



National Association of Environmental Professionals

Comments on the
Initial Findings and Draft Recommendations
of the
Task Force on Improving the National Environmental Policy Act and
Task Force on Updating the National Environmental Policy Act

Committee on Resources
U.S. House of Representatives

February 2, 2006

The National Association of Environmental Professionals (NAEP) is a national professional organization founded in 1975. NAEP has approximately 1,300 members; thousands of affiliated professionals; and state, regional and student chapters throughout the United States. NAEP members include professionals with expertise in a broad cross-section of engineering, scientific, planning, technical, legal, and academic disciplines.

Our members work in and with government agencies at the federal, state, and local levels as well as in private practice with contractors and consulting firms and also in universities and other academic positions nationwide. NAEP members have been involved in implementing the National Environmental Policy Act (NEPA) from the statute's passage to the present. As environmental professionals and NEPA practitioners, NAEP members' activities have included preparation and review of NEPA documents, development of training programs for other NEPA practitioners, submission of expert testimony, and technical expertise and policy assistance to both government and private-sector clients.

NAEP provided testimony to the Task Force on Improving the National Environmental Policy Act in September 2005, and appreciates this opportunity to provide comments on the Draft Task Force Report. NAEP's comments address both the report and the recommendations.

Comments on the Draft Report

In general, NAEP believes that the Task Force report addresses many important issues relating to NEPA implementation across the federal government. While the report does contain several inaccuracies, two misstatements in particular do need correction:

- “The Task Force was told that there was an argument to be made that NEPA played a role in blocking a floodwall project that may have prevented the flooding of New Orleans in the aftermath of Katrina...” (Draft Report at 11). In fact, the Task Force was told that the NEPA document prepared by the U.S. Army Corps of Engineers for the proposal was found by a U.S. District Court judge to be inadequate. Several years after that decision, rather than modifying the environmental impact statement, the Army Corps decided the proposed project itself was inadequate and abandoned it. This should be cited as an

example of how NEPA can prevent bad projects from being implemented – projects that waste millions of taxpayer dollars and cause significant environmental harm.

- “It was further noted by a number of environmental commentators that of the approximately 50,000 EISs filed each year only 0.2% resulted in litigation” (Draft Report at 11). In fact, 597 EISs were filed with the U.S. Environmental Protection Agency (EPA) in 2004 (Draft Report at 18). The 50,000 number is generally thought to be the approximate number of environmental assessments that are prepared annually, although no precise records are kept.

NAEP has the following additional comments on the Draft Report:

- “Some comments suggested that NEPA be amended to recognize the ‘functional equivalence doctrine’... that “exempts federal agencies from complying with NEPA requirements provided the agencies utilize other ‘substantive and procedural standards [that] ensure full and adequate consideration of environmental issues” (Draft Report at 16). The functional equivalence doctrine has been applied by courts only with respect to decisions made by EPA and is not broadly applicable to all federal agencies.
- “An indirect cost related to the preparation of NEPA documents can be measured in lost opportunities” (Draft Report at 21). The report should also note that an indirect benefit related to the preparation of NEPA documents is the avoidance of unintended environmental harm that can require years and millions of dollars to correct in the future.
- “Under current law, there is no occasion where an agency can choose (or ‘opt out’) of the NEPA process” (*sic*, Draft Report at 22). NAEP is unaware of any federal law under which a federal agency may decide, on its own, to “opt out.”

Comments on Draft Recommendations

NAEP offers the following comments on the Draft Recommendations:

- NAEP *supports* those recommendations that would improve the NEPA process by adding certainty:
 - *Recommendation 3.1* – Granting cooperating agency status to tribal, state, and local agency stakeholders.
 - *Recommendation 3.2* – Allowing state environmental review processes to satisfy NEPA where possible. However, the amendment must make it clear that, for a federal action, the federal agency will be responsible for ensuring that the state environmental review adequately addresses federal issues, covers all NEPA requirements including public involvement and review by EPA, and provides the information necessary for federal decisionmakers. In addition, the referral process described in 40 CFR Part 1504 must remain available for interagency disagreements.
 - *Recommendation 4.1* – Providing a citizen suit provision in NEPA, although the terms of such a provision should not address settlement of litigation which is best addressed on a case-by-case basis.
 - *Recommendation 5.3* – Promulgating regulations to make mitigation mandatory.

- *Recommendation 6.1* – Promulgating regulations to encourage more consultation with stakeholders.
 - *Recommendation 8.1* – Clarifying the effect of past actions for assessing cumulative impacts. However, it should be noted that the Council on Environmental Quality (CEQ) has already issued guidance on this subject; thus, amending NEPA to codify this guidance is not likely to add any time or cost savings to the NEPA process.
- Several recommendations require CEQ to assume additional responsibilities. If such additional responsibilities are going to be placed on CEQ, then Congress needs to provide adequate additional staff and funding:
 - *Recommendation 4.2* – CEQ to become a clearinghouse for monitoring court decisions.
 - *Recommendation 7.1* – CEQ to create a NEPA Ombudsman.
 - *Recommendation 7.2* – CEQ to control NEPA-related costs.
 - *Group 9* – CEQ to perform three separate studies.

NAEP *supports* these efforts as long as CEQ is provided the resources to accomplish them.

- NAEP *opposes* the recommendations that simply codify the existing CEQ regulations. Codifying the regulations would not necessarily result in any time or cost savings and would reduce flexibility. Instead, Congress should recognize that the CEQ NEPA-implementing regulations are an important element of compliance with the statute and direct the federal agencies to fully meet the requirements of those regulations. The recommendations in this category are:
 - *Recommendation 1.1* – Defining “major federal action.” This has been the subject of innumerable federal court decisions and it is unlikely that statutory language can add clarity to the discussion. The definition of the term is already included in the CEQ regulations at 40 CFR § 1508.18. Further, a statutory amendment could cause unnecessary analyses for projects that are very large but that do not significantly affect the environment. Conversely, some projects that are small yet have the potential to cause catastrophic environmental impacts could be ignored. A single statutory definition could induce agencies and applicants to break a single project into several “minor” actions, each of which would require a separate NEPA document, increasing processing costs, adding confusion, and ignoring cumulative environmental impacts.
 - *Recommendation 1.3* – Creating criteria for use of categorical exclusions, environmental assessments, and environmental impact statements. These criteria are already addressed in the CEQ regulations at 40 CFR §§ 1507.3 and 1508.4. In addition, given the vast spectrum of potential federal actions, a single set of criteria applicable to all federal agencies is both unworkable and impractical.

- *Recommendation 1.4* – Supplementing NEPA documents. The language of the proposed statutory amendment can already be found in the CEQ regulations at 40 CFR § 1502.9(c).
 - *Recommendation 5.2* – Requiring the analysis of a “no action” alternative. Under the CEQ regulations, the no action alternative is a reasonable alternative (40 CFR § 1508.25(b)(1)), and as such, an agency must “devote substantial treatment” to the analysis of this alternative (40 CFR § 1502.14 (d)).
 - *Recommendation 6.2* – Responsibilities of a lead agency. The language of the proposed statutory amendment can already be found in the CEQ regulations at 40 CFR § 1501.5.
- NAEP **opposes** the recommendations that would arbitrarily restrict the NEPA process:
 - *Recommendation 1.2* – Adding mandatory timelines for the completion of NEPA documents. Meeting a pre-determined timeline would be impossible for agencies whose actions and issues are complex. Mandatory timelines could result in the cancellation of projects that are not completed in time or could reduce the ability of an agency to create solutions satisfactory to stakeholders. Mandatory time limits also have the potential to increase litigation if agencies are seen as failing to adequately consider important issues.
 - *Recommendation 2.1* – Giving additional weight to issues and concerns raised by local interests. Comments should be considered in terms of the significance of the issues they raise and how important those issues are in terms of contributing to the decisionmaking process, not on the address of those who submitted them.
 - *Recommendation 2.2* – Setting EIS page limits. Decisions involving highly complex projects could not be adequately evaluated under arbitrary page limits; solutions to major issues would never be reached, or would be made with partial information and then litigated, increasing delays.
 - *Recommendation 8.2* – Limiting a cumulative impact analysis to proposed future actions. Subsequent phases of a project that are planned but not yet proposed should be analyzed in NEPA documents to fully capture the potential environmental impacts.
 - NAEP **opposes** Recommendation 5.1 relating to alternatives. Although NAEP supports the concept that only economically and technically feasible alternatives should be analyzed in a NEPA document, it is not clear when the feasibility and engineering studies described in the recommendation would be prepared or by whom. Requiring detailed studies prior to determining which alternatives to consider for analysis in a NEPA document will add, not reduce, time and cost to the NEPA process.

Further, NAEP suggests the **addition** of a recommendation that would ask CEQ to issue guidance that would encourage agencies to focus NEPA documents on those issues that are truly significant and relevant to distinctions among alternatives. Such guidance could include methods to reduce redundancy (for example, use of incorporation by reference) and increase readability (such as using plain language). One such method could be to prepare vastly shortened versions of environmental impact statements – similar to the stand-alone summaries

that are currently issued – and to make associated technical reports available to those who request them. This guidance would promote the preparation of shorter, less-expensive, more timely, and more reader-friendly NEPA documents that would be conducive to both public involvement and sound agency decisionmaking.

As noted in the Draft Report, agencies perceive that litigation is a threat to their proposals and act too cautiously as a result (Draft Report at 12). The report also states that the trend of larger NEPA documents is attributable to non-statutory requirements imposed by court decisions (Draft Report at 18). The report should note that these “non-statutory requirements” are those sought by plaintiffs in NEPA cases – the same groups who argued to the Task Force that “the increasing length and complexity of NEPA documents is having a negative impact on public participation” because “the groups who are the strongest advocates for increased public participation often have the least amount of time and resources to digest and comment on NEPA documents that can run in the thousands of pages” (Draft Report at 23). Methods to reduce the length of NEPA documents, the time it takes to prepare them, and the cost of preparing them is best addressed in guidance (not in a statutory change or a regulation) where case law and agency practice can be reviewed and discussed, conclusions can be drawn, and recommendations can be made.

Conclusion

Thank you for the opportunity to both testify before the Task Force and to provide comments on the Draft Task Force Report. NAEP hopes our comments are useful and will serve to promote the robust and effective implementation of our Nation’s environmental Magna Carta.