEPA. We cannot "build back better" if we cannot build at all.

Opportunities for Modernizing NEPA

Many ideas to reform NEPA have been floated and a few concrete steps have been taken.

A. Trump Administration Efforts to Reform NEPA & Streamline Infrastructure Projects

In July 2020, the Trump Administration promulgated a final set of revised NEPA implementing regulations that represented the first comprehensive update of the rules since their original adoption.[3] In doing so, it expressly cited as one of its primary goals the need to eliminate "at least in some measure, the unnecessary and burdensome delays that have hampered national infrastructure and other important projects."[4]

There are several elements of the new regulations most germane to the process for preparation of Environmental Impact Statements (EIS's) that accompany virtually all major infrastructure projects. First, the new regulations impose a general time limit for completion of an EIS to two years and a page limit of 300, unless a senior agency official approves longer periods. Second, they expressly provide that the agency shall limit alternatives considered in an EIS to a "reasonable number" that are both technically and economically feasible and also meet the goals of any permit applicant. Third, they circumscribe the scope of the environmental impacts that an EIS needs to consider by repealing the duty to consider "cumulative impacts" that had been a mainstay (and oft-litigated provision) of the original version of the regulations, and also by providing that such effects do not encompass those that are remote temporally, geographically, or causally, or that the agency has no ability to prevent.

There are currently at least four lawsuits pending to challenge these new regulations in which plaintiffs are seeking to have courts set them aside pursuant to the Administrative Procedure Act.[5] If invalidated by the courts, or reversed by the Biden Administration (as some have sought), we will be back to square one on reforming NEPA. That is only cause for cheer if the status quo is one's goal. The status quo, however, is not the goal of either the Biden Administration or those concerned about climate change.

B. Earlier NEPA Reform Proposals & Initiatives

A full decade before the Trump Administration's recent NEPA regulations, the Obama Administration sought to streamline NEPA review of infrastructure projects funded by the American Recovery and Reinvestment Act ("ARRA"). The ARRA was enacted following the Great Recession of 2007-09. The goal was to kick start the economy by building roads, repairing bridges and modernizing the Nation's aging infrastructure. The Obama White House issued a Presidential Memorandum entitled, "Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review," instructing federal agencies to "identify and work to expedite permitting and environmental reviews for high-priority infrastructure projects with significant potential for job creation."[6] The Memorandum directed five cabinet-level departments to select up to three high-priority infrastructure projects for which the necessary environmental review and federal permitting processes could be completed within 12-18 months. It was neither an Executive Order, however, nor a proposed regulation, and it was of limited scope. Therefore, not much happened to speed NEPA review.

Around the same time, Congress enacted three NEPA measures. They were tailored to expedite environmental review for specific types of infrastructure projects: The Moving Ahead for Progress in the 21st Century Act ("MAP-21"),[7] the Water Resources Reform and Development Act ("WRRDA"),[8] and the Fixing America's Surface Transportation ("FAST") Act.[9]

MAP-21 included various provisions to improve environmental reviews for transportation projects, including combining or truncating various steps in the NEPA review process, establishing a framework for setting and enforcing deadlines to complete NEPA analysis designed to ensure final project decisions within four years, and authorizing expanded use of Categorical Exclusions under NEPA. WRRDA adopted similar types of environmental review acceleration provisions for water resources infrastructure

projects. The FAST Act established a Federal Permitting Improvement Steering Council to function as a "one-stop-shop" for streamlining permitting across agencies, including those in the following sectors: renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, and manufacturing. It also established a pilot program to allow up to five states to assume federal responsibility for NEPA review and use their own laws and regulations to perform environmental reviews and approve projects in lieu of NEPA. In addition, the FAST Act addressed judicial review of applicable projects by reducing the limitations period to bring a court challenge from six to two years, and expressly directing courts to consider significant adverse effects on jobs in resolving requests for preliminary injunctions against a project.

Many other NEPA reform proposals have been put forth. One recommends the creation of a specialized government office dedicated to NEPA analyses.[10] Another would amend the Statute to specifically address projects which impact economically disadvantaged communities.[11] Still another would shift the focus of the Statute from preventing adverse environmental impacts to compensating for them.[12] There have also been calls for establishing specialized environmental courts.[13]

When all is said and done, however, NEPA has not much changed since 1970. The changes made have been incremental at best, and the changes proposed by the current Administration are being challenged in the courts and targeted for repeal. That leaves us with the courts, who are still the arbiters of the adequacy of environmental review. Fifty years on, it is the judges who decide.

Conclusion

NEPA was enacted to address the unchecked environmental damage that followed unprecedented infrastructure growth in the middle of the last century. It has served an importance purpose in ensuring that projects – including projects with a laudable public purpose – achieve not only our economic goals, but our environmental goals. After 50 years, however, NEPA is showing its age. It has become a way for some project opponents not only to prevent damage to the environment, but improvement of the environment. How the Biden Administration addresses that tension is critical to achieving its climate and economic goals. If it fails to enact meaningful NEPA reform, the success of the incoming Administration's infrastructure and climate change agenda will be decided the same way earlier Administration's agendas have been – in the courts.

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Marten Law is one of the nation's premier environmental practices, advising clients on regulatory compliance, public lands issues, project siting, and environmental remediation issues. Its lawyers have represented clients in several of the largest environmental litigation cases in the country: including the 2010 Deepwater Horizon and 1989 Exxon Valdez oil spills and multi-billion Superfund cleanups. Its lawyers have held senior positions in environmental agencies, and collaborated on development projects in the mining, oil and gas, solar, and wind industries. It has also represented, in environmental matters, some of the country's largest manufacturing, transportation, e-commerce, forestry, technology, real estate development, agriculture and financial companies in complex regulatory, permitting, enforcement and administrative matters throughout the United States.

We look forward to helping our clients and friends navigate what will undoubtedly be a fast changing post-election landscape. Watch this space.

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[1] *See* James E. Salzman and Barton H. Thompson, Jr., Environmental Law & Policy 340 (5th ed. 2019); https://ceq.doe.gov/docs/ceq-reports/nepa-litigation-surveys-2001-2013.pdf (providing data on NEPA cases filed between 2001-13).

[2] https://joebiden.com/clean-energy/#

[3] 85 Fed. Reg. 43,304 (July 16, 2020).

[4] https://www.federalregister.gov/documents/2020/07/16/2020-15179/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental

[5] *See, e.g., Alaska Community Action on Toxics v. CEQ*, case no 20-5199 (N.D. Ca.); *California v. CEQ*, case no. 20-6057 (N.D. Ca.); *Environmental Justice Health Alliance v. CEQ*, case no 20-6143 (S.D.N.Y.); *Wild Virginia v. CEQ*, case no. 20-45 (W.D. Va.).

[6] https://obamawhitehouse.archives.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more.

[7] Pub. L. No. 112-141 (July 6, 2012).

[8] Pub. L. No. 113-121 (June 10, 2014).

[9] Pub. L. No. 114-94 (Dec. 4, 2015).

[10] Aliza M. Cohen, NEPA in the Hot Seat: A Proposal for an Office of Environmental Analysis, 44 U. Mich. J.L. Reform 169, 171 (2010).

[11] Marissa Tripolsky, A New NEPA to Take A Bite Out of Environmental Injustice, 23 B.U. Pub. Int. L.J. 313, 337 (2014).

[12] Bradley C. Karkkainen, Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 Colum. L. Rev. 903 (2002).

[13] Scott C. Whitney, The Case for Creating a Special Environmental Court System, 14 William & Mary L. Rev. 473 (1973).