

["If I let you write the substance and you let me write the procedure, I'll screw you every time."](#)

Former US Rep. Dingell

In [the prior post](#) I criticized some of the positions of environmental groups in the debates over the Senate permitting reform bill. But advocates of the bill have also made problematic arguments.

Most important of those problematic arguments is a claim by proponents that the permitting reform bill is only about procedure, not substance in terms of environmental law, and thus the impacts of the bill are marginal in terms of environmental outcomes. In particular, because the bill does not change the underlying standards of the Clean Air Act, Clean Water Act, or the Endangered Species Act, for instance, advocates argue there is little cost to the tradeoffs in the bill.

There is something to be said for arguments that procedural requirements may be unnecessary or ineffective in achieving goals. But a blanket claim that procedure doesn't matter for outcomes is flat wrong. Thus, the quote I began this blog post with is from one of the most effective and prolific legislators in the US House in the 20th Century, who had a hand in the drafting of many of our leading environmental laws.

Why does procedure matter? Substantive standards can exist but if there is no enforcement, they will be flouted. Enforcement depends on who is able to enforce, and what their interests are. Whether enforcement is effective or a plausible threat depends on burdens of proof for establishing violations. Whether violation of law is worthwhile even with enforcement depends on the sanctions that can be imposed for violations (a key lesson from law and economics scholarship).

So, of course eliminating judicial review remedies for NEPA will mean that agencies will comply with NEPA less stringently. Whether that is good or bad is a different question. Likewise, constraining remedies for violations of wetlands protections under the Clean Water Act also will mean those provisions will be less stringently complied with. And the permitting certainty provisions – by [essentially creating a much more stringent "clear and convincing evidence" standard for government enforcement of regulatory standards](#), plus large damages if the government loses a legal challenge to its enforcement action, will surely chill government regulation to

protect the environment and other important social goals, and thus lead to weaker substantive standards in practice.

Indeed, the permitting reform bill itself exemplifies why procedure matters for substance. The judicial review provisions for project sponsors when agency approval decisions are delayed, or the permit certainty provisions constraining gov't ability to revoke permits are all procedural. They are there because the hope is that those procedural requirements matter in terms of substantive outcomes – whether those projects get built.

A more defensible version of this argument in favor of the permitting reform bill is that NEPA has no substantive component, so enforcement of NEPA's procedural requirements is less closely tethered to environmental outcomes. There is something to this, but as I've noted in a series of blog posts earlier, there are a [range of reasons](#) why one might think NEPA's procedures do produce important substantive changes.

In the end, it is frustrating that some proponents appear to be arguing there are no tradeoffs here, just a loss of unnecessary procedure. Some of the procedure may be unnecessary, or at least losing it may not have major impacts. Some of it will matter a lot. Trying to sort those two categories out is one reason I spent so much time digging into the bill. I wish more of those arguing for the bill would be more honest about the tradeoffs and choices that are being made.