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“WORST CASE” ANALYSIS: A STUDY IN RECKLESS, WASTEFUL CONJECTURE

*Senator Alan K. Simpson**

INTRODUCTION

We will shortly be observing the twentieth anniversary of this nation's first environmental statute—the National Environmental Policy Act of 1970 (NEPA).¹ The passage of NEPA encouraged the public to participate in environmental decisionmaking; it heightened environmental awareness on the part of federal planners and decisionmakers; and it increased environmental litigation. Interestingly enough, NEPA requires federal agencies to assess and explain the environmental consequences of their proposed actions, but it does not require that federal agencies choose an environmentally correct course of action. As the Supreme Court recently noted, “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”²

Various courts, however, while paying lip service to this notion, have confused the statutory requirements of NEPA with their own views of environmental protection. Some courts, for example, used the “worst case” requirement in the NEPA regulations to conclude that federal agencies had not complied with the procedural requirements of NEPA and thus remanded the issue back to the agencies for further review. Such holdings required agencies to engage in rather absurd and time-consuming speculation which did nothing to further environmental analysis or decisionmaking.

In this article, I will attempt to briefly outline the purposes and goals of NEPA and the regulations, including the “worst case” require-

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1. 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

2. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989) (footnote omitted).

ment, and the use and misuse by litigants and courts of that requirement. This misuse ultimately resulted in the decision to amend the regulation, given the confusion and wild speculation it engendered.

BACKGROUND

NEPA declares that:

[I]t is the continuing policy of the Federal Government . . . 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.³

To implement this promise of a national concern for the environment, NEPA "also establishes some important 'action-forcing' procedures."⁴ Specifically, section 102(2)(C) requires all federal agencies to:

[I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses and man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible commitments of resources which would be involved in the proposed action should it be implemented.⁵

The "detailed statement" required in Section 102(2)(C) has evolved into what is now generally referred to as the environmental impact statement (EIS) process.

In addition to proclaiming a national environmental policy and creating an action-forcing mechanism to further that policy, NEPA established the Council on Environmental Quality (CEQ).⁶ The Council is a three-member body within the Executive Office of the President which not only serves as the White House advisor on environmental matters, but also acts as the overseer of NEPA implementation by the federal agencies.⁷

3. 42 U.S.C. § 4331(a) (1982).

4. 115 Cong. Rec. 40,416 (remarks by Senator Jackson).

5. 42 U.S.C. § 4332(c) (1982).

6. *Id.* § 4342.

7. *Id.* §§ 4342, 4344.

Pursuant to an Executive Order⁸ and in order to provide insight to the federal agencies as to what NEPA expected of them, CEQ issued guidelines in 1970⁹ and revised guidelines in 1973.¹⁰ These CEQ guidelines, however, were just that—guidelines. Although CEQ considered them to be “nondiscretionary,” some federal agencies considered the guidelines to be only advisory in nature.¹¹ Courts also differed in their interpretation of the weight to be given to them in determining NEPA compliance.¹²

Consequently, compliance with the important and valuable goals of NEPA was haphazard, inconsistent, and frequently nonexistent. As CEQ noted,

The lack of a uniform, government-wide approach to implementing NEPA has impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process. It has also caused unnecessary duplication, delay and paperwork.¹³

Thus, in 1977, in a climate of environmental activism, President Carter issued an Executive Order which authorized CEQ to issue regulations to implement the procedural provisions of NEPA.¹⁴ These regulations were to be binding on all federal agencies.¹⁵

After a thorough rulemaking process in which business, labor, state and local governments, and environmental groups were consulted during a lengthy public comment process, CEQ issued its NEPA regulations in 1978.¹⁶ The regulations have worked reasonably well,¹⁷ and have been amended only once in the almost 12 years since they were promulgated.

8. Exec. Order No. 11,514, 3 C.F.R. § 795 (1970).

9. 35 Fed. Reg. 7,391 (1970) (Interim Guidelines); 36 Fed. Reg. 7,724 (1971) (Guidelines).

10. 38 Fed. Reg. 20,550 (1973) (codified at 40 C.F.R. §§ 1500-1517 (1988)).

11. 43 Fed. Reg. 55,978 (1978).

12. *Id.*

13. *Id.*

14. Exec. Order No. 11,991 (May 24, 1977), 3 C.F.R. 123 (1978). The Executive Order was based upon the President's constitutional authority to insure the faithful execution of the laws, U.S. CONST., art. II, § 3, and the statutory authority of NEPA, the Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4375 (1982 & Supp. V 1987), and section 309 of the Clean Water Act.

15. Some independent regulatory agencies including the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission have argued that, because of their independent status, the Executive Order does not apply to them and thus that the CEQ NEPA regulations are not binding on them. CEQ strongly disagrees with this position. Courts have also made it clear that the CEQ regulations are binding on all federal agencies, including independent regulatory agencies. *See, e.g., The Steamboatmen v. Federal Energy Regulatory Comm'n.*, 759 F.2d 1382, 1392-93, 1393 n.4 (9th Cir. 1985). Legislation is currently pending in Congress which would give CEQ statutory authority for its regulations implementing the procedural provisions of NEPA. *See, e.g., H.R. 1113 and S. 1089 101st Cong., 1st Sess. (1989).*

16. 43 Fed. Reg. 55,980 (1978).

17. Since 1978, CEQ has reviewed its regulations several times, and has asked for public comment on their efficacy. As a result of such reviews, the Council has periodically issued guidance regarding the implementation of its regulations. *See* Forty

THE "WORST CASE" ANALYSIS REQUIREMENT

This one very significant amendment concerned the regulation dealing with incomplete and unavailable information.¹⁸ As originally written, section 1502.22 required an agency to make it clear when there were gaps in relevant information or if scientific uncertainty existed. If the costs of obtaining such incomplete or unavailable information were not exorbitant, then the agency was required to obtain it. If the costs of obtaining the information were too high or if the information simply could not be obtained, then the agency was required to "weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty."¹⁹ If the agency did decide to proceed with the action, then it was required to include in its EIS for the project a "worst case analysis and an indication of the probability or improbability of its occurrence."²⁰ All of this was to be done because of a lack of information, and thus could not possibly be based on anything but conjecture.

APPLYING THE WORST CASE TO THE EIS PROCESS

In stark contrast to other CEQ regulations, the requirement to prepare a "worst case" analysis in the face of incomplete or unavailable information led to ridiculous, speculative, time-consuming, and wasteful "analysis" of the most dubious value. The worst case analysis requirement simply did not meet the goal of the CEQ regulations; in other words, the imposition of some order and rationality into NEPA compliance.

Indeed, interest groups and regulatory zealots sought to use the unavailability of information to twist the logic of the original NEPA law in order to require worst case scenarios that were unlikely to exist in the real world. Many saw the worst case requirement as a window of opportunity to place requirements in the EIS process that would seriously hinder the regulatory approval of certain projects or bring about cries of public outrage when the worst case was revealed. Not only did the worst case analysis requirement run counter to the original purpose of NEPA, but it also corrupted the NEPA process because it required "guesswork" that would inflame the fears of the American public, and place pressure on federal regulators to deny permits for projects where a worst case scenario was developed.

For example, an environmental group in Oregon was able to halt virtually all spraying of herbicides on public lands in Oregon by claim-

Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981), and Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (1983). In addition, the President's Regulatory Relief Task Force, chaired by then Vice President Bush, reviewed the CEQ regulations in 1981 and concluded that they were not in need of amendment.

18. 40 C.F.R. § 1502.22 (1988).

19. 40 C.F.R. § 1502.22(b) (1985).

20. *Id.*

ing that the environmental documentation prepared pursuant to NEPA must contain a "worst case" analysis.²¹ The environmental group, and the court which heard the case, agreed that adverse health effects were neither likely nor probable, yet insisted that the federal agencies speculate as to what could happen if, in fact, the herbicides did cause health effects.²² This situation was made even more ludicrous by the fact that the Environmental Protection Agency, under the auspices of the Federal Insecticide, Fungicide, and Rodenticide Act, had already approved the herbicides for use!²³

INTRODUCING RATIONALITY BY ELIMINATING "WORST CASE"

In 1984, CEQ received a petition seeking a change in the worst case requirement.²⁴ As a result of this petition and comments from others, the Council eventually issued an Advance Notice of Proposed Rulemaking on the worst case requirement and indicated that it was considering amending the regulation.²⁵

Over 150 comments were received in response to the notice, a majority of which cited problems with the worst case analysis requirement.²⁶ Consequently, the Council voted to amend the regulation, and published a proposed amendment to section 1502.22.²⁷ After a further comment period during which over 180 comments were received,²⁸ a final rule was promulgated in April, 1986 and became effective on May 27, 1986.²⁹

The new section 1502.22 retains the requirements of disclosing the existence of incomplete or unavailable information, obtaining the information if it is reasonable to do so, and assessing the reasonably foreseeable significant adverse environmental impacts even in the absence of all relevant information. As CEQ noted in its preamble to the final regulation, "[t]hese goals are based on sound public policy and early NEPA case law."³⁰

21. *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1477 (9th Cir. 1983) (SOCATS); *see also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1242 (9th Cir. 1984) (SOS).

22. *SOCATS*, 720 F.2d at 1479; *SOS*, 747 F.2d at 1244.

23. *SOCATS*, 720 F.2d at 1479-80; *SOS*, 747 F.2d at 1248.

24. Petition to the Honorable A. Alan Hill, Chairman, Council on Environmental Quality, Executive Office of the President, to Amend 40 C.F.R. Section 1502.22 (1983), to Reestablish a Sound Rule of Reason Governing Worst Case Analysis in Environmental Decision Making Mandated by National Environmental Policy Act section 102(2)(C)(ii), 42 U.S.C. § 4332(2)(C)(ii) (1984). The Council also received requests from government agencies and private parties to review and amend Section 1502.22 51. Fed. Reg. 15,618, 15,619 (1986) (final rule).

25. 49 Fed. Reg. 50,744 (1984).

26. 50 Fed. Reg. 32,234, 32,236 (1985).

27. *Id.* at 32,238.

28. 51 Fed. Reg. 15,620 (1986).

29. *Id.* at 15,625-26.

30. 51 Fed. Reg. 15,620 (citing *Scientists' Institute for Pub. Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973)).

Amended section 1502.22, however, differs in two important ways from the original regulation. First, it eliminates the requirement for agencies to “‘weigh the need for action against the risk and severity of . . . [proceeding] in the face of uncertainty.’”³¹ The Council stated that its reason for this change was “‘that the weighing of risks and benefits for the particular federal proposal at hand is properly done after completion of the entire NEPA process, and is reflected in the Record of Decision.’”³²

Second, and more importantly, the amended regulation eliminates the worst case analysis requirement. Rather than requiring federal agencies to engage in “‘endless hypothesis and speculation,’”³³ the new section 1502.22 requires agencies to:

[I]nclude within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.³⁴

In the Council’s view, this change eliminated needless—and sometimes useless—speculation, but required, more appropriately, that an analysis of impacts be grounded in the “‘rule of reason.’”³⁵ As the courts had recognized:

[A]n EIS need not discuss remote and highly speculative consequences This is consistent with the (CEQ) Council on Environmental Quality Guidelines and the frequently expressed view that adequacy of the content of the EIS should be determined through the use of a rule of reason.³⁶

31. 51 Fed. Reg. 15,621 (1986).

32. *Id.* The “Record of Decision” is the document issued by an agency after completion of an EIS which (1) states “what the decision was . . .”, (2) identifies the alternatives “considered by the agency in reaching its decision . . .”, and (3) states “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted . . .” 40 C.F.R. § 1505.2 (1988).

33. 51 Fed. Reg. 15,620 (1986).

34. 40 C.F.R. § 1502.22 (1988).

35. 51 Fed. Reg. 15,621 (1986).

36. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *see also Scientists Institute*, 481 F.2d at 1092 (NEPA’s “requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason.”). The new rule states that the analysis of:

‘[R]easonably foreseeable’ [impacts] includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

40 C.F.R. § 1502.22(b)(1) (1988).

CEQ's elimination of worst case analysis was not, however, the last word on the requirement.

JUDICIAL REVIEW—SURVIVING THE INEVITABLE COURT CHALLENGE

Soon after the final amended regulation was published, various dissatisfied groups made public their inclination to challenge the regulation in court. Although no direct challenge was ever filed, in *Oregon Natural Resources Council v. Marsh*, the United States Court of Appeals for the Ninth Circuit, *sua sponte*, determined that a worst case analysis was required under NEPA, regardless of CEQ's rulemaking efforts on the matter.³⁷ To compound the issue, the Ninth Circuit then cited *Marsh* as authority for the worst case requirement in a later case, *Methow Valley Citizens Council v. Regional Forester*.³⁸

The plaintiffs in *Methow Valley* brought suit seeking review of the Forest Service's decision to issue a permit allowing a ski area in the Okanogan National Forest in Washington,³⁹ The Ninth Circuit Court of Appeals held that the Forest Service had a duty to prepare a "worst case analysis" if it could not obtain information adequate to enable it to make a reasoned assessment of the impact the development would have on a local mule deer herd.⁴⁰

In *Marsh*, various nonprofit organizations sought to enjoin the construction of the Elk Creek Dam near the Rogue River in Oregon. The organizations claimed that the Army Corps of Engineers, which was to construct the dam, had "violated NEPA by failing . . . to include a 'worst case analysis' of uncertain effects"⁴¹

Because of the Ninth Circuit's confused stance on the worst case requirement and other NEPA procedures, the United States Supreme Court granted certiorari in both *Marsh* and *Methow Valley*,⁴² The cases were consolidated for oral argument, and decisions were handed down on May 1, 1989.⁴³

The Supreme Court soundly rejected the Ninth Circuit's analysis of the worst case requirement, stating the NEPA itself "does not mandate that uncertainty in predicting environmental harms be addressed exclusively in this manner."⁴⁴ Rather than being a "codification of prior

37. 832 F.2d 1489, 1496-97, 1497 n.8 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1851 (1989). Specifically, the court concluded that the worst case requirement was "a codification of prior NEPA case law." *Marsh*, 832 F.2d at 1497 n.8; *see also Methow Valley*, 833 F.2d at 817 n.11.

38. 833 F.2d 810, 817, n.11 (9th Cir. 1987).

39. *Methow Valley*, 109 S. Ct. at 1843. Suit was brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). *Methow Valley*, 109 S. Ct. at 1843.

40. *Methow Valley*, 833 F.2d at 817.

41. *Marsh*, 109 S.Ct. at 1856.

42. 108 S.Ct. 2869 (1988).

43. *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989); *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989). The existence of a worst case requirement was an issue in both cases, but was addressed only in *Methow Valley*, 109 S. Ct. at 1847-49. In *Marsh*, the Court noted that the lower court's holding with respect to the worst case requirement was erroneous for the reasons stated in their opinion in *Methow Valley*. *Marsh*, 109 S.Ct. at 1857.

44. *Methow Valley*, 109 S. Ct. at 1848.

NEPA case law," the worst case requirement, according to the Supreme Court, was simply a CEQ invention used to fulfill the " 'judicially created principl[e]' that an EIS must 'consider the probabilities of the occurrence of any environmental effects it discusses.' " ⁴⁵ Thus, the Court agreed with CEQ's finding that "case law prior to the adoption of the 'worst case analysis' provision did require agencies to describe environmental impacts even in the face of substantial uncertainty, but did not require this obligation necessarily be met through the mechanism of a 'worst case analysis.' " ⁴⁶

CONCLUSION

Fortunately, it would appear that the Supreme Court's opinion in *Methow Valley* has tolled the final death knell for worst case. The Court resoundingly quashed the notion that NEPA or any subsequent case law required such hypothetical posturing and conjecturing. CEQ, having waged very major battles in amending its regulation, will in no way be swift to revisit the issue.⁴⁷ Rather than squandering time and money developing a worst case analysis, federal agencies should now be able to properly concentrate and focus their efforts just where NEPA originally intended: on assessing the reasonably foreseeable environmental impacts of their decisions and actions.

Over the last 20 years, federal agencies, with the assistance of CEQ, have learned that compliance with NEPA can be a useful tool. Far from being simply "one more hurdle" they have to jump, federal agencies have come to realize that a good and thorough analysis leads to better decisions and to increased environmental protection at decreased cost. Even though resisted in the West at its inception, NEPA has stood the test of time, and will likely remain an important and vital statute for the next 20 years and beyond.

45. *Id.* (quoting *Sierra Club v. Siegler*, 695 F.2d 957, 970-71 (5th Cir. 1983)).

46. *Methow Valley*, 109 S.Ct. at 1848. The Court also concluded that CEQ modified its regulation and eliminated the worst case requirement only "after the prior regulation had been subjected to considerable criticism" and "provided a well-considered basis for the change . . ." *Id.* at 1848-49 (footnote omitted).

47. In his confirmation hearing, Michael R. Deland, now Chairman of CEQ, firmly stated his commitment to the CEQ regulations, including the 1986 amendment requirement. *Hearings before the Senate Committee on Environment and Public Works on the Nomination of Michael R. Deland, Chairman-designate of the Council on Environmental Quality* 226, 101st Cong., 1st Sess. 14-15 (1989).