The Application of The National Environmental Policy Act to the North American Free Trade Agreement

Testimony of
the Center for International Environmental Law
and the National Audubon Society

Before the Senate Committee On Environment and Public Works

Submitted by Robert F. Housman and Paul Orbuch
of the Center for International Environmental Law

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I. NEPA and Its Application to NAFTA

A. NEPA

In order to understand the legal application of NEPA to NAFTA it is necessary to first have a basic understanding of what NEPA is and how it functions. NEPA has been described as a purely procedural law. NEPA does not dictate an outcome, rather it prescribes a process for reaching a final decision.[4]

NEPA has two principal goals: 1) to ensure that decision makers take environmental considerations into account; and 2) to ensure that Congress and the public have knowledge of the environmental impacts of decisions being taken.[5] To meet these goals, NEPA requires all federal agencies to prepare and make public an environmental impact statement for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the human environment."[6]

B. NEPA's Application to NAFTA.

As the district court held in Public Citizen NEPA applies to NAFTA because: 1) USTR is a federal agency; 2) approval and initialing of NAFTA is both a recommendation on a proposal for legislation, and a major federal action; and, 3) NAFTA will have significant effects on the human environment.

1. Agency

Pursuant to NEPA and the Council on Environmental Quality's regulations implementing NEPA (the CEQ Regulations),[7] USTR is an agency. The CEQ Regulations define "federal agency" to include

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[4]Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

[5]Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370 (1989). NEPA also functions to ensure that other sub-federal governmental entities are appraised of the environmental impacts of proposals for federal legislation or major federal actions. 40 C.F.R. § 1506.6. Given that NAFTA's rules will apply to state and local environmental, health, and safety laws, as well as to federal laws, this aspect of the NEPA process is particular important with regard to NAFTA.

[6]42 U.S.C. § 4332(2)(c).

[7]The CEQ Regulations are considered "mandatory regulations applicable to all Federal agencies and are entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

laws and regulations. The acceptance of these obligations is by both law and logic a "major federal action."

3. Effects

By the government's own admission, NAFTA will have a range of environmental impacts, some positive and others negative, on the quality of environment and human health and safety throughout the United States.[13] For example, the government's Interagency Review of U.S.-Mexico Environmental Issues notes that increased trade driven by NAFTA will: increase the amount of land transportation in the U.S.-Mexico border region, which will have adverse affects on air quality, noise pollution, and congestion; "have severe impacts on wetland and other aquatic wildlife habitats . . . .; and, impact "[a]bout 50 endangered species and over 100 'candidate' species in the border region and Northern Mexico."[14] These three examples of impacts alone demonstrate that NAFTA will have a significant effect on the human environment.[15] These environmental effects, and others caused by NAFTA, are precisely the types of significant environmental effects that NEPA has been used to evaluate for over twenty years.[16]

Moreover, the government recognizes in the Review that these environmental effects are the direct causal result of NAFTA.[17] Under a heading entitled "Possible Environmental Effects of NAFTA", the Review provides succinctly that "the number of Mexican pollutant-emitting facilities will increase; this will prompt Mexican commercial and residential pollutant increases that will affect the U.S. and will prompt concomitant increases in U.S.

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[13]See Interagency Review of U.S.-Mexico Environmental Issues (Feb. 1992) (the Review) (the Review contains over 200 pages of discussion of NAFTA's environmental effects).

[14]Id. at 5, 6, 8.

[15]See 40 C.F.R. §§ 1508.8 (defining effects); 1508.14 (defining human environment); 1508.27 (defining significant).

[16]See e.g. NRDC v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) (requiring that an EIS address effects of "simultaneous inter-regional development on migratory species."); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1444 (9th Cir. 1992) (discussing EIS regarding impacts on endangered red squirrel); Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977) (stating that allegation that "increased congestion would have an adverse effect on farming operations . . . clearly [fell] within the zone of interests protected by NEPA.").

[17]See, e.g., Review at 85.

The broad application of NEPA to proposals for international agreements, logically including trade agreements such as NAFTA, was never even raised as an issue during the inter-agency review of the CEQ Regulations.[22] Despite their "overall close scrutiny" of the proposed CEQ implementing regulations, neither the Department of State, nor the Department of Justice, nor USTR, ever commented on these provisions of the CEQ Regulations requiring an EIS for proposals for the ratification of treaties that the government now challenges.[23]

The responsibility to undertake an EIS for international agreements has been repeatedly recognized by the executive branch.[24] For example, the Final EIS for the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter

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recognition can also be seen in the lack of prior judicial challenges to the application of NEPA to international agreements. While the issue of NEPA's extraterritorial reach has been hotly contested by the Executive branch since the statute's enactment, see e.g. EDF v. Massey, 1993 U.S. App. LEXIS 1380 *12 (D.C. Cir. 1993), Greenpeace v. Stone, 748 F. Supp. 749 (D. Haw. 1990), NORML v. Department of State, 452 F. Supp. 1226 (D.C. D.C. 1978), there has been no reported challenges on the applicability of NEPA to any type of international agreement.

[22]Yost Testimony at p.7.

[23]Yost Testimony at p. 7; see also 40 C.F.R. § 1508.17.

[24]See Affidavit of David Wirth at 4, Plaintiffs Exhibit SS, Public Citizen v. United States Trade Rep., Civ. No. 92-2102 (CRR) (D.C. D.C. filed June 30, 1993). see also Final Environmental Impact Statement for the Renegotiation of the Interim Convention on the Conservation of North Pacific Fur Seals (1976); Final Environmental Impact Statement for the Ratification of the Proposed Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1973); Final Environmental Impact Statement for the Incineration of Wastes at Sea Under the 1972 Ocean Dumping Convention (1972); Draft Environmental Impact Statement for the Agreement Between the United States and Canada for the Conservation of Migratory Caribou and Their Environment (1980); Draft Environmental Impact Statement on the Interim Convention on the Conservation of North Pacific Fur Seals (1983); Draft Environmental Impact Statement for the Convention on the Conservation of Migratory Species of Wild Animals (1979); Draft Environmental Impact Statement on the Intercontinental Transport Agreements (1979); Environmental Impact Statement on the Montreal Protocol on Substances that Deplete the Ozone Layer (1988); Environmental Impact Statement on the World Heritage Convention (1973).

Particularly illustrative of this point is the 1984 legislative EIS prepared for Congressional consideration of The Compact of Free Association (the "Compact"), an agreement between the United States and the Governments of the Pacific islands of Palau, the Marshall Islands, and the Federated States of Micronesia.[29] The Compact provided for an entirely new political status and a new basis for economic, political and military cooperation between the islands and the United States. Areas covered included: self-government, foreign affairs, security and defense relations, communications, immigration, international trade, grant and program assistance, and taxation. Subsidiary agreements to the Compact covered areas such as telecommunications, law enforcement and extradition, and the turnover of U.S. assets on the islands. Despite the national security, foreign affairs, trade and investment, and economic issues raised in the Compact, the Reagan administration complied with the NEPA requirements and prepared an EIS that addressed the environmental effects of all components of the Compact.

D. The Application of NEPA to NAFTA Does Not Conflict With Either the Substance or Intent of the Trade Acts.

There are no "clear and unavoidable statutory conflicts" between NAFTA and the Trade Acts that would vitiate the need for an EIS for NAFTA.[30] Flint Ridge and the CEQ Regulations permit the evasion of NEPA requirements only in those rare circumstances where "existing law applicable to the agency's operations . . . makes compliance impossible."[31] No such impossibility prevents the application of NEPA to NAFTA.

Like the Trade Acts, NEPA has interpreted to be essentially procedural in nature.[32] Thus, as the CEQ Regulations require,[33] the requirements of NEPA can easily be made to comport with those of the Trade Acts. The conflicts others have described between the statutory regimes of NEPA and the Trade Acts are red herrings. For

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[29]See Compact EIS.

[30]See Flint Ridge Dev. Co. v, Scenic Rivers Assoc., 426 U.S. 776, 787-88 (1976).

[31]Id.; 40 C.F.R. § 1500.6; see also Izaak Walton League 655 F.2d 346, 367 (D.C. Cir.) cert denied 454 U.S. 1092 (1981).

[32]See EDF v. Massey, 1993 U.S. App. LEXIS 1380 *12 (D.C. Cir. 1993) ("In many respects, NEPA is most closely akin to the myriad laws directing federal decisionmakers to consider particular factors before expanding aid or engaging in certain types of trade").

[33]40 C.F.R. § 1501.2.

mandates conform, they do not conflict. The only difficulties that could possibly arise are ones of timing and as a factual matter no such conflicts exist.

E. A Legislative EIS for NAFTA Would Fulfill the Requirements of NEPA

Given the particular facts of NAFTA, a "legislative" EIS (LEIS) would appropriately fulfill the requirements of NEPA.[38] LEISs have proven successful at analyzing, even under tight time constraints, the environmental impacts of other international agreements. For example, an LEIS for the Montreal Protocol, a complex multilateral treaty with both trade and environmental implications, was prepared in roughly a two-month time period.[39]

Similarly, an expedited and streamlined LEIS process for NAFTA could be made compatible with both the fast-track procedures and the Clinton administration's self-imposed NAFTA schedule. Fast track rules for Congressional consideration of NAFTA require House and Senate votes on the implementing package within 60 legislative days of introduction of the legislation, or within 90 legislative days if the package includes revenue measures.[40] An LEIS forwarded to Congress within 30 days of transmittal of NAFTA, as required under the CEQ Regulations, would fit within these fast-track time frames and would also allow ample time to integrate the LEIS into Congressional consideration of NAFTA.

Moreover, an LEIS on NAFTA begins with a leg up. NAFTA's environmental effects has been the topic of a wide range of governmental and non-governmental studies. While these efforts do not fulfill NEPA's requirements, they provide much of the factual raw materials from which USTR could in short order craft an objective LEIS. What remains is for the agency to take on the task of addressing the specific issues that are mandated under NEPA and the CEQ Regulations.[41] Here again, NAFTA has a head start. USTR

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[38]See 40 C.F.R. § 1508.17. This statement does not in any way concede that, based upon different factual circumstances, an LEIS will always be the appropriate form of NEPA review for other trade agreements.

[39]52 Fed. Reg. 45,520-21 (Nov. 30, 1987).

[40]19 U.S.C. §§ 2903(a)(1); 2191(c)(1),(e)(1).

[41]See, e.g., 40 C.F.R. §§ 1502.14, 1502.16(d) (alternatives); 1508.7, 1508.8 (cumulative impacts); 1502.14(f), 1502.16(h) (mitigations measures).

addition, like the heads of other agencies—but unlike members of the President's core personal staff—the USTR is appointed by the President with advice and consent of the Senate.[46] Similarly, USTR is subject to the Freedom of Information Act, while the President and his core staff are exempt from the act.[47]

Nor is USTR an "extension of the President for purposes of NAFTA's introduction to Congress . . . ."[48] In negotiating NAFTA, USTR acted pursuant to a specific mandate from Congress, not mere instruction from the President.[49] USTR developed U.S. positions on various sections of the agreement with little or, in many cases, no input from the President.[50] These independently crafted positions are now memorialized in the terms of NAFTA. Even the broad goals USTR took into the NAFTA negotiations are products of the Congress not the President.[51] It is hard to imagine how USTR is an extension of the President for NAFTA purposes when USTR, by statute, reported to Congress on NAFTA; acted pursuant to Congressional authority in negotiating NAFTA; followed Congressional goals in negotiating NAFTA; and, independently crafted, negotiated and agreed to NAFTA provisions.

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4. This assertion serves only to obfuscate. Clear distinctions exist between the speechwriter in Professor Tribe's example, and the USTR here. For example, the speechwriter does not have a duty to report to Congress, USTR does. 19 U.S.C. § 2171 (c)(1)(H). The speechwriter is not appointed with advice and consent, USTR is. 19 U.S.C. § 2171(g). The speechwriter does not have the independent authority to speak as a representative of the United States, USTR does. 19 U.S.C. § 2171(c)(1)(C). If, however, the speechwriter's State of the Union proposal was later taken up by an agency and finalized into a proposal for legislation or a major federal action with significant affects on the human environment, then Professor Tribe's analogy would be on point. 42 U.S.C. § 4332(2)(c). The duty to prepare the EIS would, however, fall upon the agency and not the President's speechwriter. Id.

[46]19 U.S.C. § 2171(b)(1).

[47]15 C.F.R. §§ 2004, 2005. The president and his core staff are immune from the Freedom of Information Act. See Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1040-41 (D.C.Cir. 1985).

[48]Tribe Testimony, supra n. 45, at 4.

[49]19 U.S.C. § 2171(a)(1)(C).

[50]Public Citizen supra n. 2, at 8.

[51]19 U.S.C. §§ 2113, 2114.

agreement.[57] NAFTA is not "tentative" in any respect. Further, the USTR, who holds the rank of "Ambassador Extraordinary,"[58] is clearly not a subordinate officer.

Furthermore, while the President maintains the ability to present NAFTA to Congress this task is solely a ministerial formality. Nothing the President can do in presenting NAFTA can change the terms and obligations of the agreement USTR initialed.[59] Under Franklin it is USTR's initialing of the terms of the agreement, not the formality of the President's submission of these preconceived terms, that constitutes the final action here.[60] Finally, if the mere formality of Presidential submission to Congress of a course of action pre-determined by a federal agency, prevents Congress from regulating the activities of the acting agency, and courts from reviewing these agency actions, domestic administrative law and practice would be entirely re-crafted—and not for the better.

C. Judicial Review Does Not Conflict with the Separation of Powers Doctrine.

The requirement that USTR must prepare an EIS does not encroach upon the powers of the President. Under Nixon v. Admin. of Gen. Services[61] USTR must prepare an EIS unless the preparation of an EIS "prevents the executive branch from accomplishing its assigned functions." The President, however, has no explicit powers over international trade per se.[62] Under the Constitution

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[57]See, e.g., Alan Toulin & Jill Vardy, Trade Officials Say NAFTA Deal Is Alive and Well, Fin. Post, July 1, 1993, 5.

[58]19 U.S.C. § 2171(b)(1).

[59]19 U.S.C. § 2191(d).

[60]Franklin, 112 U.S. at 2773 (finality exists when the agency first expresses its final opinion as to a course of action and that opinion will have an effect on the parties).

[61]433 U.S. 425, 443 (1977); see also Morrison v. Olsen, 487 U.S. 654, 693 (1988).

[62]Thus, the President's authority to recommend legislation, U.S. Const., Art. II, § 2, cl. 3, and "inherent" powers over foreign affairs, United States v. Curtiss Wright Export Co., 299 U.S. 304 (1936), renders the authority over international trade at most a "shared power." Moreover, many scholars question whether the President has such "inherent powers" over foreign affairs. See, e.g., Louis Henkin, Foreign Affairs and the Constitution, 66 For. Affairs 284 (1988); Arthur Schlesinger, Congress and the Making of American Foreign Policy, 51 For. Affairs 78 (1972).

American citizens and their environment, as well as the NAFTA implementing legislation.[71]

The conclusion that the doctrine of separation of powers precludes Congressional oversight and judicial review here must be viewed in light of its affects on the long-standing delicate balance of powers under the Constitution. A finding that Congress cannot regulate, and the courts cannot review, the actions of USTR here would vest the President and the rest of the executive branch with nearly absolute and unfettered authority over foreign affairs and international trade. This is precisely what the founding fathers sought to avoid by providing a system of checks and balances in both international trade and foreign affairs relating to international agreements.

Conclusion

Commentators have likened NEPA to the environmental Magna Carta.[72] While not perfect, this analogy is nevertheless illuminating. NEPA is in many ways similar to a bill of procedural environmental rights enjoyed by the American public. NEPA's primary purpose—to ensure that decision makers and the American public are aware of the environmental considerations of their actions—is particularly appropriate to NAFTA. The NAFTA debate has raised serious issues regarding the effects of the agreement on the environment, and public health and safety. The government, in particular the Clinton administration, is to be credited for its efforts to raise and address these environmental concerns. We are, however, about to embark upon the final step in the NAFTA process, a step that will create serious binding legal obligations upon the United States, and will have significant impacts on our environment. By law, such a step requires the systematic review of these environmental issues in the form of a NEPA mandated LEIS. Nothing in the Constitution or any other U.S. laws vitiates NEPA's requirement that an LEIS be prepared.

We recognize that the preparation of a LEIS will require a significant commitment of resources in order to keep NAFTA on the administration's self-imposed time schedule. However, it remains a fact that the administration can fulfill the requirements of NEPA without compromising its schedule for NAFTA implementation. Although NEPA's requirements may be inconvenient for the administration, these inconveniences are the small and inconsequential costs of democratic government.

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[71]Id. at Art. I, § 8, cl. 18.

[72]See, e.g., Daniel Mandelker, NEPA Law and Litigation, 1:01, at 1 (1990).