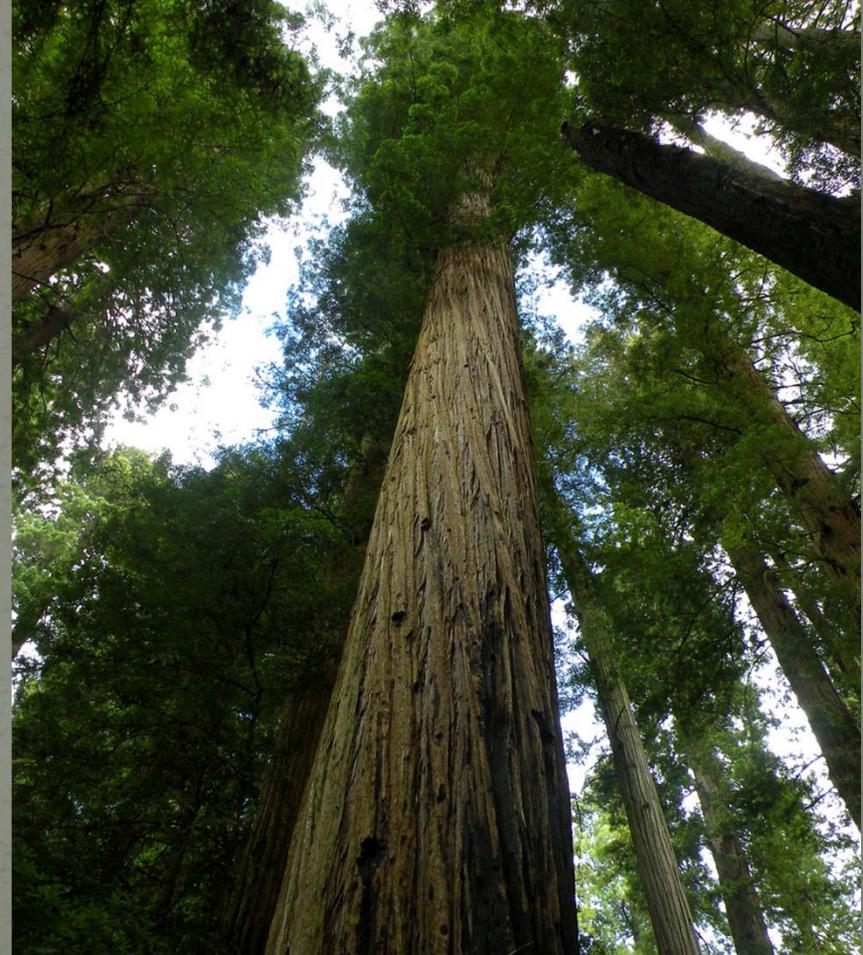


Legislating NEPA Away

NEPA Workshop
Riverside, California
October 3, 2013

The Problem

- “Any fool can destroy trees. They cannot run away; and if they could, they would still be destroyed,—chased and hunted down as long as fun or a dollar could be got out of their bark hides, branching horns, or magnificent bole backbones. Few that fell trees plant them; nor would planting avail much towards getting back anything like the noble primeval forests. **During a man's life only saplings can be grown, in the place of the old trees—tens of centuries old—that have been destroyed. It took more than three thousand years to make some of the trees in these Western woods,**—trees that are still standing in perfect strength and beauty, waving and singing in the mighty forests of the Sierra. Through all the wonderful, eventful centuries since Christ's time—and long before that—**God has cared for these trees, saved them from drought, disease, avalanches, and a thousand straining, leveling tempests and floods; but he cannot save them from fools,—only Uncle Sam can do that.**”
 - John Muir, “The American Forests,” The Atlantic, 1897.



A Solution

- **“The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment,** particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, **declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures,** including financial and technical assistance, in a manner calculated to foster and 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...**The Congress recognizes that each person should enjoy a healthful environment and that **each person has a responsibility to contribute to the preservation and enhancement of the environment.**”

- Then National Environmental Policy Act of 1969

Legislation in the 112th & 113th Congress

- In the last three years, over 90 pieces of legislation have been introduced aimed at weakening, waiving, or undermining NEPA
- Project-specific exemptions and modifications to NEPA are the primary means by which the law is undermined

NEPA: Under Siege

What is the Ultimate Goal of all of this Legislation?

NEPA: Losing a Say

What is the Ultimate Goal of this Legislation?

- “Recission of NEPA is the main goal.”

- The Heritage Foundation, “Eight Principles of the American Conservation Ethic,” Diane Katz and Craig Manson, July, 2012 (est.), available at: <http://www.heritage.org/research/projects/environmental-conservation>

NEPA: Under Siege

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 - The Heritage Foundation, “Eight Principles of the American Conservation Ethic,” Diane Katz and Craig Manson, July, 2012 (est.), available at: <http://www.heritage.org/research/projects/environmental-conservation>
- “Lawmakers should narrow the scope of the National Environmental Policy Act (NEPA) review process and remove the analysis of greenhouse gas emissions as a requirement, with the ultimate goal of rescinding NEPA.”

-Seven Costly Sins of the Water Resources Development Act of 2013, Emily Goff, Heritage Foundation, May 2013, Available at: <http://www.heritage.org/research/reports/2013/05/7-problems-of-the-water-resources-development-act-of-2013>

NEPA: Under Siege – Death by 1000 Cuts

“The following steps can pave the way to recission...”

- Narrow NEPA Reviews
- Mandate time limits
- Limit Alternatives
- Eliminate GHG Determinations

The Heritage Foundation, “Eight Principles of the American Conservation Ethic,” Diane Katz and Craig Manson, July, 2012 (est.), available at: <http://www.heritage.org/research/projects/environmental-conservation>

NEPA Under Siege - MAP-21

- Legislative CEs for:
 - Projects within a ROW
 - Projects with under \$5 million in federal funding or under \$30 million with less than a 15% federal share
- Dispute Resolution/Elevation Process
- Financial Penalties on Agencies – penalties of up to \$20K/week
- Time Limits – environmental reviews must be completed within 4 years
- Delegation to States – pilot program made permanent
- Judicial Review Limits – complaints must be filed within 150 days

NEPA: Under Siege

- **The recent highway bill** reforming the federal highway program included some key reforms. It will shorten the project approval process, eliminate unnecessary programs, and give States more flexibility to address their particular needs. . . **It should be followed by reform of the 42-year old National Environmental Policy Act to create regulatory certainty for infrastructure projects, expedite their timetables, and limit litigation against them.**
- – From GOP Platform, “We Believe in America,” Fall 2012, available at: http://www.gop.com/2012-republican-platform_restoring/

Typical Ways NEPA is Legislatively Waived or Limited

- 1. Complete Non-Qualification – circumvents threshold language
 - “X shall not be considered a ‘major federal action’
- 2. Limits Consideration of Alternatives– limits the scope of environmental review by limiting alternatives
 - “Only the proposed action and the no-build alternative need be evaluated.”
- 3. Limited Time – Congress limits the time to comply with NEPA requirements with default approvals in cases of delay
 - “All environmental reviews for X must be completed within 180 days.”
- 4. Limit Public Participation – Congress limits the amount of time the public has to submit comments on a proposed action
- 5. Legislative Categorical Exclusions
 - “X is categorically excluded from the requirements to prepare and EA or EIS”
- 6. Elimination or Limitation of Judicial Review
 - Numerous ways: limitation of time to file complaint, limiting scope of judicial review, preventing injunctions, preventing recovery of attorney fees under EAJA, or completely eliminating judicial review.

Key Challenges in Defending NEPA

1. Lack of understanding and difficulty in putting to rest common myths about NEPA
2. Branding NEPA & Telling NEPA Success Stories
3. Broadening Coalition
4. Messaging
5. Attacks are now bipartisan

NEPA: Under Siege

Water Resource Development Act of 2013 (S. 601)

- Dispute Resolution/Elevation Process
- Financial Penalties on Agencies
- Time Limits
- Delegation

NEPA Myths

1. NEPA is the primary cause of project delay
2. NEPA is simply a tool for unnecessary litigation
3. NEPA is in need of statutory reform
4. NEPA is simply bureaucratic “red tape” leading to project delay

NEPA FACTS

- NEPA is NOT the Problem

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 - Changes in project funding/lack of funding
 - Local/State agency priorities
 - Project Complexity

Source: “The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress,” Linda Luther, Congressional Research Service, April 11, 2012.

NEPA Facts

NEPA Rarely Leads to Litigation

NEPA Facts

NEPA Rarely Leads to Litigation

0.2%

Source: http://ceq.hss.doe.gov/legal_corner/litigation

NEPA Facts

The vast majority of proposals in these legislative attacks can already be addressed through existing flexibilities within the law

H.R. 4383 – Streamlining Permitting of American Energy Act of 2012

- Introduced by Representative Lamborn (R-CO) on April 18, 2012, and co-sponsored by Representatives Coffman and Tipton, the bill aims at “streamlining application for permits to drill and increase the funding for energy project permitting.
- Time Limits - The bill creates a strong presumption of approval for permits by requiring permitting decisions within 30 days with default approvals in cases of delay.
- Environmental Review - It also disallows the consideration of extraordinary circumstances for CEs under the Energy Policy Act.
- Public Input - Incredibly, the bill also penalizes public participation by instituting a \$5,000 “documentation fee” for all protests of leases, rights of way, or Applications to Drill.
- Judicial review: Limits venue, the filing period, the standard of review, injunctive relief, and eliminates attorney fees under the Equal Access to Justice Act.

NEPA Success Stories

- Need More Stories Documenting NEPA Success
- Stories that resonate beyond the environmental community

What You & Your Organization Can Do

1. Brand NEPA
2. Advocacy & Accountability
3. Document Success Stories
4. Stay in Touch!