



FIDELITY

Exploration & Production Company

February 4, 2006

The Honorable Cathy McMorris
Chair
Task Force on Improving NEPA
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Representative McMorris:

Fidelity Exploration & Production Company (Fidelity) greatly appreciates the efforts of the United States House of Representatives, Committee on Resources to study and recommend methods for improving and updating the National Environmental Policy Act. Fidelity is an oil and gas production company operating on federally administered lands in the Rocky Mountain Region. Thus, we are and have been engaged in several aspects of NEPA. Whether it is a resource plan amendment or a project specific NEPA document, Fidelity recognizes the importance of consistent participation in order to protect our commercial interests. As a result, we have also had to intervene in several NEPA related lawsuits. It is because of this overarching NEPA experience, Fidelity greatly appreciates this opportunity to share its opinion on the NEPA process.

Fidelity's primary concerns with NEPA do not lie with the law itself. Rather, most of our concerns lie with the manner in which various agencies employ the NEPA process. Fidelity believes that in many instances, agencies are failing to comply with the Council on Environmental Quality (CEQ) requirements at 40 CFR 1500 and their own respective guidelines for NEPA implementation. As discussed in our comments below, current CEQ regulations already address some of the Recommendations. While reviewing the statute for efficiencies without comprising the intent of NEPA is a worthy effort; we also believe that the current study provides an additional opportunity, through rulemaking, to reform agency implementation of NEPA.

The most important areas for NEPA reform are limited scope of analysis, expanded use of Categorical Exclusions (CEs), proper tiering of NEPA documents and better alternative identification. The Recommendations on mandatory NEPA timelines, size of NEPA documents and NEPA cost control can be more effectively addressed if the foregoing substantive areas of NEPA documentation are the main focus for reform.

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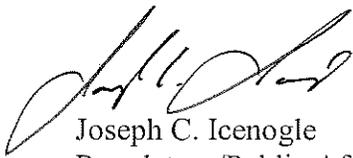
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Fidelity can support the concept of a NEPA Ombudsman within the CEQ as discussed in Recommendation 7.1. However, in order to make the Ombudsman effective, Section 309 of the Clean Air Act, which granted the Environmental Protection Agency (EPA) its NEPA oversight responsibilities, would have to be amended. Fidelity believes that the oversight responsibilities are better carried out by the CEQ and not within EPA. These oversight responsibilities should include interagency NEPA conflict resolution authority, overseeing NEPA training and expertise within all federal agencies, and tracking and advising federal agencies on the impacts to the NEPA process as determined through judicial and administrative proceedings. This statutory change would also eliminate EPA's conflicting role as a NEPA lead or as a cooperating agency with its current oversight responsibilities.

We greatly appreciate your consideration of Fidelity's attached comments. Should you have any questions or comments, please feel free to contact me at the letterhead address.

Respectfully Submitted
FIDELITY EXPLORATION & PRODUCTION COMPANY



Joseph C. Icenogle
Regulatory/Public Affairs Manager

NEPA RECOMMENDATIONS		FIDELITY COMMENTS
ADDRESSING DELAYS IN THE PROCESS		
1.1	Amend NEPA to define "major federal action."	Instead of creating a definition as outlined in the Recommendation, Fidelity recommends that the Committee review the "Major Federal Action" definition in the CEQ Regulations at 40 CFR 1508.18 and 40 CFR 1508.27.
1.2	Amend NEPA to add mandatory timelines for the completion of NEPA documents.	Fidelity supports the mandatory timelines with limited extensions as outlined in the Recommendation. Fidelity would add that the best method to limit the timeline and size of a NEPA document is to narrow the scope of the analysis.
1.3	Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE) Environmental Assessments (EA) and Environmental Impact Statements (EIS).	Fidelity strongly supports this Recommendation. However, tied to the criteria is the need to define the scope of the analysis for EAs and EISs. The analysis should be limited in scope to include (a) only those alternatives that are technically and economically feasible; and (b) those alternatives within the statutory authority of the applicable regulatory agency. In addition, there should be expanded use of CEs., particularly in areas that already have extensive development or for projects within geographical areas in which extensive NEPA documentation has taken place.
1.4	Amend NEPA to address supplemental NEPA documents.	Fidelity supports this Recommendation. Federal agencies need clear standards for when to supplement a NEPA document. Moreover, supplemental NEPA documents should only focus on the specific issues that initiated the supplement. Many times agency will use a supplemental NEPA document to reanalyze issues or effects that are not the source of the supplement. This will also provide affected parties with more certainty surrounding the NEPA process.
ENHANCING PUBLIC PARTICIPATION		
2.1	Direct CEQ to prepare regulations giving weight to localized comments.	Fidelity believes that this Recommendation is not necessary. Instead the lead agency should have the discretion to accord greater weight to comments with greater scientific and socio-economic validity, regardless of the source. Fidelity further suggests that agencies' focus should be on comments of substance and not the form comment letter. State and local governmental agencies can always apply for cooperating agency status as defined in 40 CFR 1508.5 and 1501.6. Many times local governments are the best agencies to provide expertise on issues that affect their constituents, thus giving weight to local comments to the extent it is appropriate.
2.2	Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7.	While Fidelity supports this Recommendation, Fidelity believes that limitations on the scope of analysis, proper tiering and better alternative identification (as discussed in 5.1) are better methods of addressing the problem of overly lengthy NEPA documents.
BETTER INVOLVEMENT FOR STATE, LOCAL AND TRIBAL STAKEHOLDERS		
3.1	Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.	Fidelity supports this Recommendation as long as it is drafted in accordance with 40 CFR 1501.6. It is important that the cooperating agency status be granted only to duly constituted entities that have legal jurisdiction or special expertise. If cooperating agency status is granted outside of these areas, the NEPA process may create additional delays by having "too many cooks in the kitchen." Also, affected entities should be required to request cooperating agency status within 30 days after the Notice of Intent or the Scoping Notice is published. Additionally, a failure by an entity to request cooperating agency status should be deemed a waiver of its interest in participation as a cooperating agency.

NEPA RECOMMENDATIONS		FIDELITY COMMENTS
3.2	Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.	Fidelity does not support this Recommendation. Many times state environmental review programs have a different process and requirements than a federal agency. In order to bring the state environmental review up to the same standards to satisfy federal concerns, a supplemental document would likely be required. Currently, 40 CFR 1506.2 provides agencies with the directive to work with state and local governmental procedures in order to reduce or eliminate unnecessary NEPA duplication.
ADDRESSING LITIGATION ISSUES		
4.1	Amend NEPA to create a citizen suit provision.	<p>Fidelity supports the four of the five bulleted Recommendations.</p> <p>Fidelity does not understand the intent behind the third bullet: <i>"Prohibit a federal agency – or the Department of Justice ..."</i> This Recommendation needs to be eliminated or clarified.</p> <p>The fourth bullet: <i>"Establish clear guidelines..."</i> discusses the establishment of clear guidelines on who may have standing to challenge an agency decision. Fidelity recommends that, in addition to the criteria already addressed in bullet four, the committee add and adopt similar standards for a stay of a decision or approval as defined in 43 CFR 3150.2 (b). In essence, the challenging parties should have to demonstrate i) a relationship to the proposed federal action; ii) the extent to which the challenger is directly impacted or harmed by the action; iii) whether the challenger was engaged in the NEPA process prior to filing the challenge; iv) the likelihood of the challenger's success on the merits of its challenge; v) the likelihood of irreparable harm to the challenger or resources if the challenge is not heard; and vi) whether the public interest is best served if the challenge is heard.</p> <p>In bullet five: <i>"Establish a reasonable time period for filing a challenge"</i> Fidelity recommends that the 180-day time frame for challenges be amended to 30 days from notice of a final decision on a project NEPA document. Project proponents run a significant financial risk in implementing a NEPA analyzed project and need the assurance that after 30 days all appeals, protests and lawsuits have been filed. While, the NEPA decision is "full force and effect" the shorter 30-day period provides the project proponent with an understanding of the legal issues surrounding a project where the proponent can make an informed decision whether it wants to proceed or not.</p> <p>Fidelity also believes that the Committee should recommend more stringent bonding requirements for plaintiffs that challenge a final NEPA document. In the case of NEPA litigation over resource development, the plaintiffs should be statutorily required to post a minimum bond to cover all legal costs incurred by the applicant in order to defend the proposed action, as well as costs associated with unnecessarily delayed production.</p>
4.2	Amend NEPA to add a requirement that agencies "pre-clear" projects.	<p>As drafted in the title, Fidelity does not support the concept of pre-clearing projects. We are concerned that a pre-clearing requirement would result in additional delays in final approval of a project. Also, it may open yet another door to litigation.</p> <p>However, as drafted in the text, Fidelity supports CEQ's monitoring of judicial proceedings or agency administration decisions and advising appropriate federal agencies of the applicability of such actions.</p>

NEPA RECOMMENDATIONS		FIDELITY COMMENTS
CLARIFYING ALTERNATIVE ANALYSIS		
5.1	Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible.	Fidelity strongly supports this Recommendation. Currently, the CEQ regulations do not require agencies to include economic and technical feasibility in their interpretation of reasonableness. While the "Forty Most Asked Questions Concerning CEQ's NEPA Regulations" provide guidance (Question 2a) that an alternative should be "practical or feasible from the technical and economic standpoint and using common sense," this standard has never been codified. Project proponents should be consulted in the development of reasonable alternatives. Many times the agency does not completely understand the operational aspects of the proposed action; and therefore, does not have the information necessary to properly draft the reasonable alternatives.
5.2	Amend NEPA to clarify that the alternative analysis must include consideration of environmental impact of not taking an action on any proposed project.	Fidelity believes that this Recommendation should be expanded to include "consideration of social, economic, and environmental impact." The social and economic impacts are often not adequately addressed, especially the beneficial or positive impacts of a proposed action. Discussion of the effects on the human environment should include tax revenues, job opportunities and losses, and other relevant public interest factors.
5.3	Direct CEQ to promulgate regulations to make mitigation proposals mandatory.	Fidelity believes that this Recommendation is not necessary. The need for mitigation should be determined on a case-by-case basis. If a mitigation measure is identified and adequately analyzed, it becomes a "condition of approval" that is subject to inspection and enforcement.
BETTER FEDERAL AGENCY COORDINATION		
6.1	Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.	Fidelity believes that this directive is not needed. Currently, the agencies will send any NEPA document upon a stakeholder request, and will place any stakeholder on its mailing list to receive scoping notices. Stakeholders are also invited to participate in the process. Regulations encouraging more consultation will likely serve to create more delays and procedural litigation opportunities. The Committee should direct CEQ to promulgate regulations to encourage more consultation with the project proponents. The project proponent is often left out of the development of alternatives and the identification of mitigation measures related to its proposed action. Enhanced consultation with project proponents in these areas will lead to better decision-making because the proponent will have the expertise to assist the agency in the implementation of the proposal.
6.2	Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.	Fidelity believes this amendment is not needed. A greater need exists for Congress to hold agencies accountable for compliance with the CEQ regulations. It is imperative to the process that each agency, whether a lead, cooperating or oversight agency, understand and fully comply with the CEQ regulations.
ADDITIONAL AUTHORITY FOR THE COUNCIL ON ENVIRONMENTAL QUALITY		
7.1	Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality.	Fidelity supports the "NEPA Ombudsman" only if Section 309 of the Clean Air Act be amended to divest EPA of its NEPA oversight responsibilities. Fidelity would rather have interagency NEPA conflict decision-making with the CEQ than within EPA. Many times EPA is a lead or cooperating agency and also has its oversight responsibility concurrently. This leads to conflicting

NEPA RECOMMENDATIONS		FIDELITY COMMENTS
		goals.
7.2	Direct CEQ to control NEPA related costs	This Recommendation is not necessary, if the scope of NEPA documentation is narrowed as proposed above. Imposing reasonable limits on the scope of analysis will result in a corresponding reduction in costs.
CLARIFY MEANING OF 'CUMULATIVE IMPACTS'		
8.1	Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.	This Recommendation is not necessary. Chapter 3 of an EA or EIS should clearly describe the "Affected Environment." This description will necessarily include the effects of past actions in the assessment of cumulative impacts.
8.2	Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.	This Recommendation may be problematic for Federal Land Policy Management Act (FLPMA)-related or programmatic NEPA documentation. FLPMA planning documents and programmatic documents are based upon "reasonably foreseeable" activities and not concrete proposals. Fidelity is concerned that this Recommendation may slow the process to supplement and implement Resource Management Plans that are crucial to states where there is an abundance of federal lands or may adversely affect the preparation of a programmatic document that is analyzing resource development over a large area.
STUDIES		
9.1	CEQ study of NEPA's interaction with other Federal environmental laws.	NEPA analyzes the implementation of federal and state laws on a proposed action. A study of duplication and conflicting environmental laws may be warranted; however, it is clear that Congress intended NEPA to be a procedural law and not a substantive environmental protection law.
9.2	CEQ study of current Federal agency NEPA staffing issues.	Fidelity strongly supports this study. Many times the federal employees charged with implementing NEPA appear to not have sufficient training and experience in the NEPA documentation process.
9.3	CEQ study of NEPA's interaction with state mini-NEPAs" and similar laws.	This study may have value to the Committee in understanding the various state versions of NEPA; however, Fidelity does not see it as a high priority study. It has been Fidelity's experience that the respective state agencies generally interact well with the federal agencies. The priority area should be the evaluation of the federal agencies charged with implementing NEPA.