

**COMMENTS OF THE  
NATIONAL STONE, SAND & GRAVEL ASSOCIATION  
ON THE FINDINGS AND RECOMMENDATIONS  
OF THE  
HOUSE TASK FORCE ON UPDATING  
THE NATIONAL ENVIRONMENTAL POLICY ACT  
February 1, 2006**

**INTRODUCTION**

The National Stone, Sand and Gravel Association ("NSSGA"), whose member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the United States, appreciates the tremendous work of the Committee's Task Force on Updating the National Environmental Policy Act (NEPA). Our members have participated in the Committee's extensive field hearings. We recognize the vital importance of fixing the NEPA process to ensure a timely and adequate supply of aggregate for vital public works projects. NSSGA is pleased to provide comments on the Task Force's Initial Findings and Recommendations.

**COMMENTS ON DRAFT RECOMMENDATIONS**

**(1) Addressing Delays in the Process**

Perhaps the biggest frustration our members have is it is nearly impossible to plan for the length of the NEPA process that often has no clear end point. There must be some end to the level of data that will be reviewed and the studies that must be undertaken. For example, in June 2000, the Corps completed a programmatic Environmental Impact Statement (EIS) for the Lake Belt area in west Miami Dade County, Florida to facilitate long-term mining permits for 10 companies over a fifty-year period. The EIS was completed in coordination with a state and local long term planning process to ensure that mining would occur in an environmentally responsible manner. Long term permits were issued in 2002 and a NEPA lawsuit ensued, claiming that the 2002 permits were invalid and that supplemental EIS must be done in light of ongoing studies. Now, more than four years later, the case is still unresolved and the risk of an adverse ruling affecting the companies mining operations still remains. This is but one example of project opponents using the NEPA process as a never ending game to delay or stop projects.

**Thus, NSSGA strongly supports recommendation 1.2 to add mandatory timelines for the completion of NEPA documents.** However, rather than amending NEPA to limit EISs to 18 months and Environmental Assessment (EA) completion to 9 months, as suggested in the Report, we favor a more flexible approach that would create 3 or 4 presumptive time lines to be

established at the outset of the NEPA process, perhaps at scoping stage. NSSGA believes such time lines are best set by amending the Council of Environmental Quality (CEQ) (40 CFR 1508.8) regulations, which currently allow an applicant to request that time lines be set rather than amending NEPA itself, given CEQ's extensive expertise in addressing agency NEPA compliance. Should the Committee feel that legislative change is appropriate, NSSGA favors expanding the NEPA expediting provisions of the 2005 SAFETEA-LU legislation ("Safe, Accountable, Flexile, Efficient Transportation Equity Act: A Legacy for Users") 23 USC 6002 which directs the Secretary of Transportation to take charge of the interagency NEPA process and set a schedule of completion for that process. There is no reason why such a process could not be adopted for non-transportation projects.

**NSSGA also supports recommendation 1.4 to amend NEPA to address supplemental NEPA documents and to clarify that supplementation should not be required once the agency has issued a final decision.**

Recommendation 1.4 would essentially codify the criteria in the CEQ regulations at 40 CFR 1502.9 (c)(1)(i) and (ii) as well as recent Supreme Court law to prevent unnecessary delays in the process. Often project opponents demand supplemental EISs in an effort to reopen the NEPA process to stop worthwhile projects. This strategy runs counter to the Supreme Court's recent unanimous decision in Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373, 2384-85 (2004), which held that once the BLM issued an EIS prior to approving a land use plan, "there (was) no ongoing 'major Federal action' that could require supplementation." The Court further clarified that an agency does not have an ongoing obligation to constantly revise its EIS every time a new circumstance arises. Thus, any such amendment should clearly state that, unless there is a second, and, wholly distinct federal action, or a significant change to the underlying federal approval, there is no ongoing federal action subject to NEPA.

**NSSGA does not support recommendations 1.1 (to define "major federal action.") and 1.3 (to create unambiguous criteria for use of categorical exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS)).** The reach and complexity of federal actions covered by NEPA is staggering. It is virtually impossible to legislate a uniform definition. The current CEQ regulations set forth criteria for defining significance and each agency has developed implementing procedures. Defining "major federal action" to include new and continuing projects that would require substantial planning time, resources or expenditures, as suggested, would arguably limit actions that may have an immediate impact with serious consequences. Conversely, other actions with long term planning, such as a 10-year mine plan may only have minor impacts due to mitigation measures. Yet, NSSGA also recognizes that the term "major" is often subject to conflicting interpretations and suggests that the CEQ regulations be amended to provide greater clarification. Legislating criteria for CEs would potentially create more confusion, given the large number of actions and programs that may be covered. CEQ is currently looking at this issue as part of its "modernizing NEPA Implementation" process, which hopefully will

result in guidance to assist federal agencies and other interested parties in, developing and revising CEs by promoting consistent and clear practices. Relying on CEQ's experience and expertise is far better than legislation.

**(2) Enhancing Public Participation**

**NSSGA supports recommendation 2.2 (codifying page limits in CEQ regulations) but does not support recommendation 2.1 (directing CEQ to prepare regulations giving weight to localized comments).** EIS preparers often exceed the page limits for EIS and EAs in the CEQ regulations. These preparers often write massive documents for fear of excluding important analyses. The result is that it is very difficult for the public to develop meaningful comments. Amending NEPA to codify these presumptive page limits will force EIS preparers to exercise discipline in preparing documents that will facilitate the submission of better information to the agency. Such legislation would not constrain EIS writers since it would allow agencies to prepare longer EISs for more complex projects, nor would it prevent EISs from including appendices or incorporate other NEPA documents by reference as currently allowed under the CEQ regulations. On the other hand, CEQ should not be directed to require that localized comments be given more weight than comments by outside groups. NEPA should be an open process in which all comments are fairly considered. Mandating that localized impacts be given over-riding weight in all cases deprives the agencies and the public of the needed discretion to consider all relevant comments. Moreover, many agencies regulations (eg., the Corps) already set forth the particular weight to be given to state and local comments. (See 33 CFR 320.4 (j)). CEQ's role in working with agency NEPA contacts on this issue would be undermined by such a Congressional directive.

**(3) Better Involvement for State, Local and Tribal Stakeholders**

**NSSGA supports recommendation 3.1 provided that any amendment also grants cooperating agency status to any other federal agency that has jurisdiction by law. However, NSSGA does not support recommendation 3.2 to amend NEPA to allow existing state environmental review processes to satisfy NEPA requirements.** Federal agencies should be included in any amendment addressing cooperating agencies, given the extensive interaction of many federal, state and local environmental requirements in permitting large projects such as aggregate operations. Further, despite the fact that the CEQ regulations provide that federal agencies with jurisdiction, by law, shall become a cooperating agency upon the request of the lead agency (40 CFR 1501.6), many agencies such as the FWS often do not have the time or resources to participate early in the EIS process. Such agencies often severely criticize a proposed action after the draft EIS has been issued. Up front participation by such agencies along with state, local and tribal stakeholders will provide a process to address often conflicting priorities between different levels of government before major conflicts arise. This is especially critical for aggregates mining since the industry is heavily

regulated at the state and local level. Again, Section 6002 of the SAFETEA-LU legislation provides a good model for such an amendment to NEPA.

NSSGA opposes any amendment that would allow existing state environmental review processes to satisfy NEPA because it could create significant conflicts between federal and state law that cannot be easily resolved. While many state versions of NEPA are modeled after the federal law, there are often differences. For example, California law states "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (CA. Public Resources Code sec. 21002). It would be hard to create functionally equivalent uniform criteria for state versions of NEPA. Rather, the best approach is to direct that CEQ use its existing authority in 40 CFR 1506.2 to issue guidance that will harmonize federal and state processes and avoid unnecessary duplication through joint document preparation and coordinated review. The CEQ Interagency Work Group on harmonizing NEPA with other laws should also look at state versions of NEPA in developing such guidance.

#### (4) Addressing Litigation Issues

**NSSGA supports recommendation 4.1 (amend NEPA to create a Citizen Suit provision) but does not support recommendation 4.2 (amend NEPA to add a requirement that agencies "pre-clear" projects).** NEPA litigation reform is absolutely essential. The tactics of those wishing to use NEPA to delay projects are well known. By asking for more discussion of certain issues, and then moving on to new issues each time the agency responds, project opponents can create issues for future litigation. Without any statute of limitations, opponents may sue up to 6 years after the action, relying on the general statute of limitations for civil actions against the U.S and its agencies (28 U.S.C 2401). The ever present threat of litigation, years after facilities began operation, makes it very difficult for aggregate producers that depend on long term mining permits to meet contractual commitments for infrastructure projects such as highways and mass transit. Even the Supreme Court has condemned delaying tactics used by opponents in the NEPA process to sue well after a final decision is made.

" [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978).

A NEPA Citizen Suit provision clarifying judicial review procedures and imposing a statute of limitations would be extremely helpful. Such a provision also

should make clear that a challenger must specify how it would be affected by the action and may not raise issues that it did not raise while participating in the NEPA process. NSSGA recommends that a 180-day statute of limitations be imposed from the publication in the Federal Register announcing a permit or license action, unless the agency's own enabling statute or procedures contain a shorter statute of limitations. For example, section 6002 (l) of SAFETEA-LU has a 180-day limit for transportation projects unless a shorter time is specified in Federal Law.

NSSGA does not support recommendation 4.2 requiring CEQ to pre-clear projects. While CEQ is sorely in need of more resources, imposing a clearance obligation for certain judicial proceedings or agency administrative decisions would be unduly burdensome and divert CEQ's limited resources away from other important tasks, particularly CEQ's role in advising the President on national environmental policy. Moreover, CEQ already provides such advice in many instances. The agency monitors NEPA litigation and often analyzes and provides guidance to federal agencies on the impact of important NEPA court decisions, so this amendment will not provide any added benefit.

#### **(5) Clarifying Alternatives Analysis**

**NSSGA supports recommendation 5.1 (limiting "reasonable alternatives" to those which are economically and technically feasible) and recommendation 5.3 (directing CEQ to promulgate regulations to make mitigation proposals mandatory). NSSGA partially supports recommendation 5.2 (requiring consideration of the "no action" alternative).** Often, NEPA documents discuss alternatives that are not practicable because they do not meet the underlying purpose and need of a proposed action. This makes meaningful alternatives analyses very difficult. Recommendation 5.1 would help ensure that the alternatives analysis is meaningful and eliminate consideration of alternatives that are not feasible due to costs and engineering factors. This amendment will also ensure that the range of alternatives analyzed will be defined by the underlying purpose of the proposed action, and require that an agency give substantial deference to the permittees' objectives in developing the overall project purpose.<sup>1</sup> An agency would then not be forced to analyze a myriad of infeasible alternatives merely because they are suggested by third parties whose real agenda is to delay or stop the project.<sup>2</sup> For example, the Corps Lakebelt EIS

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<sup>1</sup> See City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999).

<sup>2</sup> For example, if the project purpose is to operate a quarry to provide needed aggregate to the local region, the action agency would not have to analyze an alternative that a third party finds more suitable. See Louisiana Wildlife Fed'n v. York, 761 F.2d 1044 (5<sup>th</sup> Cir. 1985) (Holding "not only is it permissible for the Corps to consider the applicant's objectives, the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable").

considered the alternative of importing limerock from Mexico as an alternative to issuing long term mining permits, despite clear evidence that such an alternative was cost prohibitive and could in no way meet the demand for limerock necessary for road construction in Florida. It does not advance the NEPA process to require that the Corps provide a detailed analysis of such an obviously infeasible alternative.

Recommendation 5.2 would go a step further than the current CEQ regulations (40 CFR 1502.14 (d)) and require a more extensive analysis of "no action" in light of the project purpose. Requiring a fuller consideration of the environmental impacts of the "no action" alternative will help ensure that the often overlooked environmental impacts of maintaining the "status quo" will be fully considered. For example, in Lake Belt, the Corps found that environmental impacts of their own piecemeal permit decisions for aggregate mining over west Miami Dade county (defined as the "no action" alternative) would have greater adverse environmental impacts than implementing a proposal for long-term permitting of multiple mining operations as part of a comprehensive multi-year land use plan. However, NSSGA does not support an amendment that would require rejecting "no action" if, on balance, the impact of undertaking the project would outweigh impacts of executing the decision. Such an amendment would unnecessarily intrude into an agency's discretion to weigh and balance alternatives, and could be subject to abuse in determining what factors would result in rejecting "no action."

NSSGA's support of recommendation 5.3 is based on the fact that mitigation often is not carried out after a proposal is implemented. While the CEQ regulations specifically direct that mitigation conditions developed as part of an EIS should be implemented (40 CFR 1505.3), legislation, making mitigation obligations binding, would help resolve this concern. Indeed, courts have held that mitigation conditions must be treated as binding in order to justify reducing impacts below the level of significance so as to avoid completing a full EIS.<sup>3</sup>

#### **(6) Better Agency Coordination**

**NSSGA supports recommendations 6.1 (directing CEQ to promulgate regulations to encourage more consultation with stakeholders) and**

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<sup>3</sup> See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982) (Forest Service's decision not to prepare an EIS in connection with its approval of an exploratory mineral drilling project was reasonable and adequately supported, because the agency conducted a thorough analysis of the proposed action and imposed specific mitigation measures to address the relevant areas of environmental concern – including potential impacts on the wilderness area's grizzly bear population; Sierra Club v. Alexander, 484 F.Supp. 455, 466 (N.D.N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980) (upholding Corps' decision not to prepare an EIS, based on onsite and offsite mitigation measures to compensate for the filling of 38 acres of wetlands for a shopping mall project; Oklahoma Wildlife Fed'n v. U.S. Army Corps of Eng'rs., 681 F.Supp. 1470, 1489 (N.D. Okla. 1988) (citing cases approving use of "mitigated FONSI's").

**recommendation 6.2 (amend NEPA to codify CEQ regulation regarding lead agencies).** Improvements in the NEPA process can best be achieved by facilitating early and meaningful involvement from all stakeholders. Often, stakeholders are not brought to the table until certain decisions are made regarding impacts and alternatives. The current CEQ initiative to modernize NEPA should seriously consider this issue. NSSGA's support for codifying CEQ regulation 15601.5 (lead agencies) is based on its view that lead agency roles are often not well defined, especially where several federal agency approvals are involved. Section 1506.5 contains fairly detailed lead agency procedures, but these procedures are often not carried out due to conflicts between agencies. This problem is particularly serious in 404 permitting where the Corps, EPA and the USFWS often clash over proposed impacts to wetlands, water quality and endangered species. Congress has already spoken on this issue in SAFETEA-LU and the Energy Policy Act of 2005 regarding energy and transportation projects. There is no reason why this approach cannot be expanded to cover all federal agency NEPA actions.

**(7) Additional Authority for the Council on Environmental Quality**

**NSSGA does not support these Recommendations. Recommendation 7.1 amends NEPA to create a "NEPA Ombudsman" within CEQ to resolve conflicts within the NEPA process.** This action essentially duplicates existing process under section 309 of the Clean Air Act, (42 USC 309) whereby EPA can refer actions that it finds are "unsatisfactory from the standpoint of public health, or welfare or the environment" to CEQ for resolution. That process has generally worked well over the years. Further, CEQ currently works to informally mediate interagency disputes in many instances. Creating a CEQ "ombudsman" to resolve interagency NEPA disputes would unnecessarily inject CEQ into substituting its judgment for that of an agency charged with primary decision-making. Recommendation 7.2 (directing CEQ to control NEPA related costs) would also inject CEQ into the agency budgetary process. CEQ has neither the resources nor the expertise to control such costs. CEQ can, however, certainly monitor costs and provide data to Congress for consideration in the agency budget review process.

**(8) Clarify the Meaning of Cumulative Impacts.**

**NSSGA does not support recommendation 8.1 (to amend NEPA to clarify how agencies would evaluate the effects of past actions for assessing cumulative impacts) but does support recommendation 8.2 (directing CEQ to promulgate regulations making clear the types of future actions appropriate for consideration under cumulative impact analysis).** The issue of how to assess cumulative impacts is quite complex. The CEQ regulation at 40 CFR 1508.7 does not provide much specificity. CEQ's January 1997 Report, "Considering Cumulative Effects under NEPA" provides general principles and methodologies that are helpful and support NSSGA's view that legislating criteria on such a complex issue is not a good idea. However, NSSGA strongly supports directing CEQ to issue clarifying regulations on this contentious issue. The uncertainty regarding cumulative impacts assessment has been a

problem for the aggregates industry, as witnessed by the decision in NWF v. Norton, 332 F.Supp. 2d 179 (DDC 2004), that set aside a Corps permit for a Florida Rock's mine in Ft. Myers, Florida for failure to adequately assess cumulative effects regarding the project's impacts on the endangered Florida Panther. Defining "reasonably foreseeable" future actions is especially problematic for NSSGA members since it is very hard to predict what kinds of land use changes will be facilitated by permitting a large scale mining operation. Any such guidance must consider the decision of U.S. Dept. of Transportation v. Public Citizen, 124 S.Ct. 2204, 2215 (2004), where a unanimous Court held that an EIS need not analyze impacts unless they are proximately caused by the agency action. Strict adherence to the requirement of proximate causation in defining "foreseeability" is very important in establishing reasonable limits on assessing such impacts.

## (9) Studies

**NSSGA strongly supports recommendations 9.1- 9.3 directing that CEQ conducts studies of NEPA's interaction with other federal laws, current federal agency NEPA staffing issues, and NEPA's interaction with state versions of NEPA.** The complexity of environmental laws at all levels has increased dramatically since 1970 when NEPA went into effect. NEPA must now interface with so many other processes such as those required under the Clean Water Act, the Endangered Species Act, the National Historic Preservation Act and the Coastal Zone Management Act. The range and complexity of federal programs has also exploded over the past 36 years. Federal agency NEPA staffing is often inadequate to address NEPA's interface with other environmental review processes. State environmental laws covered by "mini NEPAs" have also grown tremendously creating further conflicts in process. The studies set out in these recommendations are absolutely essential in modernizing the NEPA process to address these many changes.

## CONCLUSION

In closing, NSSGA commends the Resources Committee for undertaking the NEPA reform initiative and pledges to work with the NEPA Task Force to improve the NEPA process. We would be pleased to discuss our comments on the Task Force's recommendations.