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RESEARCH NOTE

THE COUNCIL ON ENVIRONMENTAL QUALITY: THE NEED TO TAKE A SECOND LOOK

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This note describes some of the altered circumstances making re-appraisal of the Council on Environmental Quality's (CEQ) role in federal environmental decisionmaking desirable,¹ and identifies some of the questions which should be addressed in this research undertaking.

The institutional and policy environment within which CEQ operates is different from what it was three to six years ago. CEQ's personnel have changed and it is operating under a new president. The agencies with which CEQ interacts have themselves undergone alteration, as new offices have been created and personnel hired to help the agencies meet their environmental obligations. Also, the composition of the congressional committees to which CEQ must answer has been modified. Outside the government, CEQ's natural allies within the environmental movement are better organized and somewhat more sophisticated in their lobbying efforts in the agencies and in Congress.

Congress has implicitly strengthened the National Environmental Policy Act (NEPA) by rejecting most major assaults on it. Concern with many agencies has shifted from elementary to more complex questions of NEPA implementation. Energy supply has now joined environmental protection high on the congressional agenda, and Congress and the executive branch alike appear more interested in the implementation of existing environmental legislation than in the enactment of new environmental statutes. All these institutional and policy changes have implications for CEQ.

INSTITUTIONAL CHANGES

CEQ's New Personnel

In an organization as small as CEQ, the personal characteristics of the top leadership may have a significant impact on the manner in which organizational tasks are identified and pursued. CEQ member-

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1. For a mid-1973 appraisal, see Liroff, *The Council on Environmental Quality*, 3 Env. L. Rep. 50051 (August 1973). See also Liroff, *A National Policy for the Environment: NEPA & Its Aftermath* (1976).

ship has changed completely since 1972. The new Council members have backgrounds somewhat different from those of their predecessors, and they may have different styles of leadership. This change at the helm may have produced an alteration in CEQ's definition of its principal organizational tasks, influenced the manner in which the Council relates to other executive office personnel and to line agencies, and had an impact on staff morale. There has been considerable staff turnover at CEQ since 1972, but there are enough staff remaining who have served both Councils that a comparative staff perspective on leadership styles should be readily available.

A New Executive Office

Since 1974, CEQ has been operating within the administration of President Gerald R. Ford. Ford's administration is far more open in style than was the Nixon administration, and CEQ reportedly has greater access to the president than it had in the Nixon White House. One must ask whether this increased access has led to greater influence on policy content, altered CEQ's relationship with other bodies within the executive office, or induced greater presidential reliance on CEQ for ecological advice.

The relationship between CEQ and the Office of Management & Budget (OMB) merits particular attention. Like the relationship between line agencies and OMB, it is largely cloaked in secrecy. Is CEQ treated differently from line agencies, and is there a healthy mutual respect between the two staff organizations? Furthermore, how, if at all, does CEQ become involved in the budgeting process? In this deficit-ridden administration, has CEQ's ability to discourage the funding of environmentally undesirable projects increased over what it was in the Nixon administration?

CEQ's Relations with Executive Branch Agencies

For several reasons, CEQ's relations with executive branch agencies may have undergone considerable change. More agencies now have environmental affairs offices than had them in 1970. To the extent these offices are environmental advocates, they may have improved CEQ's access to agency decisionmaking and prompted CEQ to alter the techniques it uses to promote policy change within the agencies. CEQ personnel have chaired inter-agency task forces addressing environmental issues, and cooperated with other agencies in the funding of studies of complex socioeconomic and environmental problems. In addition, CEQ alumni serve in key executive positions in other agencies, and some agency alumni serve in CEQ. These

formal and informal contacts may have enhanced CEQ's ability to influence other agencies' policies.

Special effort should be devoted to an analysis of CEQ's relationship with the Environmental Protection Agency (EPA). Section 309 of the Clean Air Act requires EPA to make a "referral" to CEQ of any agency action it deems environmentally unsatisfactory. The last time this referral process was examined, it appeared to be non-operative.² Yet, in recent years, EPA has found agency endeavors unsatisfactory and CEQ has publicly criticized individual agency projects. Are these actions taken independently of one another, or is there some formal mechanism by which EPA makes Section 309 referrals to CEQ?

Examination of CEQ's relations with executive branch agencies can be accomplished through interviews with agency NEPA liaisons and with persons who serve as NEPA contacts in offices of general counsel. Their names have been published in CEQ's 102 Monitor. These agency personnel can provide an agency perspective on CEQ's influence and status within the executive branch, and on CEQ's role in encouraging NEPA compliance.

CEQ's Relations with Congress

CEQ's oversight and appropriations committees in the House changed in 1975, at the beginning of the 94th Congress. John Dingell, principal House sponsor of NEPA and chairman of the House subcommittee that has assumed principal responsibility for NEPA oversight, resigned this subcommittee chairmanship to assume another chairmanship. Dingell took with him the subcommittee counsel who had had the major staff responsibility for NEPA matters. The subcommittee now has a new chairman and a new staff counsel. The subcommittee has already held one NEPA oversight hearing, and has been involved in disputes with other committees over amendments to NEPA, but the implications of the change in the chairmanship and staff have yet to be fully explored by an outside researcher.

Jamie Whitten, the conservative southern Democrat who dislikes environmental regulation, surrendered his jurisdiction over CEQ and EPA appropriations to another appropriations subcommittee. The consequences of this change merit examination; in the past, Whitten has used his position to encourage CEQ to conduct environmental studies which emphasized the costs rather than the benefits of en-

2. Healy, *The Environmental Protection Agency's Duty to Oversee NEPA Implementation: Section 309 of the Clean Air Act*, 3 Env. L. Rep. 50071 (August 1973).

vironmental regulation. CEQ's new appropriations subcommittee may be somewhat friendlier.

CEQ and its Environmental Constituency

In its early years, CEQ was subject to considerable criticism for its behind the scenes approach to influencing federal policy. By now, environmentalists may have mellowed in their views, and have a more positive attitude because the Council has finally begun to exercise its authority to hold public hearings on environmental matters. More importantly, environmentalists may have discovered fruitful ways of obtaining CEQ assistance in their disputes with agencies over individual projects. One ought to identify the patterns of consultation with this constituency and the outcomes of such contact.

CEQ's involvement in a particular controversy may be especially important to the agencies and environmentalists, because the Council's views may have a considerable impact on subsequent litigation. In 1974, CEQ and the Department of Justice agreed that CEQ would be consulted by the department on the adequacy of an impact statement, before the final government position was developed in a NEPA lawsuit. Shortly thereafter, in *Warm Springs Dam Task Force v. Gribble*, No. A-1146 (U.S. June 17, 1974), Justice William O. Douglas, in his capacity as Circuit Justice for the Ninth Circuit, stayed work on the Warm Springs Dam pending a decision by the Ninth Circuit on the merits of the plaintiffs' claims of impact statement inadequacy. In his opinion, Justice Douglas gave great weight to a CEQ determination of impact statement inadequacy, because CEQ has the statutory obligation to assess federal programs for their compliance with NEPA.³ In the aftermath of the Warm Springs Dam decision, agencies multiplied their requests to CEQ for impact statement evaluations.⁴ One ought to inquire whether the decision has also prompted potential environmental litigants to solicit CEQ's evaluation and if so, what factors dictate CEQ's response? Similarly, under what circumstances does CEQ evaluate an impact statement on its own initiative?

Contact between CEQ and environmentalists is not limited to discussions of individual projects. Just as important, undoubtedly, is cooperation (and disagreement) regarding proposed amendments to NEPA. In 1972, CEQ and environmentalists clashed over legislative proposals granting relief to EPA from its NEPA burdens. In 1974,

3. See § 204(3) National Environmental Policy Act, 42 U.S.C. § 4344 (1970).

4. Comment, *Supreme Court Ushers in New Era for CEQ in Warm Springs Case*, 4 Env. L. Rep. 20669 (September 1974).

the Community Development Act permitted the Department of Housing and Urban Development (HUD) to delegate almost all of its NEPA obligations, and in 1975, disputes over the authorship of impact statements for highways prompted Congress to enact the first major substantive amendment to NEPA itself. CEQ reportedly participated in the development of the NEPA delegation provisions of the Community Development Act, and CEQ and environmentalists were deeply involved in the 1975 congressional deliberations over direct amendment of NEPA. The outside researcher should explore the extent to which CEQ and environmental lobbyists coordinated their activities on these legislative matters.

A view of CEQ from environmental groups based outside Washington may be somewhat difficult to obtain, but national environmental groups and environmental lobbyists in Washington should provide a useful perspective on CEQ-environmental group relations.

THE ALTERED POLICY CONTEXT

NEPA

NEPA has passed through its first phase of implementation, and now environmental impact statements are usually prepared as part of agencies' standard operating procedures. Many more difficult issues have arisen: How should NEPA requirements be integrated into agency-OMB budget processes, how should environmental considerations be integrated early into the decisionmaking process, and how can NEPA be used to expand agency jurisdictions? Answering these tough questions may require an intimate knowledge of agency operations, a knowledge which CEQ may lack. In such circumstances, will CEQ's role in promoting NEPA implementation be diminished? Furthermore, will CEQ be able to count on court-provided guidance to assist it in responding to these more complex problems, or will it be more on its own because courts will be less aggressive in attacking these issues than they were in addressing elementary matters?

Other Policies

There is now far greater concern with energy supply than there was during CEQ's first three years of existence. New agencies such as the Energy Resource and Development Administration (EROA) and Federal Energy Administration (FEA) have been created to cope with energy matters. Except for its highly visible role in discussions of Outer Continental Shelf oil leasing, CEQ is conspicuous by its absence from media reports of federal energy deliberations. This prompts one to ask what CEQ has done beyond producing several

energy studies. Is there an informal division of labor, with CEQ producing studies while EPA is engaged in daily wrestling within the administration over energy/environmental matters?

The federal government also seems more concerned with implementation of existing environmental legislation than with the establishment of new statutes. New environmental initiatives are not flowing from the executive branch as freely as once they did, and Congress seems to have slowed somewhat the enactment of environmental bills. From 1970 through 1973, CEQ published a presidential "environmental program" and the president issued an environmental or natural resources message. This is no longer the case. Now that it has diminished responsibility for shepherding environmental legislation through the administration, how does CEQ use the time formerly allocated to this task?

CLOSING COMMENT

CEQ has passed from infancy to adolescence. Is it acquiring new wisdom rapidly and applying it keenly, or is it beginning to suffer a premature case of hardening of the arteries? A well-designed research project might address this question.