



February 6, 2006

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

RE: NEPA Task Force Initial Findings and Draft Recommendations

Dear Sir or Madam:

The National Mining Association (NMA) appreciates this opportunity to submit comments on the "Initial Findings and Draft Recommendations" of the House Resources Committee Task Force (Task Force) on Improving and Updating the National Environmental Policy Act (NEPA). NMA commends the Task Force's initiative in gathering information on improving the NEPA process. The Task Force's findings and draft recommendations represent an important step forward in modernizing a process currently beset by inordinate delays and rising costs that impede the development of our natural resources without providing commensurate environmental benefits.

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Since many NMA members conduct coal and mineral operations that require federal decisions or authorizations, they have extensive experience with the NEPA process, especially the protracted delays and costs associated with NEPA compliance.

The following comments focus on the Task Force's draft recommendations concerning NEPA's interaction with other federal environmental laws (Group 9), delays in the process (Group 1), clarifying the alternatives analysis (Group 5), improving federal agency coordination (Group 6), and addressing litigation issues (Group 4). Overall, NMA believes these recommendations, with particular clarification or modification, have the potential to provide critical improvements to the NEPA process. Congress enacted NEPA to require federal agencies to evaluate and minimize the environmental impacts of their actions, while ensuring the public's participation in the process. NMA believes the following recommendations can be implemented while preserving and advancing these core goals.

➤ **Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws.**

NMA strongly supports the Task Force's acknowledgement of duplication and overlap in the environmental review process. The Task Force recommended commissioning a study and report that evaluates the interaction between NEPA and other federal environmental laws, as well as the amount of duplication and overlap in the environmental evaluation process. NMA believes such a study would show considerable duplication and overlap, specifically in regards to the environmental permitting procedures applicable to proposed exploration and mining operations prior to receiving federal approval. In fact, NMA's statement to the Task Force, submitted November 17, 2005, revealed these self-evident truths.

Mining is subject to comprehensive environmental regulation related to the planning, operation, and closure of mining operations. First, mining activities are subject to laws and programs that apply to many industries and their impact on a specific resource like the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act, and Safe Drinking Water Act. Second, mining is also subject to laws and programs directed specifically at the effects of mining on many natural resources. Examples of these latter types of laws with specific mining regulatory programs include the Federal Land Management and Policy Act, the Surface Mining Control and Reclamation Act, and the Forest Service Organic Act. These programs establish environmental objectives and standards implemented through a transparent permitting process, allowing for the full integration and consideration of the objectives of the other non-industry specific environmental laws such as the CWA or CAA. Altogether, these laws ensure the full and thorough consideration, both substantively and procedurally, of environmental impacts from mining operations on federal lands irregardless of the NEPA process. These laws and their corresponding regulations, as evaluated and applied through their permit processes, provide the functional equivalent of a NEPA review for proposed exploration and mining operations on federal land.

As shown by the testimony of Luke Russell, Director of Environmental Affairs, Coeur d'Alene Mines Corporation, and Laura Skaer, Executive Director of the Northwest Mining Association, mining operations on federal lands face a lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. One solution to this problem is to legislatively exempt federal agencies, such as the Bureau of Land Management, Office of Surface Mining, and U.S. Forest Service, from performing a formal NEPA review when their permitting processes offer the functional equivalent. Such an exemption would streamline the permitting processes by excluding duplicative and costly environmental reviews.

Furthermore, a functional equivalence exception would allow these agencies to more efficiently and effectively focus resources on the development of our nation's natural resources, while still preventing and minimizing environmental impacts as originally intended under NEPA. Congress enacted NEPA as a planning tool for federal agencies, mandating that agencies consider the environmental impacts of

their actions. This purpose is now served by the environmental permitting processes currently applied by federal agencies under other statutory schemes.

In fact, Congress has exempted the Environmental Protection Agency from completing a NEPA review for certain permitting decisions under the CWA and CAA for this very reason. See 33 U.S.C. § 1371(c) (2005); 15 U.S.C. § 793(c)(1) (2005). The Task Force possesses an important opportunity to recognize the benefits of reducing duplication in the environmental review process through the application of the functional equivalence exemption outside of EPA permitting decisions. Given these benefits, NMA urges the Task Force to forego additional study and recommend that Congress amend NEPA to include a legislative exemption founded on the functional equivalence doctrine as advocated above.

If the Task Force determines that a study of the overlap is still necessary, NMA urges the Task Force to provide the Council on Environmental Quality (CEQ) with a more specific directive. The CEQ study should not stop with locating duplication and overlap with the NEPA review process. More importantly, CEQ should evaluate how other environmental permitting schemes are providing the sufficient "hard look" at the environmental impacts of a major federal action, and thus fulfill the purpose of NEPA. Moreover, the Task Force should specifically require CEQ to evaluate the functional equivalence doctrine as a solution to the current duplication within the environmental review process. To accomplish this goal, the Task Force should forward all relevant testimony to CEQ for appropriate consideration.

➤ **Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.**

NMA strongly supports the addition of mandatory timelines for the completion of NEPA documents. As the Task Force is aware, the fear of litigation has pushed federal agencies to engage in "paralysis through analysis." Consequently, mining operations face a protracted and unpredictable review process devoid of enforceable agency deadlines. The National Academy of Sciences (NAS) has acknowledged that NEPA reviews are "time consuming" and that in the hardrock mining industry "there is a tendency for the [permitting] process to drag on for years, even a decade or more." *Hardrock Mining on Federal Lands* 122 (National Academy Press, 1999). Codifying mandatory timelines for the completion of NEPA documents would provide a solution to this problem.

The Task Force received testimony from Luke Russell of the Coeur d'Alene Mines Corporation, and Laura Skaer of the Northwest Mining Association, detailing their personal experiences with delays in the NEPA process. For example, Mr. Russell stated that "[w]hen [he] first began working with NEPA in the mid 1980's the time . . . to prepare an EIS for a mining project took about 18 months." According to Mr. Russell, "[t]oday an EIS for a mining project may take 5-8 years." This timeframe does not even factor in possible appeals and litigation. Ms. Skaer also gave a striking account of the problems in securing investment in mining operations due to excessive permitting delays. For example, the Revett Minerals Rock Creek Project endured 14 years of NEPA review.

The above testimony shows the great difficulty mining operations face in making investment decisions when such a huge delay and uncertainty exists in completing the environmental review process under NEPA. Moreover, these delays come at a cost to the local communities who stand to benefit from an approved mining operation. Due to NEPA related delays, these communities lose the associated employment opportunities and tax revenue. Ms. Skaer testified that the Rock Creek mine would "generate \$237 million in payroll, purchase \$303 million in materials and supplies, and pay more than \$30 million in property and production taxes, \$23 million in state income taxes and \$85 million in federal income taxes."

These delays in the NEPA process, which provide no commensurate environmental benefits, illustrate the need for the codification of mandatory timelines for the completion of NEPA review documents. NMA recognizes that the 18 month cap on completing an environmental impact statement (EIS) and nine month cap on completing an environmental assessment (EA) represent realistic timeframes. NMA, however, encourages the Task Force to consider shortening these timeframes to those advocated by CEQ in its "Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations." According to CEQ, the completion of an EIS for "large complex energy projects would require only about 12 months," while the completion of an EA should take "no more than 3 months, and in many cases substantially less." See 46 Fed. Reg. 18026 (Mar. 16, 1981). In addition, NMA urges the Task Force to incorporate a nine month mandatory timeline for the completion of a supplemental EIS, since excessive delays are also associated with such reviews.

NMA also supports the Task Force's allowance for a six and three month extension for completing an EIS and EA, respectively. NMA, however, urges the Task Force to further clarify the procedures for obtaining these extensions prior to finalizing this recommendation. Recommendation 1.2 states that "[b]efore the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met." NMA opposes authorizing CEQ to extend these timeframes. Instead, NMA recommends that the authority be given to the lead agency to process the extension requests. The lead agency, not CEQ, is the best equipped to make the decision on whether an extension is appropriate for a specific project. Extensions should, however, be limited to circumstances involving unanticipated and material evidence bearing on the environmental impacts of the project. Furthermore, the lead agency should be limited to reviewing only this material evidence during the extended timeline.

All in all, mandatory timelines provide the hard guidance and goals necessary to eliminate the "paralysis by analysis" currently inhibiting the NEPA review process. While it may be argued that mandatory timeframes will foreclose public participation and/or consideration of certain issues, NMA believes that this is not the case. Many environmental statutes provide deadlines for final agency decisions without undermining public participation or precluding a full airing of the underlying environmental issues.

- **Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible.**

NMA strongly supports amending NEPA to require that the "reasonable alternatives" analyzed during NEPA review be limited to those that are economically and technologically feasible. Mineral exploration and development, as well as other natural resource development projects, are constrained by geologic factors. In turn, these factors limit the number of practical alternatives available to project proponents that are worthy of extensive review. The resources of both federal agencies and project proponents are wasted when alternatives not capable of being implemented undergo extensive evaluation.

Thus, NMA wholly supports requiring that only those alternatives supported by feasibility and engineering studies and capable of being implemented after taking into consideration cost, technologies, and socioeconomic consequences be considered. NMA also urges the Task Force to recommend the limiting of alternatives studied to those that meet the purposes and need statement of the project. Restricting the alternatives analysis in this way would eliminate unnecessarily complex and lengthy NEPA documents, conserve administrative resources, and expedite the entire review process.

- **Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.**

NMA agrees with the Task Force that ensuring constructive dialogue between the stakeholders is necessary for an improved NEPA process. Such reforms, however, must also include a provision prohibiting those stakeholders who did not participate from the outset of the environmental review process from obstructing an agency's ability to complete and approve relevant NEPA documents.

NAS has recognized the importance of this issue in terms of permitting hardrock mining operations. NAS found that "[t]he lack of early, consistent cooperation and participation by all the federal, state, and local agencies involved in the NEPA process results in excessive costs, delays, and inefficiencies in the permitting of mining on federal lands." NAS further found that "[d]elayed and inconsistent involvement by nongovernmental organizations exacerbates these problems." Ultimately, NAS recommended that "[f]rom the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of environmental impact statements for new mines." *Hardrock Mining on Federal Lands* 111 (National Academy Press, 1999).

In light of the recommendations put forth by NAS, NMA encourages the Task Force to further expand its own recommendation. As written, the recommendation appears to focus on the consultation between federal agencies and other interested parties, presumably public stakeholders. Although NMA believes this is a worthy reform of the NEPA process, the coordination and consultation between federal

agencies and the lead agency must also be addressed. Thus, the Task Force should direct CEQ to promulgate deadlines for consultations among interested federal agencies. Such deadlines should require participation at the time a consulting agency has been notified of the opportunity to participate in the review. If these deadlines are not met, the lead agency should be authorized to proceed with the NEPA process using the best available information.

This approach is utilized in existing federal and state permitting processes and has proven effective in providing meaningful opportunities for agencies and other local agencies to offer their views on the effects proposed actions will have on the environment that are within their area of expertise. *See, e.g.,* 30 U.S.C. § 1263(a). Too often, federal agency coordination is lacking in the NEPA process, triggering delays and rising costs. Deadlines for interagency consultations would provide the incentive needed to gain timely, meaningful participation by federal agencies that is currently lacking in the NEPA process.

➤ **Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues.**

NMA strongly supports the Task Force's authorization of a study and report of current federal agency NEPA staffing issues. Any reforms of NEPA will fall short if federal agencies do not have the staffing, expertise, and administrative resources to complete the NEPA review process in a timely and efficient manner. Thus, Congress must be made aware of any related staffing or resource deficiencies before it proceeds with any legislative reforms.

➤ **Recommendation 4.1: Amend NEPA to create a citizen suit provision.**

While NMA believes certain reforms are needed to reduce litigation related delay, we do not support amending NEPA to include a citizen suit provision. The right of prospective plaintiffs to challenge the NEPA review process is adequately established in existing case law through reliance on the judicial review provisions of the Administrative Procedure Act. By impliedly creating a new cause of action under NEPA, NMA believes a citizen suit provision would unnecessarily disrupt the massive body of case law that has accrued over the last 30 years. Adding a citizen suit provision would open the door to years of new litigation as parties challenge the limits of the new law.

Instead, NMA supports amending NEPA to include certain provisions that clarify when a potentially affected party may raise purported NEPA-related claims in a challenge to a final agency action. Specifically, NMA suggests enactment of the following prerequisites for raising NEPA claims in connection with any challenge to the merits of a final agency action: (1) the party participated in the NEPA public comment process in a manner that adequately put the federal agency on notice of potential claims against and/or objections to the NEPA process; (2) the party presented credible evidence of harm related to the issues actually raised during the process; (3) and the party files a timely challenge within the period allowed to challenge final agency action under applicable law, and if no law imposes a specific

timeframe for challenging the final action, then imposition of a 60-day limitation period for commencing an action that raises NEPA-related claims. These three requirements would accomplish the Task Force's goal of clarifying the standards and procedures for judicial review of NEPA actions without the need to include a potentially disruptive citizen suit provision.

NMA appreciates the opportunity to submit these comments on the Task Force's draft recommendations for updating and improving the NEPA process. NMA looks forward to a continuing dialogue with the Task Force as it moves forward in finalizing its report and recommendations and beyond. Should any questions arise regarding these comments, please contact Tawny Bridgeford at (202) 463-2629.

Sincerely yours,

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