

NEPA Task Force Report Comments
C/O NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

5 February 2006

Dear Task Force Members:

Please accept these comments from Hells Canyon Preservation Council on the National Environmental Policy Act of 1969. I have worked with NEPA since 1973 when I was in college with a major in Environmental Policy and Public Analysis at University of California. For the rest of my career I have written comments of federal timber sales, forest plans, mining proposals, water quality disagreements, Endangered Species controversies, and other environmental questions. Now, as the Executive Director of HCPC I will try to give an unemotional review of what I see as an inspiring law that has elicited enormous debate in the last 30 years of my activism.

I think that the law needs reform to lower the cost and effectiveness of the environmental review process and litigation, but not only by simplifying it. NEPA as it stands, is a very simple law, defined in great part by the CEQ regulations which are complicated. But NEPA should not be implemented on the whims of the regulations solely.

The most important factor in the effectiveness of NEPA is the way in which many agencies following many legal imperatives must work together to negotiate on decisions. The other crucial ingredient is the way that the process involves people. These are procedural but the result of what we the public comes up with is functional and substantial in implementation. For example, if legitimate comments are not recognized or followed, the agency will receive appeals or challenges till the law is followed. In this way the NEPA process is a collective and collaborative way of making good social decisions.

The fact that NEPA documents have come from the world of 5 page reviews in the 1970s to 500 page analyses in 2006, characterized by stalling, and arguing over all but the periods in every sentence, is a consequence of commenters attempting to stop undeserving projects by challenging the process. Give us a point of victory or defeat where all reasonable alternatives have been looked at and the decision made decisively—as President Bush

says—as an up or down decision, end of debate, and we will agree to that decision, but it must be a fair one.

Delay is victory in this public policy forum and expediting a project through “streamlining” the process and procedure means only loss to those who oppose it. Streamlining is a metaphor for making the process less effective and expediting projects. Every project that is delayed or even stopped is only a temporary victory; every one that goes forward tends to be a permanent loss, sometimes with permanent degradation. This fact is the basis for many of my thoughts on NEPA, however it need not be the case that thick documents make better decisions. Give us a decision that is thumbs up or thumbs down, one that is permanent, and we will give only support, though begrudgingly, it is true.

Delaying a project may also mean that it will be improved enough to get the support of most commentators before it is approved. In this case there are hardly any proponents nor opponents and only people who have had their thoughts heard and responded to. For this reason, it is crucial to hear what people say. But people are not heard when the process is so convoluted or lengthy as to create angst and frustration in decision makers. They only listen and then make the decision that they originally proposed, to hell with challenges, to hell with screaming protests, to hell with process. This is not as it should be and it is the understandable response to lengthy and vacuous documents that are responding to litigation. There must be a better way to solve this problem than to force the shortening of documents and to disallow filing of lawsuits.

One other major problem that I see is the role of politics in decision making. I respect the notion that there is no way to eliminate politics in making decisions that affect a person’s living (and they all do). But NEPA should lessen the way in which politics affects the decision. It doesn’t and it could.

The fix should be procedural (by wrestling with CEQ regulations as they can be changed to reflect conditions) but also provide substantive results rather than merely burdening NEPA with endless provisions and expense. Ultimately, the NEPA process will only give peace to project supporters if all of us understand that a project will only be looked at once, with all of its flaws, with an up-or-down decision that lasts as long as the wind shall blow.

I offer the following opinions on the needs of NEPA organized by Groups:

Group 1

Recommendation 1.2 I agree with the recommendation.

Recommendation 1.2 Mandatory timelines won’t work to protect natural resources. Imagine an agency that has limited funding (which one isn’t?) and is presented with an EA which it cannot afford to complete—in 9 months it is deemed complete? Hardly! To do so is not in the spirit of NEPA. Better

would be to set a suggested timeline for NEPA documents contingent on funding to prepare and finish the document. This could be in the revised statute rather than setting a drop-dead timeline without contingencies. If the necessary amount of money to prepare a document is allocated it would be done on time.

Another option is to put the required timeline into regulations but make it contingent on acquiring the funding.

Recommendation 1.3 NEPA requires preparation of an EIS and the statute fails to mention Categorical Exemptions or Environmental Assessments. These are mentioned in the CEQ regulations. However, EAs and CEs have become the convention by court orders and they are a useful convention. With that in mind, it is logical to bring a clear and unambiguous description of this logical process into the law. Although it would be unorthodox, an EA could be defined in law as a document prepared to determine whether an EIS or a CE should be done. In this option the EA would be a much less rigorous analysis of environmental impacts and it would save time and money. Another option would be simply to define each of these three documents as the current CEQ guidelines define them but to embed them into the statute. The CE should be additionally defined to include only actions that have no potential for significant impacts.

Recommendation 1.4 I agree with the bulk of this recommendation. The proposed revision should add that in the case of a significant mistake being made by the agency on an EIS or EA, the agency can use a supplement to add information to remedy the mistake within 2 months. This could allow a period for negotiation, to avoid a lawsuit, or simply to correct an omission.

Group 2

Recommendation 2.1 Giving all local input an advantage over non-local information is a mistake. This discounts the concerns that national organizations and individuals living just beyond the boundaries of a state, who may care deeply about an issue, would have on local issues. This could be a disaster if, lets say, operation of the Three-Mile Island Nuclear Power Plant were at stake or in the case of downwinders who lived in Utah being affected by events that took place near Las Vegas. There are a million other possibilities that can be raised, but please don't diminish NEPA in this manner.

Recommendation 2.2 This recommendation sounds pretty good but it is a procedural problem being remedied with a prescriptive cure. As such it can be beat with a better mousetrap: smaller print, appendices, an in-office file to review, or a website file. Better would be to state what limit might be effective--the documents should be descriptive, accurate, short, and decisive--and that funding will be limited on reports that contain or exceed 150-300 pages. Put a price on the mousetrap and the report will be more efficient.

Group 3

Recommendations 3.1 and 3.2 Both of these provisions seem alright.

Group 4

Recommendation 4.1 The creation of a “citizen suit provision” apparently only limits lawsuits and we at HCPC believe that is inappropriate. Please do not use the name “citizen suit provision” as a euphemism for “limiting lawsuits.” In addition, a fair minded provision should give no preference to businesses and it should not limit the individual’s ability to sue. Remember NEPA should be a provision that supports the individual. Please also clarify the recommendation so that it defines a right that we citizens are gaining. Define what you mean by providing a citizen suit provision as we don’t see this as expanding the rights of citizens or individuals. The bullet that gives businesses a special right not to be limited in activities that weren’t part of the initial lawsuit is arcane and confusing; it seems a special case that doesn’t deserve a special place in law.

This part of NEPA could include a provision to require forced arbitration on extreme decisions such as those on nuclear power plants, oil exploration, discovery, or production, and on mining issues. Again it should provide an up-or-down decision on public lands that is final and puts conservation issues on equal footing with defining activities like oil development or spending money on levees in New Orleans. The defeat of dams in and above Hells Canyon is a good example of such a decision, although there was no arbitration involved. It is unfair for either side to fight the decision again and again before land is protected or developed. Make a decision and get on with it.

Recommendation 4.2 This recommendation seems needless but alright.

Group 5

5.1 This would limit options in NEPA by defining reasonable alternatives as being limited to economic or technical feasibility. Take for example oil development in Alaska or mining in Hells Canyon, timber harvest in Oregon or fish harvest in the ocean--none of these entails spending a cent not to develop. Why even consider technical or economic concerns? Or is that even the point of this provision? What is the point of it? Does this proposed provision end the requirement of looking at the No Action alternative as a baseline for a proposal? Bad idea.

5.2 The No Action proposal should be left as it is. In the case of oil development, an up-or-down decision weighs social costs (as in Alaska) against actual costs of development. To forget social costs is to gravely discount a hundred years of environmental protection that has provided us enormous progress in this country--take for example coal mining and air

quality controls. Financial benefits to these activities? None! Social and intangible costs? Vast! These should also play a part in the analysis if you change the No Action Alternative to be more prescriptive.

5.3 Good but put this in NEPA rather than in the regulations and cut # (2) in the second sentence. At the end of this provision add "...if it is approved."

Group 6

6.1 This is a good idea!

6.2 I'm unclear of how this might work.

Group 7

7.1 HCPC very much agrees with this proposal, but put the Ombudsman in the staff and put the burden on the Council for the most important issues. The Council should be reinstated and be made of the House majority leader, the House minority leader (or their alternates) and Director of the EPA. Only critically important issues should the case rise to the Council, much like the "God Committee" in the Endangered Species Act.

7.2 This could limit the size of NEPA documents by cutting the budget for preparing EAs and EISs which is good, but the potential loss of analysis isn't.

Group 8

8.1 and 8.2 create a rather limiting definition of cumulative effects but HCPC has no concrete suggestions other than to put all of the definitions into regulations.

Group 9

All of the studies should be like NEPA and reflect the length of a woman's dress: long enough to cover the issue and short enough to keep it interesting.

Other comments

- 1) The CEQ Director should work under and for the council rather than being shifted at the political whim of the President.
- 2) Functional equivalent environmental processes are only alternative processes, but usually they lessen protections. Please eliminate this definition in all Regulations.

Thank you very much for seeking comments on NEPA. This is what makes NEPA a good process: review, feedback, change.

Sincerely,

Mike Medberry
Executive Director