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Comment
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NEPA EXPRESS: A NEED FOR SUSTAINABLE STREAMLINING FOR TRANSPORTATION PROJECTS WITHOUT UNDERMINING ENVIRONMENTAL REVIEW

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Introduction

With the U.S. House of Representatives' transportation bill, the American Energy and Infrastructure Jobs Act of 2012 ("H.R. 7"), stalled on the floor, House Republicans have backed away from some of the bill's more controversial proposals.¹ Among its more well-known provisions, the bill sought to cut federal mass-transit spending and federal spending for bike and pedestrian projects.² Additional provisions sought to streamline environmental review. While the \$260 billion bill undergoes a rewrite to reattach mass transit funding, the new bill would still include such environmental streamlining.³

Recent Streamlining for Federal Transportation Legislation

The streamlining of environmental review in Representative John Mica's original bill, as reported on the House floor, refers to the National Environmental Policy Act of 1969 (NEPA). This Act establishes a national framework for environmental protection by requiring the federal government to "encourage productive and enjoyable harmony between man and his environment."⁴ It applies to "major federal actions significantly affecting the environment."⁵ While NEPA does not require the federal government to select the most environmentally friendly option, it entails procedural processes ("the NEPA Process") that consider environmental impacts and alternatives.⁶ These procedures include: categorical exclusion for when detailed analysis is not required; an environmental assessment (EA) from which a finding of no significant impact (FONSI) indicates no significant environmental damage; and an environmental impact statement if the project would have significant environmental consequences.⁷

NEPA streamlining is nothing new in transportation legislation.⁸ The Act stands as a procedural roadblock for substantial federally funded projects, and delays planning and implementation in the name of environmental protection. What separates H.R. 7 from previous long-term transportation bills is the extent to which it undermines the environmental review process. Prior environmental streamlining provisions in transportation bills have targeted specific areas. A 2007 Congressional Research Service (CRS) report identified common elements of environmental streamlining legislation. These included codifying existing regulations, delineating lead agency authority, specifying categorically excluded projects, and limiting judicial review.⁹

For example, section 6002 of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005: A Legacy for

Users (“SAFETEA-LU”) designates a lead agency for surface transportation projects, limits judicial review of final agency actions, authorizes funding to speed up the review process, and authorizes state-level programs to assume federal responsibilities for compliance with environmental laws.¹⁰ While SAFETEA-LU does include a relatively short, 180-day limitation on judicial review, much of its environmental streamlining targets efficiency throughout the environmental review process and delegates some authority to the states to encourage agency coordination and effectiveness.¹¹

The environmental review streamlining under H.R. 7 would undermine NEPA further than under SAFETEA-LU. House Speaker John Boehner reported that H.R. 7 would “lower government barriers to responsible production of American-made energy and use the revenues to repair and improve America’s transportation infrastructure.”¹² These barriers include NEPA review for transportation projects. The Speaker’s website declares that the bill “speeds up bureaucratic approvals--the real hurdles delaying improvements to highways, bridges, and other projects.” He refers to “concurrent review,” which like under SAFETEA-LU, aims to encourage coordination between agencies to integrate planning and environmental review.¹³ For example, section 3011 refers to integration of planning and environmental review, with the intent of allowing planning decisions to be made alongside the environmental review process.¹⁴ While such efficiencies could allow for more coordination and faster planning for major transportation projects, other provisions significantly undermine the integrity of the NEPA Process.

First, section 3008 establishes a funding threshold for environmental review. Under this section, projects “shall not be considered Federal action for the purposes of ... [NEPA] if such funds ... (a) constitute 15 percent or less of the total estimated project costs; or (b) are less than \$10,000,000.”¹⁵ Putting a cap on NEPA review based on funding does not consider inexpensive projects that could cause significant harm to the environment. While \$10,000,000 may not represent considerable funding for transportation projects, such actions should not be automatically exempt from NEPA review purely based on cost.

Second, section 3009 would halve SAFETEA-LU’s 180-day judicial review time limit, already reduced from the original six years.¹⁶ H.R. 7 would limit judicial review to 90 days “after the date of publication in the Federal Register announcing such action.”¹⁷ While it could be assumed that parties interested in judicial review would be aware of Federal Register notice and prepared to file for review, 90 days is short to prepare litigation.¹⁸

Third, H.R. 7 would limit the NEPA Process to 270 days. If this deadline is not met, “the project shall be considered to have no significant impact to the human environment for the purposes of [NEPA]; and ... that classification shall be considered to be a final agency action.”¹⁹ Therefore, projects that extend beyond the 270-day deadline will be automatically approved. The issue here is that NEPA review can be extended for a variety of reasons. A 2007 report cited the difficulties in determining the “degree to which the NEPA process itself is the source of delays.”²⁰ One reason for this is that projects may be delayed while in the NEPA stage for other reasons unrelated to environmental review, such as funding issues.²¹ Deron Lovaas for the National Resource Defense Council argued in a February 11, 2012, article that “there is no evidence that environmental reviews are the cause of most project delays.”²² He added that only 4 percent of transportation projects require the most-extensive review, and the majority of undertakings are categorically excluded.²³ Therefore, a small number of remaining projects would be subject to the 270-day provision. These projects would be those determined to require the highest level of environmental review, because they are likely to have significant environmental impact. Thus, it would make sense for these projects to be allowed time for adequate environmental review and not defaulted after a prescribed deadline.

Lastly, section 3017 would extend categorical exclusions and eliminate NEPA review for any “project within a right-of-way.”²⁴ House Democrats raised concerns about this extension, suggesting that such a provision would apply to “any extension of a rail line ... or the replacement of any railroad-related facilities.”²⁵ The report adds that “a community may have a two-lane road today, but own enough right-of-way to support an eight-lane superhighway.”²⁶ As proposed, section 3017 would allow agencies to make such right-of-way expansions without environmental review, regardless of the extent of environmental impact.

Sufficient Environmental Review Can Also be Efficient

NEPA streamlining does not have to undermine the environmental protections afforded to citizens and other concerned stakeholders. In a recovering economy, it is understandable that the federal government would want to accelerate transportation agency output to create infrastructure jobs. But the House must consider the effects of environmental

streamlining. Efficient environmental review can exist without default rules that would automatically approve federal action regardless of environmental impact. These are the very projects that could, and likely would, have significant environmental impacts, and therefore should receive thorough review.

Instead, the federal government should continue on the path established by state delegation under SAFETEA-LU. In a letter responding to H.R. 7, Oregon Governor John Kitzhaber argued that his state “has proven that regulatory streamlining can deliver transportation projects more quickly and at a reduced cost while improving environmental outcomes.”²⁷ Here, he is referring to his state’s Collaborative Environmental and Transportation Agreement for Streamlining (CETAS). Established in 2001, the agreement coordinated both state and federal agencies in Oregon to encourage procedural improvements regarding environmental review.²⁸ Among others, CETAS cites recent multi-agency accomplishments in the realms of habitat conservation, storm-water management, and linking planning and the environmental process.²⁹ According to CETAS, these accomplishments are due to multi-agency coordination in order to encourage the “efficient use of each agency’s limited resources.”³⁰

Now given the opportunity to rewrite H.R. 7, Congressman John Mica’s Committee on Transportation and Infrastructure should look to more-sustainable options for streamlining NEPA in any long-term transportation legislation. Encouraging agency coordination would create a long-term solution for efficient environmental review, and ultimately speed up transportation projects. The current proposals in H.R. 7 do not appropriately address the environmental-review timeline, and stand to do more harm than good by ignoring the reasons behind a prolonged NEPA process. Congressman Mica should take this time to learn from Oregon’s example, because efficient and sustainable NEPA streamlining is possible without undermining environmental protections.

Footnotes

¹ Burgess Everett, Republicans to Redo House Transportation Bill, Politico (Feb. 23, 2012, 5:06 PM), www.politico.com/news/stories/0212/73230.html.

² Id.

³ Id.

⁴ National Environmental Policy Act of 1969 § 2, 42 U.S.C. § 4321 (2006).

⁵ National Environmental Policy Act (NEPA), U.S. Env’tl. Prot. Agency, www.epa.gov/compliance/basics/nepa.html (last visited Mar. 18, 2012).

⁶ Linda G. Luther, Cong. Research Serv., RL 32032, Streamlining Environmental Reviews of Highway and Transit Projects: Analysis of Legislative Proposals During the 108th Congress 4 (2007).

⁷ NEPA, supra note 5.

⁸ Luther, supra note 6, at 11.

⁹ Id.

¹⁰ Id. at 17.

¹¹ Id.

12 American Energy & Infrastructure Jobs Act American Energy & Infrastructure Jobs Act, Speaker of the House John Boehner, [http:// www.speaker.gov/energy](http://www.speaker.gov/energy) (last visited Mar. 1, 2012).

13 Id.

14 H.R. 7, 112th Cong. § 3009 (2012).

15 Id. at § 3008.

16 Deron Lovaas, Demolishing Public Participation and Environmental Reviews: The Six Worst Ideas in H.R. 7, Natural Res. Def. Council Staff Blog (Feb. 11, 2012), http://switchboard.nrdc.org/blogs/dlovaas/demolishing_public_participation.html.

17 Id. at § 3009.

18 H.R. Rep. No. 112-397, Dissenting Views, at 965 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt397/pdf/CRPT-112hrpt397.pdf>.

19 H.R. 7, supra note 14 at § 3018.

20 Luther, supra note 6, at 8.

21 Id.

22 Lovaas, supra note 16.

23 Id.; see also H.R. Rep. No. 112-397, supra note 18, at 962.

24 H.R. 7, supra note 14, at § 3017.

25 H.R. Rep. No. 112-397, supra note 18, at 965.

26 Id.

27 Letter from Oregon Governor John A. Kitzhaber to U.S. Rep. Earl Blumenauer (Feb. 15, 2012), available at <http://t4america.org/wp-content/uploads/2012/02/OR-Gov-letter-re-HR7.pdf>.

28 Ore. Dep't of Transp., Oregon's Collaborative Environmental and Transportation Agreement for Streamlining (CETAS) 3 (June 16, 2005), available at http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/CETAS_Booklet.pdf.

29 Ore. Dep't of Transp., Amended Progress Report -- August 2008 to August 2009; Amended Work Plan -- September 2008 to September 2010 1-2 (Sept. 18, 2008), available at [ftp://ftp.odot.state.or.us/techserv/Geo-Environmental/Environmental/Other %20Enviromental%20Materials/CETAS/Annual% 20Reports %20and%20Work %20Plans/2008_2010_Workplan/CETAS_2008-2010_Work_Plan_12-29-09_FINAL.doc](ftp://ftp.odot.state.or.us/techserv/Geo-Environmental/Environmental/Other%20Enviromental%20Materials/CETAS/Annual%20Reports%20and%20Work%20Plans/2008_2010_Workplan/CETAS_2008-2010_Work_Plan_12-29-09_FINAL.doc).

³⁰ CETAS, *supra* note 28, at 3.