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National Environmental Policy Act Is 'at a Crossroads'

The 35-year-old law gives citizens input in the review of land-use proposals. Those who say it slows progress are trying to curb its power.

by Tim Reiterman
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SAN FRANCISCO — After the National Environmental Policy Act was adopted 35 years ago, the law led to a major design change in one of the nation's most ambitious energy projects — the 800-mile pipeline that carries oil from Alaska's North Slope.

As a result of the often contentious ecological review, most of the pipeline was laid above ground so it would not damage the fragile permafrost, and built in a way that would not block the movement of caribou herds.

More recently, the law assured San Franciscans a voice in the conversion of one of the city's most prized historic sites — the old Army Presidio — into a national recreation area designed to be self-supporting and divided into open space, public use areas and commercial offices, including a recently opened 23-acre digital arts center built by "Star Wars" creator George Lucas.

Now, however, NEPA is facing strong challenges from the Bush administration, Congress and business interests who say the law has been holding up progress on a number of fronts, among them building highways, preventing forest fires and drilling for oil and gas in the Rocky Mountains.

The House version of the pending energy bill would exempt many oil and gas exploration projects from NEPA review.

And a congressional committee is holding public hearings with the stated intention of changing how the law works. To expedite a wide range of projects, the administration and lawmakers have exempted some categories of federal actions from NEPA assessments or limited their scope.

The federal government takes an estimated 50,000 actions each year — including building campgrounds in national forests and plotting the routes of super-highways. And, to varying degrees, every one of those actions involving federal land, funds and permits is subject to scrutiny under NEPA.

The three-page statute, known as the Magna Carta of environmental law, required the government for the first time to involve the public in decisions that could harm natural surroundings or disturb neighborhoods. The law has been imitated by other countries and many states.

But its critics — including mining, timber and energy companies, developers, farmers and ranchers — have long chafed under the costly and protracted environmental reviews that the law often sets in motion.

"NEPA is at a crossroads," said Bradley C. Karkkainen, a University of Minnesota law professor who is an expert on the statute. "We could end up undoing 35 years of progress or [providing] a NEPA that can address the environmen-

tal challenges of the 21st century. It could go either way."

Along with the Endangered Species Act, the Clean Water Act and other environmental laws, NEPA was adopted after the catastrophic 1969 oil rig blowout that blackened Santa Barbara County beaches and killed thousands of seabirds.

For the first time, the law guaranteed the public information and a forum on many matters directly affecting their lives. "It affects the air they breathe, the water they drink, their recreational resources and the views they enjoy," said Lucy Swartz, a former government lawyer who now serves on the board of the National Assn. of Environmental Professionals.

However, those calling for changes to NEPA say the law has made it far too easy for environmentalists and others to mount legal challenges over technicalities. "It has been used as a stick in the spokes of the wheels of progress," said Russ Brooks, an attorney for the property rights-oriented Pacific Legal Foundation.

The number of NEPA-related lawsuits averaged 108 annually between 1974 and 1997, but rose to 137 in 2001 and 150 in 2002, according to a study by the non-profit Environmental Law Institute in Washington. The jump, the study said, may have been prompted in part by Bush administration actions that environmentalists viewed as harmful.

One of those actions was President Bush's 2002 Healthy Forests Initiative, which called for thinning forests to reduce wildfire danger and exempted many logging projects of 1,000 acres or less from review. Environmentalists argued that without NEPA scrutiny, timber companies would be free to cut down the largest, most commercially valuable trees, which are often the most fire-resistant.

The energy bill passed by the House would insulate certain oil and gas drilling projects on public lands from NEPA reviews. Although the Senate version of the bill does not include the exemptions, conservationists are concerned that the House exemptions will resurface in a final bill.

One exemption would eliminate reviews of the effects of water discharges during extraction of methane from coal beds, and that is of particular concern to ranchers and farmers in the Powder River Basin of Montana and Wyoming.

The reviews are critical to their livelihood, said Kevin Williams of the Western Organization of Resource Councils, because the gas exploration process pulls water out of aquifers used by farmers and ranchers, and the discharges containing salts can work their way into irrigation supplies. "They are pumping out a tremendous amount of water in the region that could affect the agricultural economy, the tourist economy, the fisheries, you name it," said Williams, whose 9,500-member organization includes hundreds of farmers and ranchers.

Proponents of the law fear that a House Resources Committee task force recently convened by Chairman Richard W. Pombo (R-Tracy) is setting the stage to gut the law. Pombo and Republican colleagues proposed the exemptions now pending in the House energy bill. The task force is conducting public hearings around the country to review NEPA.

"Over the past few years, it has been death by a thousand cuts," said Neha Bhatt, a Sierra Club representative in Washington. "We see these hearings as an attempt to build a bad public record and come back with a big hit overhauling the existing law."

Pombo said the accumulation of requests for exemptions for energy, transportation, defense and domestic security projects signaled the need for a thorough reexamination of the law. "Everyone is complaining about the way NEPA works," he said.

James L. Connaughton, chairman of the White House Council on Environmental Quality, said the law generally was working well, but that the administration was trying to accelerate some environmental assessments without sacrificing protection.

During the first congressional task force hearing, held in April in Spokane, Wash., Utah mining executive Luke Russell called NEPA "a monster, devouring millions of dollars and years of time needlessly on redundant studies, conflicting requirements and wasteful litigation."

In 1992, Russell said, his company had to spend \$11 million on an environmental impact study for a gold mine on federal land in Alaska — and by the time federal agencies approved the project, the price of gold had dropped so far that the project was not economically viable. After the company revived the project five years later, additional environmental assessments cost \$6.7 million more.

Yet the number of full environmental impact statements required under the statute has declined from 2,000 to 3,000 a year in the 1970s to about 500 annually, according to Karkkainen of the University of Minnesota.

Unfortunately, Karkkainen said, "the general thrust of the administration's proposals is not to produce information more efficiently but to produce less information.... We should be more efficient, not less informed."

The challenge to reforming NEPA, experts say, is accelerating the review process while preserving what the law is supposed to do: determine and disclose effects, often deterring harmful projects.

"Anyone proposing things that are environmentally dubious knows they have to go through a big process and environmental disclosure," said John Leshy, a professor at UC's Hastings law school and a former attorney in the Carter and Clinton administrations.