

February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington DC 20002

The American Petroleum Institute (API) is pleased to have this opportunity to comment on the initial findings and draft recommendations (December 21, 2005) prepared by the House Task Force on Updating the National Environmental Policy Act (NEPA). API represents more than 400 companies that are involved in all aspects of the oil and natural gas industry, including exploration and production activities that provide the oil and natural gas that are essential to America's energy security and economic growth.

Decisions made by federal agencies are vital to our ability to meet future US demand for clean-burning natural gas and oil. NEPA comes into play at many stages in the search for, development and transportation of energy supplies. While we need to use energy wisely, we must address the supply side by providing greater access to federal lands both onshore and offshore, removing procedural impediments to resource development and building the infrastructure needed to tap into global gas supplies, and to build the liquefied natural gas (LNG) facilities needed to tap into global gas supplies. Inefficiencies in the NEPA process have had the effect of putting significant volumes of these resources off limits, and have stymied proposals to site and construct new terminals to increase our capability to import liquefied natural gas from abroad.

Hurricanes Katrina and Rita last fall, and continued instability abroad in regions that provide foreign supplies of energy, have underscored the tight balance of energy supply and demand. Only 4-5 years ago, natural gas prices were in the \$2 to 3 per million Btu (MMBtu) range. Recently, prices have settled in the \$11-14 per MMBtu range, setting record levels in the fourth quarter of 2005. Higher natural gas prices have taken a particular toll – more than 2.8 million US manufacturing jobs have been lost since 2000. Chemical companies closed 70 facilities in the year 2004 alone and have tagged at least 40 more for shutdown. Because of the importance of increasing domestic production and transportation of oil and natural gas resources, a fresh look at the NEPA process is needed to improve and modernize the implementation of this statute.

The Task Force's work to open public dialogue on NEPA is a welcome and important effort, and is appropriately focused on the original intent of the statute. The National Environmental Policy Act of 1969 was intended to provide that actions taken by the federal government consider the potential environmental effects along with the social, economic and other needs and concerns of Americans, thereby creating and maintaining a "productive harmony" between man and nature:

“[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, 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.”

Unfortunately, over the years, the complexity of the NEPA approval process has grown. As the 2003 Study by the National Petroleum Council (NPC), *Balancing Natural Gas Policy – Fueling the Demands of a Growing Economy (2003)*, pointed out: “The intent and expectations identified in NEPA and Council on Environmental Quality (CEQ) regulations for a compact, clear and efficient environmental analysis and decision-making process have not been met in practice...” The often cumbersome NEPA process has increased costs and uncertainty and has delayed the development of much-needed domestic energy supplies.

The NPC Study found that the detailed analysis required by NEPA has become an end in itself rather than serving a decision-making tool for federal land and resource managers and administration policy makers. Federal agencies have come to view NEPA as a compliance requirement, instead of as a process that facilitates sound and balanced decision-making and that enhances public awareness and participation. Often, under NEPA consideration of alternatives to a proposed action (in part due to the growing threat of litigation) has been transformed into a broad search for alternatives, regardless of the feasibility of those alternatives, or whether they provide any environmental benefit.

In combination, these developments in the NEPA process have delayed development of important and environmentally responsible energy projects, particularly in the West. Vast areas of multiple use federal lands have been withdrawn from development either directly or indirectly through restrictions and constraints on operations that delay development, and/or make it uneconomic. These non-park, non-wilderness federal lands are resource-rich. The NPC Study reported that: “. . . the trend toward increasing leasing and regulatory land restrictions in the Rocky Mountain region is occurring in precisely the areas that hold significant potential for natural gas production”. The NPC concluded that in the Mountain West alone 125 Tcf of clean-burning natural gas was effectively off limits or significantly affected by access-related regulatory requirements, enough natural gas to supply the 60 million homes with natural gas heating for 30 years.

In addition, numerous lawsuits have complicated the preparation of environmental analyses and have resulted in significant project delays and cancellations. In a number of cases the mere threat of litigation has caused agency staff to perform additional analyses (e.g., prepare an Environmental Impact Statement (EIS) where an Environmental Assessment (EA) might suffice) or to consider many more scenarios for development than would be likely or practicable. Instead of providing a tool for balanced and prompt decision-making, in too many cases NEPA has been interpreted as a requirement for agencies to develop lengthy, litigation-proof documents.

Action is needed so that the NEPA process can more effectively serve its intended purpose. A first step is to ensure that adequate funding and trained staff are available for NEPA reviews. The Task Force appears to recognize this with its recommendation for a study by the Council on Environmental Quality (CEQ) of current federal staffing issues, along with a study of NEPA interaction with other Federal environmental laws and with equivalent state legislation. Due to the importance of this issue, the timetables for both studies should be shortened, perhaps to six months, to allow implementation of recommended actions by federal agencies with NEPA responsibilities as soon as possible. To complement the studies, CEQ should provide training for agencies on NEPA requirements to enhance agency staff skills and capabilities. Guidelines should be developed for Federal agencies to facilitate flexible staffing and temporary assignments of experienced personnel among different agencies when workload requires.

Interagency consultation and cooperation can and should be improved. The Task Force has acknowledged this with recommendations for interaction among not only Federal agencies but between

Federal, state, tribal and local entities. The creation of a NEPA ombudsman office within CEQ, and annual review by CEQ of agency NEPA performance, with recommendations for improvement where applicable, could help streamline and improve NEPA decision-making processes. Also, due to the importance of increasing America's oil and natural gas supplies, projects receiving NEPA review should also include an assessment of the impact on domestic energy supplies and the economy if a "no action" alternative is chosen.

It is in the interest of all parties to make the NEPA process more objective and timely. Several Task Force recommendations will help accomplish this goal, among them: that NEPA be amended to define "major federal action"; that mandatory timelines be established for the completion of NEPA documents; and that unambiguous criteria be provided for use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). These Task Force recommendations can be enhanced by adding a requirement that agencies comply with relevant Executive Orders, such as permit streamlining and energy impact assessments. Requirements for use of best available scientific evidence and cost-benefit analysis should be made more explicit. CEQ should consider the use of the established and successful practice of conducting regional or area-wide assessments as conducted for oil and gas leasing on the Outer Continental Shelf, instead of the individual project-specific reviews as is currently the norm onshore.

Agency monitoring of the effects of mitigation measures set forth in NEPA documents should become standard practice. As recommended by the NPC Study, monitoring for the effects of mitigation measures should include provision for removal or modification of conditions of approval that are found to be no longer warranted due to changed circumstances, improvements in technology, etc.

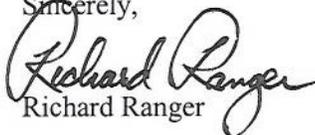
Delays to projects and to Federal agency actions that can result from litigation or the use of threats of litigation remain a concern. The Task Force recommendations provide a starting point for informed discussion of this important issue.

- Standards and procedures for judicial review of NEPA actions can and should be clarified.
- Potential litigants should be required to demonstrate standing, based upon relationship to the proposed Federal action, potential impacts from the proposed action, and participation in the NEPA process prior to filing a challenge. Potential litigants should be required to demonstrate that NEPA analyses did not rely upon best available information and science.
- Parties challenging agency action under NEPA should be responsible for reimbursement of costs borne by government and the project applicant if the challenge is not upheld.

NEPA allows the public to participate in the assessment of the impacts of energy projects. Our industry is committed to working with government officials, landowners, community groups, and other members of the public to ensure that we produce and transport the domestic oil and natural gas supplies that consumers and industry depend on, while also caring for the land and the environment.

API commends the Task Force for its effort to date. More detailed recommendations are included in the Attachment. We also request that our previous comments to the Task Force (see Attachment 2) be incorporated into the record. If you need additional information, please contact Richard Ranger at 202.682.8057, or Robert Moran at 202.682.8424.

Sincerely,


Richard Ranger

Attachment 1
Comments on the Recommendations
From the NEPA Task Force Draft Report (December 21, 2005)
Submitted by
the
American Petroleum Institute
February 6, 2006

The National Environmental Policy Act of 1969 initiated the modern era of environmental law and set the stage for other significant statutes such as the Clean Air Act, Clean Water Act, Safe Drinking Water Act, etc. NEPA's stated purposes include to: "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere".

NEPA created the Council on Environmental Quality (CEQ), and regulations under NEPA establish the process for reviewing and approving projects as diverse as highway construction; oil and gas, timber and mining operations; and housing developments. NEPA regulations provide opportunities for public comment and consideration of a range of impacts of proposed projects.

CEQ issued a report in 2003, "Modernizing NEPA Implementation" and convened an interagency task force to help agencies update their practices and procedures and better integrate NEPA into federal agency decision-making. In addition, the House Resources Committee created the Task Force on Improving the National Environmental Policy Act (NEPA Task Force). The Task Force was charged with reviewing and making recommendations to improve NEPA and to ensure that NEPA's original intent is realized – that is, federal decisions are made in an appropriate and environmentally sound manner. The Task Force held a series of hearings across the country to obtain comments on NEPA, and issued its findings and recommendations December 21, 2005.

This document provides specific comments of the American Petroleum Institute with reference to the recommendations as grouped and numbered in the Task Force Report. It should be noted that many of the recommendations of the Task Force Report can be implemented quickly via regulation under existing authority while also pursuing any needed targeted legislative changes.

Addressing Delays in the Process (Group 1)

As the Task Force recognized, delays associated with the NEPA process increase cost and uncertainty for business, increase workload for agency staffs and increase the complexity of their decision process, often without commensurate benefit to the public interest. Many commenters attribute this development to non-statutory requirements imposed by court decisions and/or the threat of litigation.

The NEPA process must be made more objective and timely. Thus, one of the most important recommendations from the Task Force is to establish unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS) [Recommendation 1.3]. This step, in combination with clear definition of "major federal actions" that reach the threshold of a requirement for an EIS, will help address delays in the process.

Sensible criteria to limit requirements for supplemental documentation (Recommendation 1.4), is an important action which should be achievable through modifications to existing regulations. In addition to the recommendations made in Group 1, the CEQ should be directed to evaluate the suitability of regional or area-wide assessments instead of individual project-specific reviews. The regional/area-wide approach has become the established and successful practice in the case of oil and gas leasing activities on the Outer Continental Shelf. CEQ should also emphasize and encourage agency use of tiered reviews and incorporation of applicable past NEPA reviews by reference. Clarifying requirements for analysis of alternatives (see Group 5 recommendations) will also help reduce delays in the process.

Public Participation (Group 2)

The objective of directing agencies to give weight to localized comments (Recommendation 2.1) is already incorporated in current CEQ regulations, and in the context of general direction requiring that agencies interpret NEPA in the light of other essential considerations of national policy. Instead of a new round of rulemaking on public participation, CEQ should establish annual review of agency NEPA performance that addresses all areas of agency performance. This review should include assessment of public participation in the process, along with recommendations for improvement where applicable. This will assure ongoing guidance to agencies by CEQ, and the accountability of agencies entrusted with NEPA responsibilities with respect to public participation. Additional discussion of the recommendation for annual review and agency accountability is found in the section addressing the Group 7 recommendations.

Limiting the length of EIS documents (Recommendation 2.2), already a requirement in Section 1500.4 of the CEQ Regulations, is best accomplished through implementation of steps recommended in Group 1, and through clarification of alternatives analyses in Group 5. The goal of enhancing public participation can also be achieved through better involvement in NEPA processes of state, local and tribal government entities with appropriate jurisdiction and accountability to local stakeholders, as discussed in the following section.

State, Local and Tribal Governmental Involvement (Group 3)

Consulting with state, local or tribal governmental entities and granting them cooperating agency status where facts and circumstances require is a means of assuring local concerns and interest are recognized through entities that have accountability to local residents, user groups, and other stakeholders. However, cooperating agency status under NEPA, as used in the Task Force report, should be limited to duly constituted state, local or tribal governmental entities with appropriate jurisdiction or with special expertise, as defined in 40 CFR Sec. 1508.5. "Stakeholder" is too broad a term.

Recommendation 3.2 (regulations to allow existing state environmental review process to satisfy NEPA requirements) is not necessary, as adequate guidance is now provided by Section 1506.2 of the CEQ regulations.

Litigation Issues (Group 4)

Delays to projects and to Federal agency actions on project applications from litigation, or from threat of litigation, have become increasingly common. Existing statutory and regulatory authority should be reviewed to evaluate whether modification of present law or regulation is necessary to require deference to an agency that completes a NEPA evaluation according to the requirements of NEPA and incorporating objective use of best available and scientifically valid information. Any person challenging that agency evaluation must bear the burden of proving the evaluation contradicts the best available information and science. Potential litigants should be required to exhaust administrative remedies, and participate throughout the NEPA process prior to filing a challenge. Standing to challenge

an agency's NEPA determination should depend upon factors such as the challenger's relationship to the proposed federal action and the extent to which the challenger is directly impacted by the subject of NEPA review.

On its face, proposed Recommendation 4.2, which calls for an amendment of NEPA to add a requirement that agencies "pre clear" projects, is unnecessary. Each agency should be able to rely upon its own legal staff (rather than on CEQ) for determination of the procedural effects of preparing NEPA documents.

Alternatives Analysis (Group 5)

As described in Recommendation 5.1, "reasonable alternatives" analyzed in NEPA documents should be limited to those which are economically and technically feasible. This is an important recommendation, since current practice has been to require analysis of ever more alternatives, resulting in voluminous assessments of unlikely alternatives, increased costs and long delays in the approval process.

In situations where agencies select the "no action" alternative as the "preferred" alternative (see Recommendation 5.2), it is critical that the economic and social effects of the "no action" alternative be expressly considered in addition to the environmental effects, consistent with the policy statement found in NEPA. With regard to oil and gas projects, economic and social effects of the "no action" alternative should include: effects upon national energy resource needs; impact of higher energy prices on economic growth; and impact of non-development on national energy security.

Assurance that mitigation measures are carried out is best left to the compliance enforcement mechanisms of the individual agencies. Promulgation of regulations by CEQ to make mitigation measures mandatory (Recommendation 5.3) would effectively convert NEPA from procedural to substantive law, in conflict with the intent of the statute.

Federal Agency Coordination (Group 6)

Interagency consultation and cooperation should be improved, but the Group 6 recommendations do not adequately address this need. Interagency cooperation, and consistency of agency NEPA decision making processes are central to the intent of the Act. The following additional recommendations should be adopted:

- To improve collaboration, federal agencies should adopt consistent, compatible and technically rigorous standards and protocols for obtaining, managing and reporting data used in NEPA analyses.
- Agencies should be directed to comply with relevant Executive Orders (e.g. permit streamlining and energy impact assessments)
- Use of Memoranda of Understanding (MOUs) should be expanded for coordinated agency reviews of resource reports and concurrent comment periods.
- Cooperative consultation among agencies should be required before an EIS is prepared instead of the common practice of agencies submitting adversarial comments or objections to completed documents.
- For energy projects, in addition to cost-benefit analysis, an assessment of the impact on domestic energy supplies, the economy, and energy security should be required if the project does not proceed

Dialogue with stakeholders early in the NEPA review process can reduce the likelihood of litigation. Present CEQ regulations already provide guidance and direction to agencies to share information with stakeholders and to seek input from them.

Similarly, codification of CEQ regulation 1501.5 regarding lead agencies is not necessary. Direction to CEQ to undertake annual assessments of the NEPA agencies' compliance with the Act and with CEQ regulations is the best means of assuring that agencies fulfill their obligations under NEPA. This necessarily includes an assessment of the effectiveness of federal agency coordination.

Council on Environmental Quality Authority (Group 7)

The establishment of a NEPA Ombudsman within CEQ (Recommendation 7.1) may provide an important means to assure interagency cooperation and consistency in NEPA processes among agencies. It is critical that this function become a means of streamlining the NEPA process, and not add another procedural hurdle. This Ombudsman should resolve disputes between agencies, remove barriers to decision making, and oversee annual reviews of agencies' performance of their NEPA responsibilities. In furtherance of this objective, each federal land management agency should be required to develop an internal accountability process for responsible management and for ensuring designated program tasks are accomplished in an efficient, cost-effective and timely manner. A quality control process needs to be put in place to ensure resource management objectives are clearly stated and measurable. CEQ is in the best position to ensure consistency among varying agencies' accountability systems.

An Ombudsman with annual review authority could provide a resource to assist agencies with performance of other important task under NEPA: 1) monitoring mitigation measures and effects (especially for projects without EISs), and 2) assuring removal or modification of stipulations and conditions of approval that are no longer warranted. Mitigation measures should be determined with reference to sound science, cost-effectiveness and practicability, and must be clearly identified in all decision documents. CEQ can provide a focused and experienced source of subject matter expertise to assure development and use of best practices in the ongoing implementation of NEPA among the diverse group of agencies with NEPA responsibilities. With this role, CEQ could also pursue the objective described in Recommendation 7.2 of long term management of NEPA related costs.

Agency accountability for responsible management of NEPA responsibilities in an efficient, timely and cost-effective manner is in the interests of all stakeholders, and CEQ is best positioned to provide expertise and oversight to achieve this outcome.

Group 8 – Cumulative Impact Analysis

Present CEQ regulations provide adequate guidance to agencies on the proper consideration of the environmental context with respect to a proposed project. Cumulative impact analysis that uses an evaluation of current and foreseeable future environmental conditions as a base, and considers the incremental effects of the proposed action in that context, is already provided for in 40 CFR Sec. 1508.7, and ensures that a holistic view will be considered. Thus, recommendation 8.1 is not necessary.

CEQ should prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than on actions that are "reasonably foreseeable" (Recommendation 8.2).

Group 9 – Studies

CEQ should study NEPA's interaction with other Federal environmental laws (Recommendation 9.1), and this study should include consideration of the interaction of the statute with the Data Quality Act,

the Energy Policy Act of 2005, and other equivalent federal legislation providing for the responsible development of our national resources.

CEQ should study Federal agency staffing issues (Recommendation 9.2). CEQ training for agencies on NEPA requirements to enhance agency staff skills and capabilities, and provisions for flexible staffing and sharing of experienced personnel among different Federal agencies when workload requires, should be considered as components of this effort.

CEQ should study the interaction of NEPA with state "mini-NEPAs" and similar environmental laws (Recommendation 9.3).

In each case, the importance of the subjects studied argues for a shorter time line, such as six months, than the one year time line described in the recommendations.

Additional Recommendation

The requirements for use of best available scientific evidence and cost-benefit analysis, implied in Task Force Recommendation 4.1 should be made more explicit through appropriate rulemaking, and/or through ongoing CEQ guidance and oversight as described above.

Attachment 2

National Environmental Policy Act (NEPA) Statement
Submitted to the
Chairman of the House Resources Committee
by the
American Petroleum Institute
September 2005

We appreciate the opportunity to submit our comments to the House Resources' "Task Force on Improving the National Environmental Policy Act (NEPA)." As the House Resources Committee considers how to update the NEPA of 1969, it is important to remember how this law affects consumers throughout the nation. Congress has clearly stated that the intent and purpose of this law is to protect the environment. The US oil and natural gas industry fully support this objective.

Decisions made by federal agencies through the environmental analysis process are vital to our ability to meet future US demand for clean-burning natural gas and oil. NEPA comes into play at many stages in the search for, development and transportation of energy supplies. Thus, it is critical that the NEPA process function efficiently while meeting its intended purpose.

NEPA allows the public to participate in the assessment of the impacts of energy projects. Our industry is committed to working with ranchers, landowners, community groups, government officials and the public to ensure that we produce and transport the domestic oil and natural gas supplies that consumers and industry depend on, while also caring for the land and the environment.

Responsible development can ensure we produce the energy needed to grow our economy while meeting all environmental requirements. Land use for energy development is temporary – and by law, the land is reclaimed after its use.

Now more than ever, it is most important to continue to develop all of our domestic energy resources, including those located beneath federal lands and coastal waters. Yet, efforts to increase domestic oil and natural gas production have been stymied. Federal restrictions in the form of NEPA delays can have the effect of putting significant volumes of these resources off limits.

Over the years, the complexity of the NEPA approval process has grown. Numerous legal challenges and lawsuits have complicated the preparation of environmental analyses causing regulators to often go above and beyond analysis requirements. These challenges have also resulted in significant project delays and cancellations and created uncertainties for those considering investments in energy supply. A fresh look at the NEPA process is necessary and there are several areas where NEPA can be fine-tuned that will have an impact on the process that allows us to develop and transport oil and natural gas:

- Ensure that adequate funding and trained staff are available for NEPA reviews;

- Eliminate duplicative environmental documentation in the NEPA process;
- Strengthen the Environmental Assessment process;
- Improve interagency consultation and cooperation;
- Make the NEPA process more objective and timely through the use of best available scientific evidence and clearly defining information needed for decision-making; and
- Enhance agency monitoring and enforcement.

Using advanced technology and sound operational practices, our industry has steadily reduced the impact of oil and gas development, both onshore and offshore. For example, the surface presence for exploration and development wells has shrunk significantly. A drilling pad the size of Capitol Hill is all that is needed to access any resources that might exist in the entire 68.2 square mile District of Columbia. Horizontal and directional drilling now enables our industry to drill multiple underground wells from a single pad, sometimes reaching sites as far away as 10 miles from the drilling pad.

Another example is that according to the U.S. Coast Guard, for the 1980-1999 period, 7.4 billion barrels of oil were produced in federal offshore waters, with less than 0.001 percent spilled. That's a 99.999 percent record for clean operations – a statistic few others can likely match or best, and far less than the volumes of natural seeps that occur on ocean and gulf floors.

NEPA is particularly important to the development of clean burning natural gas which is abundant in the Rocky Mountain states. According to the National Petroleum Council, more than half the technically recoverable resources in the Rockies are either off limits or highly restricted – that is enough natural gas [about 125 trillion cubic feet (Tcf)] to heat the 60 million homes currently using natural gas for 30 years. The Energy Policy Act of 2005 includes a provision recognizing that NEPA costs and delays can be reduced through the use of categorical exclusions for minimal surface impact activities for both onshore drilling locations and for pipeline rights-of-way corridors. This is an important step toward addressing the unnecessary delays accompanying the implementation of this law.

Progress has been made with NEPA efficiencies in the area of liquid and natural gas pipeline repairs. The pipeline industry has been working diligently and productively with the White House Council on Environmental Quality, U.S. Department of Transportation, and other federal agencies to develop an efficient means to comply with the stringent standards of the Pipeline Safety Improvement Act of 2002 while, at the same time, also fulfilling the procedural and substantive requirements of NEPA, the Endangered Species Act, and other federal laws that may apply to pipeline inspection and repair activities.

Based on the experience with pipeline inspection and repair activities, we recommend that the same administrative measures for timely coordination between and among government agencies and jurisdictions be used for construction of new pipelines.

We hope that as Congress considers this important environmental law, they consider how domestic oil and natural gas enhances our energy security, provides jobs and revenues to keep our economy growing and improves our daily lives. Sensible environmental reviews coupled

with opportunity for public comment will give us all a chance to develop our domestic energy supplies and protect the environment.