NEPA UNDER ASSAULT: CONGRESSIONAL AND ADMINISTRATIVE PROPOSALS WOULD WEAKEN ENVIRONMENTAL REVIEW AND PUBLIC PARTICIPATION

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INTRODUCTION

For over thirty years, the National Environmental Policy Act (NEPA) has provided a legal framework to promote informed decisions by federal agencies and to give the affected public a say in those decisions.[1] NEPA has helped preserve some of America's most treasured places, from the canyonlands of Utah to the old growth forests of Southeast Alaska.[2] It has helped citizens protect their communities and enhance the quality of their lives. NEPA has helped federal officials better meet the needs and interests of the public they serve.

Yet NEPA is now under assault. Numerous proposals from the Bush administration and members of Congress would weaken the environmental review and public participation now provided for under NEPA. These proposals seek to circumvent the NEPA process, rather than improve it. This Article analyzes the executive and congressional proposals to weaken NEPA put forward in the twelve months from July 2002, to July 2003. Part I

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[1] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2000)). NEPA was approved by Congress with significant bipartisan support in December 1969, and signed into law by President Richard M. Nixon on January 1, 1970. COUNCIL ON ENVTL. QUALITY, ENVTL. QUALITY—25TH ANNIVERSARY REPORT 48-49 (1994), http://ceq.eh.doe.gov/nepa/reports/1994-95/25th_ann.pdf.

[2] *See, e.g.*, *infra* notes 12-13, 99 and accompanying text.

outlines the fundamental values that NEPA promotes. Part II explains how the recent proposals to weaken NEPA are bad for the environment, bad for communities, and a bad way of governing. Part III then offers some alternative ideas that would enhance, rather than undermine, NEPA's worthy goals.

I
VALUE OF NEPA

NEPA serves two essential roles. First, it promotes informed decision-making by ensuring that federal officials thoroughly analyze the impact of major federal actions on the environment. Federal agencies must provide a "detailed statement" on the environmental impacts of proposed "major Federal actions significantly affecting . . . the . . . environment."[3] Federal agencies are required to document the decision that an action will not have a significant impact on the environment.[4] The White House Council on Environmental Quality (CEQ) has called NEPA the "foundation of modern American environmental protection."[5]

Second, NEPA provides persons affected by federal agency decisions a say in those decisions. Federal agencies must provide the public notice of the availability of its environmental documents.[6] An agency must provide the public an opportunity to comment on a draft environmental impact statement (DEIS) before

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[3] *See* 42 U.S.C. § 4332(C).

[4] Environmental Assessment, 40 C.F.R. § 1508.9, .13 (2003) (defining "environmental assessment" and "finding of no significant impact"). The White House Council on Environmental Quality promulgated NEPA regulations that are applicable to all federal agencies. CEQ Regulations for Implementing NEPA, 40 C.F.R. §§ 1500-1508.28 (1978). Each agency is responsible for supplementing these regulations with its own regulations or guidance. 40 C.F.R. § 1507.3. For examples of such supplemental regulations, see Synopsis of Environmental Review Procedures, 40 C.F.R. § 6.105 (1986) (defining "finding of no significant impact" and "record of decision" as part of the Environmental Protection Agency's Procedures for Implementing the Requirements of the Council on Environmental Quality on the National Environmental Policy Act); BUREAU OF LAND MGMT., NATIONAL ENVIRONMENAL POLICY ACT HANDBOOK (1988), http://www.ak.blm.gov/ak930/soilsman.pdf.

[5] CEQ, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997) [hereinafter CEQ EFFECTIVENESS STUDY], http://ceq.eh.doe.gov/nepa/ nepa25fn.pdf. CEQ was established by NEPA. 42 U.S.C. § 4342. CEQ's chairman is appointed by the President with confirmation by the Senate. *Id.*

[6] 40 C.F.R. § 1506.6(b).

finalizing it.[7] The regulations do not provide an explicit mandate to provide an opportunity for public comment on environmental assessments (EAs) or findings of no significant impact (FONSIs), although agencies do on some occasions. Agencies also have an explicit obligation to respond to comments when preparing a final environmental impact statement (EIS).[8]

Some critics blame the NEPA process for delay and inefficiency.[9] Of course, there are times when the NEPA process has not worked as smoothly as it should or could. However, the administrative process is rarely perfect, and these isolated instances do not justify statutory or regulatory changes. When done right, NEPA provides an essential tool for producing

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[7] 40 C.F.R. § 1503.1(a)(4).

[8] 40 C.F.R. § 1503.4(a).

[9] *See, e.g.*, 149 CONG. REC. S2358 (daily ed. Feb. 12, 2003) (statement of Sen. Thomas).

> NEPA has become a real problem in Wyoming and many States throughout the Nation. A statute that was supposed to provide for additional public input in the federal land management process has instead become an unworkable and cumbersome law. Instead of clarifying and expediting the public planning process on Federal lands. [sic] NEPA now serves to delay action and shut-out local governments that depend on the proper use of these Federal lands for their existence.

Id.; 149 CONG. REC. S15,326-27 (daily ed. Nov. 21, 2003) (statement of Sen. Landrieu) ("One of the most extraordinary aspects about [H.R. 6] is streamlining of regulations, trying to untie people's lands so we can appropriately extract natural resources, clean our coal, have good technology off our shores, and use that money to invest in our environment."); CTR. FOR THE ECON. & THE ENV'T, NAT'L ACAD. OF PUB. ADMIN., MANAGING NEPA AT THE DEPARTMENT OF ENERGY 20 (1998) ("The cost of [Department of Energy] EISs is frequently too high, EIS preparation time is often too long, and document quality is often low. . . . [T]hese problems are related in some degree to the complexity of the decisions that are the subject of many NEPA analyses." (citing DEP'T OF ENERGY, REPORT OF THE NEPA CONTRACTING QUALITY IMPROVEMENT TEAM (1995)), http://209.183.198.6/alliance/index.html; Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 909-10 (2002) (NEPA "demands the impossible: comprehensive, synoptic rationality, in the form of an exhaustive, one-shot set of *ex ante* predictions of expected environmental impacts. . . . [I]t places extreme demands on agency resources, often generates little useful information, and produces a work product too late."); Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703, 711 (1990) ("Another problem with NEPA . . . involves the multiple layers of required analyses. . . . As a result, conducting the multileveled analyses required to reach project level decisions often requires extraordinary amounts of time, money, and manpower. Also, once decisions are made, their finality is suspect.").

informed and accepted government decisions. And the facts simply do not support claims that the NEPA process is the cause of unwarranted delay and expense. For example, in a study of eighty-nine highway projects that had been delayed for at least five years, the Federal Highway Administration (FHWA) found that environmental reviews were not the major causes of delay.[10] Instead, FHWA identified lack of funding or low project priority, lack of local consensus, and project complexity as the three most significant factors in slowing highway projects down.[11]

Courts have consistently recognized NEPA's dual goals of "informed decisionmaking and informed public comment."[12] By analyzing a decision's potential adverse impacts on the environment, federal officials can take steps to minimize the damage if they decide to go ahead with a project. For example, in 2000, the United States Forest Service (USFS) proposed heavy logging on Deer Island in Alaska's Tongass National Forest, which would have required the construction of new roads on the island. In response to public comments, USFS selected an alternative in the final EIS for the Kuakan timber sale that limited adverse environmental impacts. USFS logged by helicopter instead of constructing new roads, minimized clearcutting, and used an existing log dump to store logs in the water.[13] NEPA produced a better decision for the environment.

II
PROPOSED CHANGES TO NEPA: THE WRONG PATH

Despite these demonstrated benefits of NEPA, a climate of change exists in Washington, D.C., concerning the NEPA process. CEQ has established a NEPA Task Force to "seek ways to

[10] *See* Office of Project Dev. & Envtl. Review, Dep't of Transp., Reasons for EIS Project Delays, *at* http://environment.fhwa.dot.gov/strmlng/eisdelay.htm (last modified Dec. 3, 2003).

[11] *Id*. Nevertheless, FHWA officials see NEPA as a source of delay. James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74 (2003).

[12] *See, e.g.*, Utahns for Better Transp. v. United States Dep't. of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002).

[13] Carol J. Jorgensen, Dep't of Agric., *Forest Plan Amendment No. 11: Kuakan Timber Sale* (Mar. 28, 2000), *at* www.fs.fed.us/r10/tongass; Joanna Markell, *Sudden Shutdown*, JUNEAU EMPIRE, Apr. 24, 2001, www.juneauempire.com/stories/042401/Biz_Shutdown.html.

improve and modernize NEPA analyses and documentation and to foster improved coordination among all levels of government and the public."[14] Through executive order, President Bush has established two inter-agency task forces to look at streamlining the environmental review process—one for energy projects[15] and another for transportation projects.[16] The Department of Interior has initiated a process to revise the agency's NEPA guidance.[17] While no proposals have been put forward to directly amend NEPA, numerous proposals have been made—both administrative and legislative—that would curtail opportunities for environmental review and public participation. These proposals involve excluding types of activities from the NEPA process, limiting the review that occurs (particularly the analysis of alternatives) by concentrating authority in the project's proponent, delegating authority to the states, accelerating mandatory deadlines, and limiting judicial review. Each of these strategies will be discussed in more detail below.

A. *Excluding Activities from Review*

One way of circumventing the NEPA process is to exclude activities from review. The Bush administration, for example, recently took the position in court that NEPA does not apply to the oceans beyond United States territorial waters—three nautical miles from the nation's shorelines—within the Exclusive Economic Zone (EEZ). The EEZ is a vast area extending 200 nautical miles from shore, containing millions of square miles of rich ocean habitat where the United States exercises exclusive control over fisheries, endangered species, marine mammals, marine habitat, and other natural resources.[18] Natural Resources Defense Council and other environmental groups sued the Department of Navy for conducting sonar testing in these waters

[14] National Environmental Policy Act Task Force, 67 Fed. Reg. 45,510 (July 9, 2002). *See also* James Connaughton, *Modernizing the National Environmental Policy Act: Back To the Future*, 12 N.Y.U. ENVTL. L.J. 1 (2003).

[15] Exec. Order No. 13,212, 3 C.F.R. § 250 (2003), *reprinted as amended in* 42 U.S.C. § 13,201 (Supp. 2003).

[16] Exec. Order No. 13,374, 3 C.F.R. § 259 (2003), *reprinted as amended in* 49 U.S.C.A. § 301 (Supp. 2003); *see infra* text accompanying notes 88-89.

[17] *See* OFFICE OF ENVTL. POL'Y AND COMPLIANCE, DEP'T OF THE INTERIOR, DEPARTMENT MANUAL (2003), http://elips.doi.gov/elips/wp_docs/3594.wp.

[18] *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983) (proclaiming sovereign rights of United States to EEZ).

without conducting the environmental review and involving the public as required by NEPA. The court rejected the Navy's argument that NEPA did not apply, holding that because the United States exercises significant sovereignty and legislative control over the EEZ, NEPA therefore does apply.[19]

Other attempts at excluding activities from review involve expanding the use of categorical exclusions (CEs). Nothing in NEPA itself provides for the exclusion of whole categories of actions from any review at all. However, regulations issued by CEQ allow agencies to categorically exclude certain "actions which do not individually or cumulatively have . . . significant effect[s] on the human environment."[20] The CEQ regulations direct federal agencies to identify CEs as part of the agency's procedures to implement NEPA.[21] The CEQ regulations require these procedures to be published in the *Federal Register* for comment.[22] Once an agency identifies a type of activity as a CE, no environmental review or public participation is necessary before the agency undertakes such an activity.[23] CEs are intended to be limited to actions that would not, by their nature, have significant adverse impacts on the environment.[24] For example, the Department of Agriculture's CE list includes "routine activities such as personnel, organizational changes, or similar administrative functions," and "activities which deal solely with the funding of programs."[25] In addition, agencies must provide NEPA documentation where extraordinary circumstances may result in a normally excluded action having a significant environmental impact.[26] Yet, several agencies have proposed expanding categorical exclusions to include activities that could

[19] Order on Cross Mot. for Summ. J., Natural Res. Def. Council v. United States Dep't of the Navy, No. CV-01-07781 CAS (RZx), at 16 (C.D. Cal. Sept. 19, 2002) (citing Envtl. Def. Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993)) (on file with author).

[20] 40 C.F.R. § 1508.4 (2003).

[21] *Id*. § 1507.3(b)(2)(ii).

[22] *Id*. § 1507.3(a).

[23] *Id*. § 1508.4.

[24] *See id*.

[25] 7 C.F.R. § 1b.3(a)(1)-(2) (2003).

[26] 40 C.F.R. § 1508.4; *see, e.g.*, California v. Norton, 311 F.3d 1162, 1170 (9th Cir. 2002) ("When extraordinary circumstances are present, the agency must prepare environmental documentation despite the fact that the activity in question falls within a categorical exclusion.").

have significant environmental impacts.

For example, in December 2002, USFS proposed expanding its categorical exclusions to include "thinning overstocked stands and brush" and other projects to reduce fire risks.[27] While some projects may be of such a small scale that use of a CE is appropriate, USFS's proposal lacks meaningful limits on the size, intensity, or location of the logging projects. As a result, logging with significant potential environmental impacts could move forward without review or public input.[28]

While the imminent threat of forest fires across the West is real and serious, careful review is an essential part of the solution. Current wisdom has revealed that past fire protection strategies may have done more harm than good. For example, indiscriminate thinning can increase the fire risk. According to a science publication by USFS itself, "[d]epending on the type, intensity, and extent of thinning, or other treatment applied, fire behavior can be improved (less severe and intense) or exacerbated."[29] A report of the Secretaries of Agriculture and Interior to the President warned that "the National Research Council found that logging and clearcutting can cause rapid regeneration of shrubs and trees that can create highly flammable fuel conditions within a few years of cutting. Without adequate treatment of small woody material, logging may exacerbate fire risk rather than lower it."[30]

Because the effects of the thinning allowed under USFS's proposal are highly uncertain, these projects are in special need of environmental review, rather than an exemption. As an eminent

[27] National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 67 Fed. Reg. 77,038 (Dec. 16, 2002) (claiming that these exclusions "do not individually or cumulatively result in significant effects on the human environment" but that they are designed to "reduce risks to communities and the environment"); Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 33,806, 33,813 (June 5, 2003).

[28] For a detailed analysis of the USFS CE proposal for fuels reduction, see comments submitted on behalf of NRDC by Nathaniel Lawrence and Amy Mall (Jan. 31, 2003) (on file with author).

[29] RUSSEL T. GRAHAM ET AL., DEP'T OF AGRIC., THE EFFECTS OF THINNING AND SIMILAR STAND TREATMENTS ON FIRE BEHAVIOR IN WESTERN FORESTS 15 (1999), http://www.fs.fed.us/pnw/pubs/gtr_463.pdf.

[30] BRUCE BABBITT & DAN GLICKMAN, MANAGING THE IMPACT OF WILDFIRES ON COMMUNITIES AND THE ENVIRONMENT: A REPORT TO THE PRESIDENT IN RESPONSE TO THE WILDFIRES OF 2000, at 12 (2000), http://clinton4.nara.gov/CEQ/firereport.pdf.

panel of fire ecologists recently wrote to President Bush: "[i]n summary, fire threats in western forests arise from many causes, and solutions will require a suite of treatments adjusted on a site-by-site basis. . . . [N]either the magnitude of the problem nor our understanding of treatment impacts would justify proceeding in panic or without thorough environmental reviews."[31]

Both the Bush administration and certain members of Congress are using the threat and fear of forest fires to promote logging without reviewing whether the proposed logging will decrease or increase the fire threat, and without giving the affected public a say in that review. Representative McInnis (R-CO) has introduced a bill, House Bill 1904 (H.R. 1904), that dramatically eliminates environmental review for logging projects similar to USFS's proposal. Sections 403(a) and (d) of H.R. 1904 provide that loosely defined experimental projects up to one thousand acres in size designed to deal with insect infestations "are deemed to be categorically excluded" from NEPA. The bill provides that "[t]he Secretary concerned need not make any findings as to whether the project, either individually or cumulatively, has a significant effect on the environment."[32] This language overrides the limitations on categorical exclusions provided in the CEQ regulations. Under current law, CEs are limited to activities that are known not to cause significant environmental harms and the presence in a specific case of "extraordinary circumstances" triggers more extensive review.[33] Lacking these safeguards, the provision in H.R. 1904 amounts to a complete repeal of NEPA for these projects.

In addition, H.R. 1904 dramatically limits the environmental review that is required for logging projects designed to reduce hazardous fuels, that is, to reduce the threat of fires. Section 104(b) of H.R. 1904 eliminates the requirement to look at alternatives to the proposed action. As the CEQ regulations provide and courts have repeatedly reiterated, the consideration of

[31] Letter from Norman L. Christensen, Jr., Professor of Ecology, Duke University, et al., to President George W. Bush (Sept. 9, 2002) (on file with author).

[32] Healthy Forest Restoration Act of 2003, H.R. 1904, 108th Cong. § 403(d) (2003).

[33] 40 C.F.R. § 1508.4 (2003). *See also supra* notes 20-26 and accompanying text.

alternatives is the "heart of the environmental impact statement."[34] Thus, while not excluding these logging projects from environmental review, the bill renders the review essentially meaningless.[35]

Another example of removing activities from the NEPA process can be found in the energy bill, House Bill 6 (H.R. 6), passed by the House of Representatives on April 11, 2003.[36] The Indian Energy title of H.R. 6 eliminates the application of NEPA to energy development decisions in relevant areas. Currently, the Department of the Interior approves leases, rights-of-way, and agreements relating to energy development projects in Indian Country.[37] Under H.R. 6, once a tribal energy resource agreement, describing how the tribes would implement specific projects, is approved by the Secretary of Interior, no further federal action is involved.[38] As a result, federal laws like NEPA would no longer apply to project decisions such as the decision to issue a lease for oil and gas development, and environmental review and public participation will be lost.

B. *Concentrating Authority in Project Proponent*

Opponents of the NEPA process have also proposed concentrating authority in the federal agency that is the proponent of a particular project—whether it is a new highway, new dam, or

[34] *See, e.g.*, 40 C.F.R. § 1502.14 ("This section is the heart of the [EIS]."); Van Ee v. EPA, 202 F.3d 296, 309 (D.C. Cir. 2000) ("[T]he heart of the EIS is the requirement that an agency rigorously explore and objectively evaluate the projected environmental impacts of all reasonable *alternatives* for completing the proposed action.") (emphasis added); N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1541 (11th Cir. 1990) ("Consideration of other realistic possibilities forces the agency to consider the environmental effects of a project and to evaluate against the effects of alternatives.").

[35] The Healthy Forests Initiative, launched by President Bush on August 22, 2002, includes many of the USFS proposals. *See* USFS, DEP'T OF AGRIC., HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES 3, 16 (2002), http://www.fs.fed.us/projects/documents/HealthyForests_Pres_Policy%20A6_v2.pdf; *see also* DEP'T OF AGRIC., FACT SHEET—THE 2003 SEASON 3 (2003) ("[New] procedures will allow similar new [thinning and other] projects to proceed without the need for further individual analyses."), http://www.fs.fed.us/projects/hfi/May-2003/docs/fact-sheet.pdf.

[36] Final Vote Results for Roll Call 145, HR 6 Recorded Vote (Apr. 11, 2003), *at* http://clerk.house.gov/evs/2003/roll145.xml.

[37] *See, e.g.*, 25 U.S.C.A. §§ 321, 327, 2102(a) (2001).

[38] Energy Policy Act of 2003, H.R. 6, 108th Cong. § 30,101 (2003) (adding § 2603(a)(2) to the Energy Policy Act of 1992, 25 U.S.C. §§ 3501-3506 (1992)).

new pipeline—at the expense of other agencies whose missions include environmental protection. Rather than seeking efficiency through better cooperation and coordination, these proposals seek speed by reducing the number of people who are included in the decision. In addition to reducing the role of federal agencies, such as the Environmental Protection Agency (EPA) and the Fish and Wildlife Service (USFWS), the proposals limit the role of state and local governments. The process may be completed more quickly, but the result is certainly not better. Rather than promoting NEPA's goal of informed decisions, concentrating unilateral authority in a single agency undercuts it. Valuable expertise of sister agencies will be lost and controversy will increase as important voices are shut out of the process.

C. *Binding Determination of Purpose, Need, and Alternatives*

Several legislative proposals put forward during the summer of 2003 give the agency promoting a project unilateral authority to determine a project's purpose and need and to identify alternatives for consideration. House Bill 2557 (H.R. 2557), the Water Resources Development Act (WRDA) introduced by Representative Young (R-AK), covers a range of projects built or overseen by the United States Army Corps of Engineers (Corps) including dams and structures to control floods, erosion, and navigation. It provides that other federal, state, and local agencies, "shall be bound by the project purpose and need as defined by the Secretary [of the Army] and shall consider only those alternatives to the project that the Secretary has determined are reasonable."[39] In addition, legislation passed by the House of Representatives on June 11, 2003, reauthorizing the Federal Aviation Administration, contains similar language applicable to airport capacity enhancement projects.[40]

Language proposed by Senate Environment and Public Works Committee staff for inclusion in reauthorization of a transportation

[39] Water Resources Development Act of 2003, H.R. 2557, 108th Cong. § 2028(k)(2)(A) (2003). *See also id*. § 2028(j) ("[T]he Secretary shall define the purpose and need for the proposed water resources project, and determine which alternatives are reasonable and may be reasonably anticipated to meet project purposes and needs.").

[40] Flight 100—Century of Aviation Reauthorization Act, H.R. 2115, 108th Cong. § 204 (2003) (adding 49 U.S.C § 47171(g)-(h) (2003)).

funding bill, Senate Bill 1072, would have a similar effect.[41] Even though the section of the transportation bill addressing project alternatives has the heading "Collaborative Development," the language provides the opposite. The section states that "[t]he lead agency shall determine a range of reasonable alternatives to be considered for a project."[42] The section further directs that "[a]ny other agency acting under or applying Federal law with respect to the project shall consider only those alternatives as determined by the lead agency."[43]

The impact of this language can be understood by looking at the transportation context. The language dramatically increases the authority of the United States Department of Transportation (USDOT) at the expense of other federal, state, and local agencies. Currently, the FHWA (an agency within USDOT) has ultimate responsibility for the environmental analysis that accompanies *its* decisions. For example, in deciding whether to approve a new state highway near Salt Lake City that would connect to the interstate highway system, FHWA lawfully rejected concerns raised by other agencies regarding local land use impacts.[44] Courts

[41] G. Gugliotta, *GOP Senators' Draft States Leeway on Air Rules; Inclusion in Transportation Bill Is Proposed*, WASH. POST, June 20, 2003, at A8.

[42] Senate Environment and Public Works Majority Staff Draft, Transportation Equity Act-3, § 202(a) (adding 23 U.S.C. § 325(g)(1)) [hereinafter Senate TEA-3 draft] (on file with author). The bill provides that "the Department of Transportation, or if applicable a State transportation department that has assumed responsibilities of the Secretary, shall be the lead agency in the environmental review process for a highway or transit project." *Id*. § 202(a) (adding 23 U.S.C. § 325(b)(1)).

[43] *Compare id*. § 202(a) (adding 23 U.S.C. § 325(g)(3)), *with* 40 C.F.R. § 1501.5(a) (2003) ("A lead agency shall supervise the preparation of an [EIS] if more than one Federal agency either . . . proposes or is involved in the same action [or group of related actions.]"), *and* 40 C.F.R. § 1508.16 (The lead agency has "primary responsibility for preparing the environmental impact statement.").

[44] Utahns for Better Transp. v. United States Dep't of Transp., 305 F.3d 1152, 1174 (10th Cir. 2002) ("NEPA requires agencies preparing an EIS to consider and respond to the comments of other agencies, not to agree with them."). *See also* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991) ("[T]he FAA, not the EPA, bore the ultimate statutory responsibility for actually preparing the environmental impact statement, and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously."); Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,030 (Mar. 23, 1981) ("A lead agency, of course, has the ultimate responsibility for the content of an EIS."), http://ceq.eh.doe.gov/nepa/regs/40/40p3.htm.

have traditionally afforded FHWA tremendous deference in determining both purpose and need and alternatives to consider.[45]

FHWA, however, does not have authority now over the alternatives or data that another agency evaluates in making its decisions. For example, in addition to FHWA's approval, the Corps had to approve a permit to fill 114 acres of wetlands for the Salt Lake City highway project.[46] The CWA imposes specific substantive standards on the Corps' decision, prohibiting the Corps from issuing a permit to fill a wetland if there is a less damaging practicable alternative.[47] While the alternatives analysis required for FHWA's NEPA documents in most cases will provide the information for the evaluation of alternatives under the CWA, in some cases it may not. Under current law, the Corps has the responsibility to supplement NEPA documents with additional information.[48]

An agency does not have to issue a new EIS if one prepared by another agency satisfies the first agency's legal obligations.[49] In other words, this is the purpose of having cooperating agencies come up with a single environmental analysis that satisfies all the legal obligations of all the agencies involved. The problem with the proposed "binding alternative"[50] language is that it could eliminate the responsibilities of other agencies under other laws, like the CWA and the Endangered Species Act (ESA), rather than help them achieve those responsibilities more efficiently.

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[45] *See, e.g.*, City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999) (alternative analysis that only looked at options including twelve lanes for Wilson Bridge over Potomac River was adequate); Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686 (3rd Cir. 1999) (upholding selection of bridge alignment sending traffic through historic district); Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp., 153 F.3d 1122, 1130 (10th Cir. 1998) (FHWA lawfully rejected mass transit alternative when approving construction of highway interchange); City of Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1159 (9th Cir. 1997) (upholding alternatives analysis for realignment of Highway 1 along California coast).

[46] *Utahns for Better Transp.*, 305 F.3d at 1161.

[47] For information regarding the discharge restrictions, see 40 C.F.R. § 230.10(a).

[48] *Utahns for Better Transp.*, 305 F. 3d at 1163 (citing 40 C.F.R. § 230.10(a)(4)).

[49] *See, e.g.*, LaFlamme v. Fed. Energy Regulatory Comm'n, 945 F.2d 1124, 1130 (9th Cir. 1991) (stating that when lead agencies prepare environmental statements, there is no need for cooperating agencies to duplicate the work).

[50] Senate TEA-3 draft, *supra* note 42, § 202(a) (adding 23 U.S.C. § 325(g)(3)).

In addition, the proposed language ignores the fact that NEPA imposes no substantive standards, while other statutes do. For example, regulations governing wetlands permits under § 404 of the CWA require the Corps to evaluate several factors such as "fish and wildlife values," "water quality," "conservation" and "aesthetics" in determining whether a permit is in the public interest.[51] The Corps has an affirmative duty to avoid "unnecessary alteration or destruction" of wetlands.[52] Nothing requires USDOT to take these factors into consideration, and the proposed binding alternatives language could relieve the Corps of its existing obligation to do so.

The substantive standards for environmental protection under of the Department of Transportation Act could also be lost. Section 4(f) prohibits the use of parks, historic sites, recreation areas, and wildlife and waterfowl refuges for transportation projects unless no prudent and feasible alternative exists.[53] Language giving FHWA complete authority to determine the range of reasonable alternatives, especially combined with the phrase "notwithstanding other provisions of law," arguably overrides the substantive standard in 4(f) limiting the use of parks and other valuable uses.

Language giving FHWA authority to dictate purpose and need as well as alternatives also curtails the existing role of state and local governments. The language directly conflicts with the Federal-Aid Highway Act that "contemplates a relationship of cooperation between federal and local authorities."[54] In *North Buckhead Civic Association v. Skinner*, the court held that "NEPA does not confer the power or responsibility for long range local planning on federal or state agencies. An obvious and indeed central aspect of this relationship must be respect for the sovereignty of local authorities."[55] The CEQ regulations explicitly provide a role for state, tribal, and local governments in the NEPA

[51] For general policies regarding the evaluation of permit applications, see 33 C.F.R. § 320.4(a)(1) (2003).

[52] *Id*. § 320.4(b)(1).

[53] 49 U.S.C. § 303(c) (2000); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) ("This [Department of Transportation Act § 4f] language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted").

[54] N. Buckhead Civic Ass'n. v. Skinner, 903 F.2d 1533, 1541 (11th Cir. 1990).

[55] *Id*. at 1541-42.

process.[56] CEQ has also issued guidance promoting the involvement of state, tribal, and local governments in the NEPA process.[57] Yet, giving USDOT the unilateral authority to determine a project's purpose and need and the range of alternatives precludes any meaningful role for state and local governments if they happen to disagree with USDOT's position.

Finally, language providing that USDOT "shall determine a range of reasonable alternatives" could remove the role of the courts in evaluating whether USDOT considered an adequate range of alternatives. Under existing law, courts make their own independent judgment as to whether an agency considered a reasonable range of alternatives under NEPA. While the courts are quite deferential to an agency's determination of alternatives, they certainly have on occasion halted an agency's action for the failure to consider a particular alternative. For example, the Court of Appeals for the Tenth Circuit recently held that the FHWA unlawfully confined its analysis to one action alternative for a multi-highway project in Utah.[58]

Where new legislation includes the phrase "notwithstanding any other provisions of law," one could argue that the courts no longer have any role in evaluating alternatives or purpose and need. The language could trump both existing case law and the provision in the Administrative Procedure Act that provides the public the right to challenge agency action as arbitrary and

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[56] 40 C.F.R. § 1508.5 (2003) (providing that a state, tribal, or local government may become a cooperating agency).

[57] Memorandum from George T. Frampton, Jr., Acting Chair, CEQ, to the Heads of Federal Agencies 2 (July 28, 1999) ("Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act") [hereinafter Non-Federal Agency Memo], http://ceq.eh.doe.gov/nepa/regs/ceqcoop.pdf.

> [C]ooperating agency relationships with state, tribal and local agencies help to achieve the direction set forth in NEPA to work with other levels of government "to promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Id.

[58] Davis v. Mineta, 302 F.3d 1104, 1118-19 (10th Cir. 2002). *See also* Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 814 (9th Cir. 1999) (upholding challenge to land exchange for failure to consider a viable alternative); S. Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48, 53-54 (D.D.C. 2002) (blocking seismic oil and gas exploration project from moving forward for failure to consider adequate alternatives).

capricious.[59] FHWA could argue that the legislation incorporated Congress's mandate to USDOT to determine what is reasonable, leaving no role for the courts to second guess that determination.

D. *Single Environmental Record*

The impact of the "binding alternatives" language is made even worse by provisions providing for a single environmental record. H.R. 2557, the WRDA introduced by Representative Young (R-AK), provides that the "environmental impact statement and study report for a proposed water resources project" prepared by the Corps "shall form the record and basis" for all other environmental determinations, permits, licenses, or approvals.[60] This language clearly extends the Corps' authority into decisions being made by other agencies. For example, the proposed language could limit USFWS to using the Corps' environmental analysis in determining the impact of a project on endangered or threatened species. Not only does the Corps' lack the expertise of USFWS in protecting endangered species, but the Corps' primary interest as the project sponsor is getting the project built, rather than protecting the environment.

The proposed language could also limit the role of state and local governments. For example, under the CWA, states must certify that a federal action such as approving a dam project complies with state water quality standards.[61] The Corps' NEPA analysis may not necessarily include all the information needed to evaluate compliance with state water quality standards, yet section 2028(k)(1) of H.R. 2557 could preclude the state from collecting and analyzing the relevant information.[62]

Another provision in WRDA also undermines informed and

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[59] *See, e.g.*, Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 41 (1983) (confirming arbitrary and capricious standard).

[60] Water Resources Development Act of 2003, H.R. 2557, 108th Cong. § 2028(k)(1) (2003).

[61] 33 U.S.C. § 1341(a)(1) (2000).

[62] Some may argue that the language in § 2028(k)(1) that provides, "to the extent permitted by law," would prevent such a result. This may be true, but it is far from clear. *See* H.R. 2557 § 2028(k)(1). One could certainly argue that as a subsequent act of Congress, H.R. 2557 would trump any conflicting provisions in earlier statutes. In addition, some public participation at the state and local level is the result of policy and practice, rather than a legal mandate. Such practices would be precluded by H.R. 2557's language.

responsible government decision-making. Section 2028(h)(4) of H.R. 2557 provides that "[i]nformation submitted, after the record has closed, . . . shall not be considered significant new information for purposes of the study and NEPA process."[63] This means the Corps will shut its eyes to important new information that could dramatically alter the effectiveness of the project it is planning and that will use millions of public dollars to build.[64]

Language proposed in the Senate majority's transportation draft would have a similar effect. The proposal gives USDOT control of the "environmental review process for a highway or transit project."[65] The definition of "environmental review process" is not limited to NEPA documents such as an environmental assessment, finding of no significant impact, or environmental impact statement. It "includes the process for completion of any environmental permit, approval, review or study required for a project under any Federal law."[66] While there is certainly value in coordinating various environmental reviews, consolidating the review in the hands of USDOT is not the path to effective environmental review.

E. *Delegating Authority To States*

Another way in which some have proposed to change the NEPA process is to transfer all authority for environmental review to the states. The Senate majority TEA-3 draft allows a state transportation agency to sign an agreement with USDOT to take

[63] *Id*. § 2028(h)(4).

[64] *See also* Senate TEA-3 draft, *supra* note 42, § 202(a) (adding 23 U.S.C. § 325(h)) (providing that "[i]nformation about resources in the project area may be based on existing data sources."). This provision undercuts the existing obligations of agencies to collect new information when preparing EISs, especially when such information is needed to address potentially severe environmental impacts. *See* 40 C.F.R. § 1502.22(a) (2003); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1333 (S.D. Ala. 2002) (additional investigation needed to provide additional information about the effect of the loss of optimal habitat on the Alabama beach mouse); Kettle Range Conservation Group v. United States Forest Serv., 148 F. Supp. 2d 1107, 1129 (E.D. Wash. 2001) (failure to locate information on state and private logging projects that may affect impacts of proposed project by USFS violated NEPA). The language is blatantly inconsistent with NEPA's goal of ensuring that environmental impacts are taken into account. To further NEPA's purpose, ignorance should not be an excuse.

[65] Senate TEA-3 draft, *supra* note 42, § 202(a) (adding 23 U.S.C. § 325(b)(1)).

[66] *Id*. (adding 23 U.S.C. § 325(a)(3)(B)).

control of all environmental review responsibilities.[67] The proposal is not limited to responsibilities of USDOT, but could include other environmental review responsibilities that are now in the hands of EPA, the Corps, and USFWS.[68] A state DOT may compel such delegation through an agreement with the USDOT Secretary even if other state agencies oppose such delegation.[69] Major issues remain unresolved regarding a citizen's right to challenge state action in federal court. For example, it is unclear how a state DOT's agreement to waive sovereign immunity would be enforced.

Preserving a federal role in the environmental review of activities that involve federal lands and federal funds is essential to ensuring that these lands are used and the funds spent in a way that benefits us all. Early in the process of developing the House energy bill, the House Energy and Commerce Committee considered a provision that would allow a state to trump decisions by federal land managers regarding the siting of transmission facilities such as power lines on federal lands.[70] The federal government, not an individual state, is in the best position to manage these lands in the national interest. These lands have tremendous value for a variety of purposes. As initially drafted, the bill would have overridden federal protections that ensure a balancing of competing interests in deciding how to use the public's land and, most importantly, give the public a say in the decision.[71]

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[67] *Id*. § 203 (adding 23 U.S.C. § 327(c)). The Bush administration's transportation legislation contains a similar proposal. *See* Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, S. 1072, 108th Cong. § 1603 (2003). Delegation under the administration's bill is limited to activities that are classified as categorical exclusions. All review for these activities could be transferred to the states.

[68] *See* Senate TEA-3 draft, *supra* note 42, § 203(a) (adding 23 U.S.C. § 327(b)(2)).

[69] *See id*. § 203(a) (adding 23 U.S.C. § 327(c)(1)(b)).

[70] ROBERT L. BAMBERGER, ENERGY POLICY: THE CONTINUING DEBATE, (2003), http://www.ncseonline.org/nle/crsreports/03Apr/IB10116.pdf.

[71] *See id*. This provision was changed to provide that the Department of Energy (DOE) shall be the lead agency. *See* Energy Policy Act of 2003, H.R. 1644, 108th Cong. § 7012 (2003) (adding § 216(j)(1) to the Federal Power Act, 16 U.S.C. §§ 791-828 (2000). Other agencies are bound by the environmental review document prepared by DOE. *Id*. (adding § 216(j)(3)) ("The Secretary of Energy, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law."). DOE, of course, is

States, of course, deserve a significant role in shaping activities that occur within their boundaries. NEPA already provides for a major role for states. The statute, for example, allows a state to prepare the EIS required by NEPA as long as the responsible federal official participates in the preparation and independently evaluates it before approving it.[72] CEQ has explicitly encouraged the participation of state, tribal, and local governments in the NEPA process as cooperating agencies.[73] Opportunities certainly exist to better coordinate the environmental review process with the states, but the process should not simply be turned over to them.[74] This would be just as detrimental as closing the states out of the process altogether.[75]

F. *Imposing Mandatory Deadlines*

Current legislative proposals would also limit environmental review and public participation by superimposing mandatory deadlines onto the NEPA process. For example, the Senate majority draft for TEA-3 limits agency and public comment on draft and final environmental impact statements to "not more than 60 days."[76] In addition, the proposal limits public and agency comments on environmental review associated with all other

interested in expanding transmission capacity and does not have the statutory mandates to balance competing uses of the public lands that Congress has imposed on federal land managers such as the Bureau of Land Management.

[72] 42 U.S.C. § 4332(D) (2000). *See also* Lange v. Brinegar, 625 F.2d 812, 818 (9th Cir. 1980); Essex County Pres. Ass'n v. Campbell, 536 F.2d 956, 959 (1st Cir. 1976); Conservation Soc'y of S. Vt. v. Sec'y of Transp., 531 F.2d 637, 639 (2d Cir. 1976); Swain v. Brinegar, 542 F.2d 364, 367 (7th Cir. 1976); Nat'l Forest Pres. Group v. Volpe, 352 F. Supp. 123, 125 (D. Mont. 1972).

[73] *See* Non-Federal Agency Memo, *supra* note 57, at 2.

[74] For example in June 2002, the Western Governors Association and various federal agencies signed a Protocol to enhance the permitting process for electric transmission lines. PROTOCOL AMONG THE MEMBERS OF THE WESTERN GOVERNORS ALLIANCE, THE U.S. DEPARTMENT OF INTERIOR, THE U.S. DEPARTMENT OF AGRICULTURE, THE U.S. DEPARTMENT OF ENERGY, AND THE COUNCIL ON ENVIRONMETAL QUALITY GOVERNING THE SITING AND PERMITTING OF ELECTRIC TRANSMISSION LINES IN THE WESTERN UNITED STATES (2002), http://www.westgov.org/wieb/electric/Transmission%20Protocol/9-5wtp.pdf.

The purpose of the Protocol is "to establish a framework that will enable affected states, local governments, federal agencies, and tribal governments to participate in a systematic, coordinated, joint review process for siting and permitting of interstate transmission lines" in the West. *Id*. at 2.

[75] *See* discussion *supra* Part II.B.

[76] Senate TEA-3 draft, *supra* note 42, § 202(a) (adding 23 U.S.C. § 325(e)(2)(A)(i)).

decisions related to highway or transit projects to "not more than 30 days."[77] This is inconsistent with existing law. For example, under current law, federal agencies contemplating "major construction projects" have 180 days to prepare a biological assessment required by the ESA.[78] Where formal consultation with USFWS is required under § 7 of the ESA, the Act provides a ninety-day window for inter-agency communications.[79] USFWS has an additional forty-five days after the completion of formal consultation to deliver the biological opinion to the agency requesting it.[80] The Senate draft for TEA-3 would constrict the original 135-day window by more than half.

The transportation proposal could also affect existing requirements under the CWA. For example, the public has the opportunity to request a public hearing regarding the issuance of a dredge and fill wetlands permit under § 404 of the CWA.[81] Thirty days is simply not enough time for the Corps or the state responsible for issuing a § 404 permit to provide notice of public hearing, give the public time to prepare meaningful comments for the hearing, hold the hearing, evaluate the comments received and then provide comments to USDOT.

In addition, the CWA provides USFWS ninety days to comment on a proposed permit under § 404.[82] Furthermore, states now have sixty days to determine if a proposed § 404 permit will violate state water quality standards.[83] The thirty-day limit contained in the transportation proposal could preclude compliance with these existing CWA mandates.

Both the Bush administration and some members of Congress are seeking to accelerate energy development by shortening the time for environmental review and public participation. H.R. 6, for example, requires the Secretary of the Interior to mandate specific timeframes and deadlines for decisions on resource management plans, lease applications, drilling permit applications and surface use plans.[84] This provision and others, such as one

[77] *Id*. (adding 23 U.S.C. § 325(e)(2)(A)(ii)).
[78] 50 C.F.R. §§ 402.12(b)(1), .12(i) (2003).
[79] *See* 16 U.S.C. § 1536(b)(1)(A) (2000).
[80] 50 C.F.R. § 402.14(e).
[81] 33 C.F.R. § 327.4(b) (2003).
[82] 33 U.S.C. § 1344(m) (2000).
[83] 33 C.F.R. § 325.2(b)(1)(i).
[84] Energy Policy Act of 2003, H.R. 6, 108th Cong. § 30,207(b)(3) (2003).

requiring a thirty-day limit for processing surface use plans and drilling permit applications,[85] would leave little time for meaningful review and public participation as required by NEPA.

In addition, accelerating approvals of energy development projects has been a central piece of the Bush administration's National Energy Policy. One of the recommendations issued by the National Energy Policy Development Group (NEPDG) chaired by Vice President Cheney was "to examine land status and lease stipulation impediments to federal oil and gas leasing."[86] The Cheney Energy Task Force also recommended that the Secretaries of Commerce and Interior "re-examine the current federal legal and policy regime . . . to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf."[87]

Immediately following the release of the task force recommendations, President George W. Bush issued an executive order identifying actions to expedite energy-related projects.[88] The order established an Energy Project Streamlining Task Force to "monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy."[89]

In addition, on August 15, 2001, the Bureau of Land Management (BLM) issued a memorandum identifying over forty specific tasks necessary to implement the National Energy Policy that had been developed by the NEPDG.[90] These tasks included: identifying "ways to expedite the process of approving

[85] *Id*. § 30208(b)(2).

[86] NEPDG, NATIONAL ENERGY POLICY—RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE, 5-7 (2001), http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

[87] *Id*. at 5-8.

[88] Exec. Order No. 13,212, 3 C.F.R. 289 (2002), *reprinted as amended in* 42 U.S.C. 13,201 (Supp. 2003).

[89] *Id*. The Streamlining Task Force identified sixty-three specific projects to monitor and assist with expediting. *See* White House Task Force on Energy Project Streamlining, Comments (providing a list of these projects), *at* http://www.etf.energy.gov/htmls/comments.html (last visited Nov. 1, 2003).

[90] Memorandum from Assistant Director, Minerals, Realty and Resource Protection, BLM, to All State Directors, BLM INFO. BULL. 2001-138 (Aug. 15, 2001) [BLM NEPDG Memo], http://www.blm.gov/nhp/efoia/wo/fy01/ib2001-138.html; Memorandum from Director, BLM to All State Directors et al. 1 (Oct. 12, 2001), http://www.blm.gov/nhp/efoia/wo/fy02/im2002-011.html.

Applications for Permits to Drill,"[91] and "look[ing] for opportunities to improve and streamline the management of the NEPA process for all energy resource proposals."[92] In Utah, the BLM State Director issued a memorandum to all field offices mandating that approving applications for permits to drill should be "their No. 1 priority."[93]

All of these initiatives promote a single use of the public lands—energy development—at the expense of other valuable uses such as farming, ranching, and recreation. The government is spending public funds and managing public lands. The public should have a meaningful say in these decisions and know that the impacts of the decisions on their communities and the environment have been thoroughly analyzed. Rather than imposing fixed deadlines for comment and review, Congress should give the agencies the resources to get the review done promptly.

G. *Precluding Meaningful Judicial Review*

In addition to concentrating authority in the project's proponent and limiting the time for input by the public and other agencies, several legislative proposals also limit the time for judicial review. The Senate majority draft for TEA-3, for example, imposes a 120-day deadline on citizen groups to file suit challenging a decision related to a transportation project in federal court.[94] The problem with this deadline is that, often, the record of an agency decision is not available within this period of time. Citizen groups must be given adequate time to obtain and analyze the record that supports an agency decision in order to file a complaint challenging the decision. Citizen groups can rely on requests under the Freedom of Information Act to obtain the documents that provide the basis of an agency's decision, but this process may be time-consuming.

The forest bill, H.R. 1904, passed by the House of

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[91] BLM NEPDG Memo, *supra* note 90, Attachment, at 1-1 (Task 8).

[92] *Id*. Attachment, at 1-5 (Task 36).

[93] Oil and Gas Program Review Final Report 13, *attached to* Memorandum from Robert A. Bennett, Acting Utah State Director, BLM, to All Field Offices, BLM INFO. BULL. UT 2002-08 (Jan. 4, 2002) (report on file with author), http://www.blm.gov/nhp/efoia/ut/IBs%202002.htm. *See also* Terry Tempest Williams, *Chewing Up a Fragile Land*, N.Y. TIMES, Feb. 21, 2002, at A23.

[94] *See* Senate TEA-3 draft, *supra* note 42, § 202(a) (adding 23 U.S.C. § 325(i)).

Representatives on May 20, 2003, provides another example of new limits on judicial review—dramatically curtailing judicial oversight of certain logging projects in national forests. Any challenge in court of the types of hazardous fuels reduction projects identified in the bill must be filed within fifteen days of when USFS publishes the notice of its decision in a local paper.[95] This time limitation explicitly "supercedes any notice of intent to file suit requirement or filing deadline otherwise applicable to a challenge under any provision of law."[96] Not only does this provision limit a citizens' group from adequately preparing a case, but also may preclude certain types of claims. For example, to raise issues under the ESA, a citizen must first provide sixty days notice before filing suit.[97]

III
SUGGESTED IMPROVEMENTS: THE RIGHT PATH

Opportunities do exist to achieve NEPA's goals more efficiently and effectively. One critical need is to improve monitoring. Baseline data about current conditions are needed in order to be able to assess the potential impacts of a proposed action. In addition, monitoring is needed to assess the actual impacts that occur once a decision is implemented. The Bush administration should provide the commitment and resources to federal agencies to conduct monitoring. As CEQ previously recognized, monitoring is needed "to confirm [agency] predictions of impact, to ensure that mitigation measures are effective, and to adapt projects to account for unintended consequences."[98]

Improved monitoring will give agencies greater flexibility. Agencies will be able to make contingent decisions that respond to actual impacts if accurate monitoring is completed. Agencies can use mitigation to avoid significant environmental impacts from a project—and thus avoid preparing an EIS—if monitoring and enforcement occurs to ensure that the promised mitigation actually happens. The NEPA process should not end with the completion

[95] Healthy Forest Restoration Act of 2003, H.R. 1904, 108th Cong. § 106(a) (2003).

[96] *Id*.

[97] 16 U.S.C. § 1540(g)(2)(a)(i) (2000).

[98] CEQ EFFECTIVENESS STUDY, *supra* note 5, at 31.

of an EA or an EIS. Agency resources should be spent on evaluating actual outcomes and adapting mitigation and project implementation to actual impacts that occur—rather than simply documenting decisions.

Energy companies seeking to use public lands to drill for oil and gas or to construct a gas pipeline can help provide resources for monitoring. The cost of monitoring should be incorporated into the cost of doing business on the public's lands. Such cost incorporation has in fact already occurred in at least one case; recently, BLM required significant monitoring and maintenance following construction of a gas pipeline across public lands in California, Nevada, Utah, and Wyoming.[99] The monitoring is designed to assess the effectiveness of erosion-control structures, regeneration of desirable vegetation, as well as to identify disturbances that may hinder reclamation success such as excessive grazing or authorized off-road vehicle use.[100] Failure to comply with the monitoring and maintenance plan is grounds for an immediate temporary suspension of activities if it constitutes a threat to public health and safety of the environment.[101] Pursuant to BLM's cost recovery regulations for rights-of-way, the monitoring is conducted by third-party contractors working for BLM but paid by the pipeline company.[102]

Unfortunately, at times BLM has argued that NEPA does not require monitoring. In litigation challenging the use of large thumper trucks to conduct seismic testing for oil and gas outside Utah's Arches National Park, BLM ignored evidence that the seismic company had violated conditions of the project approval that prohibited tire chains and activity under wet conditions. BLM argued that it had no duty to ensure that the seismic company complied with the mitigation measures identified in the NEPA process.[103] Although it did not address the mitigation issue directly, the court remanded the project to BLM for failure to

[99] KERN RIVER GAS TRANSMISSION CO., TIMBERLINE PIPELINE PROJECT PLAN OF DEVELOPMENT (POD) secs. 5.3.12.1, 5.3.12.4, at 5-15 to 5-16, 5-17 to 5-18 (2000), http://www.qwk-eis.org/Documents/Williams.kern.POD.1.19.00.pdf.

[100] *Id*.

[101] Kern River Gas Transmission Co., Docket No. CP01-422-000, Order Denying Rehearing and Issuing Certificate, 100 F.E.R.C. ¶ 61,056, app. A (July 29, 2002), http://2003expansion.kernrivergas.com.

[102] *See* 43 C.F.R. § 2808.4(a) (2003).

[103] *See* S. Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48 (D.D.C. 2002).

conduct adequate environmental analysis.

BLM would better serve both taxpayers and the environment if the agency expanded its cost recovery efforts for monitoring to oil and gas leases. BLM is the steward of these lands and has a responsibility to ensure that the measures it identifies to mitigate the damage of a project the agency approves are actually implemented. Especially where BLM relies on mitigation measures to avoid significant environmental impacts and thus the preparation of an EIS, the agency has a legal obligation to ensure that mitigation occurs.[104] Incorporating the cost of monitoring into the cost of doing business on public lands can help provide the resources necessary to ensure that monitoring actually occurs.

CONCLUSION

NEPA has improved government decision-making and improved the lives of Americans for the past thirty years. Unfortunately, some in Congress and the Bush administration seem to have lost sight of those goals. What NEPA set out to achieve is still worth striving for—now more than ever. As mandated by NEPA, federal agency decisionmakers should be working to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" and to "assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings."[105] Improved technology should make it easier now to get more data and more public input to inform government decisions. As NEPA prescribes, government officials should be striving not simply to speed decisions up, but to make better decisions.

[104] Karkkainen, *supra* note 9, at 909-10.

[105] 42 U.S.C. § 4331(b)(1)-(2) (2000).