

Congressional Task Force Recommends Changes to the National Environmental Policy Act (NEPA)

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The National Environmental Policy Act (NEPA) has been the bedrock of U.S. environmental law since its enactment by Congress in 1969. During the past 35 years, NEPA has been praised by its supporters and vilified by its critics, but it has certainly stood the test of time – with only two minor amendments during its long legislative life. Yet, like any controversial law, intense legislative scrutiny was bound to arrive some day. This past April, Congress initiated the first-ever, serious look at the effectiveness of NEPA – with an eye toward possible amendments. Specifically, the House of Representatives, Committee on Resources, established the *Task Force on Improving NEPA*, chaired by Representative Cathy McMorris (R-WA) to oversee the review.

Throughout 2005, the task force held seven hearings in various parts of the country to determine public sentiment about NEPA. Some environmental interests were concerned that the Task Force was out to undertake in a NEPA “witch hunt.” They even criticized the locations and format of the hearings because the task force avoided some of the most *NEPA-active* regions of the country (such as California and Oregon), and did little to publicize them. . Surprisingly, however, the task force’s *Initial Findings and Draft Recommendations*, released on December 21, 2005, endorse NEPA’s fundamental objectives and contain relatively even-handed recommendations for legislative change.

In its hearings, the committee focused on the following nine areas of NEPA practice.

- NEPA’s intent
- The impact of changing NEPA
- NEPA litigation
- Coordination with federal, state, local and tribal entities
- Interaction with other environmental laws
- Delays caused by NEPA
- Cost of compliance
- Public Participation
- Adequacy of federal agency resources for NEPA compliance

Although the Task Force heard 66 witnesses, the views generally expressed fall into one of three “camps”: 1) Environmental organizations generally felt that NEPA has been working fine and needs little change; 2) business and industry

groups felt that NEPA is too broad in its application, too expensive, and has resulted in too much project delay; and 3) local governments felt that federal Lead Agencies generally do not involve them sufficiently in the NEPA process and pay too little attention to their views when they do participate.

The task force’s 22 recommendations fall into nine subject areas, all of which are summarized in Table 1.

Table 1. NEPA Task Force Recommendations

Task Force’s Recommendations	Task Force’s perception of problem and approach to solution
Group 1 - Delays caused by the NEPA process	
1.1 Amend NEPA to Define “major federal action”	<p>NEPA applies to too many federal actions. Thus the phrase “major federal action,” the NEPA trigger, should be narrowed to exclude many types of projects.</p> <p>The new definition would define “major federal actions” as only those projects requiring <i>substantial planning, time, resources, or expenditures</i>, thereby reducing the number of actions subject to NEPA.</p>
1.2 Amend NEPA to add mandatory time lines for completion of NEPA documents	<p>NEPA documents take far too long to prepare and Lead Agencies generally ignore the CEQ’s advice that they establish time limits for NEPA compliance (40 CFR 1501.8).</p> <p>This recommendation would impose an 18-month time limit for completion of an EIS and nine-month limit for an EA/FONSI.</p>
1.3 Amend NEPA to create unambiguous criteria for use of a CATEX, EA and EIS	<p>Agencies spend too much time trying to figure out the appropriate level of NEPA compliance and often get it wrong. At the current time, each agency exercises its own discretion with little uniform guidance.</p> <p>This recommendation would define when each level of documentation is appropriate.</p>
1.4 Amend NEPA to address supplemental NEPA documents	<p>Too often, supplemental NEPA documents are improperly required <i>after</i> the NEPA process is allegedly completed.</p> <p>This recommendation would codify the requirements for supplemental documents currently found in the CEQ NEPA Regulations (40 CFR 1502.9(c)(1)(i) and (ii).</p>



Group 2 – Enhancing public participation	
2.1 Direct CEQ to prepare regulations giving weight to localized comments	<p>The views of <i>localized</i> comments are not given sufficient weight by federal Lead Agencies.</p> <p>The recommendation would require CEQ to issue regulations to require lead agencies to give greater weight to the comments of <i>local</i> groups and citizens than those of <i>outside</i> groups and individuals.</p>
2.2 Amend NEPA to codify the EIS page limits	<p>Environmental Impact Statements are far too long, thereby precluding effective public involvement. Federal Lead Agencies generally ignore the page limits established by CEQ, 150 pages for normal projects and 300 pages for complex projects (40 CFR 1502.7).</p> <p>This recommendation would codify the current CEQ page limits.</p>
Group 3 – Better Involvement for State, Local, and Tribal Stakeholders	
3.1 Amend NEPA to grant tribal, state, and local stakeholders “cooperating agency” status	<p>Currently state and local governments and tribes may be Cooperating Agencies, but only at the discretion of the federal Lead Agency.</p> <p>This recommendation would grant “cooperating agency” status to “political subdivisions without regard to a request by the Lead Agency” thereby increasing their involvement in the NEPA process.</p>
3.2 Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements	<p>In those states with their own “mini-NEPA” type law, there is often duplication of effort when a project involves both state and federal approval.</p> <p>This recommendation would direct CEQ to adopt regulations making a state-level environmental impact reviews “functionally equivalent “ to NEPA and allowing such reviews to substitute for NEPA review.</p>
Group 4 – Addressing Litigation Issues	
4.1 Amend NEPA to create a citizen suit provision	<p>Under current law NEPA contains no citizen suit provisions. Rather, NEPA litigation is brought under the Administrative Procedure Act.</p> <p>This recommendation would create special requirements for NEPA litigation including new standards for legal challenges including:</p> <ul style="list-style-type: none"> ▪ Requiring challengers to demonstrate that the federal agency did not use best available information and science;

	<ul style="list-style-type: none"> ▪ New rules for “exhausting administrative remedies;” ▪ Restrictions on judicial settlement agreements that affect private businesses; ▪ New rules for “standing;” and ▪ A 180-day statute of limitation of legal challenges.
<p>4.2 Amend NEPA to add a requirement that agencies “pre-clear” projects</p>	<p>Currently, federal courts hand down dozens of NEPA decisions each year requiring Lead Agencies to figure out what the courts meant and how to implement them. CEQ plays no role.</p> <p>This recommendation would require CEQ to monitor court decisions and advise federal agencies as to their applicability to projects.</p>
<p>Group 5 - Clarifying Alternatives Analysis</p>	
<p>5.1 Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are <i>economically and technically feasible</i></p>	<p>Currently, the rules for screening and evaluating alternatives are unclear, and vary greatly from agency to agency leaving considerable discretion to Lead Agencies. The concepts of economic and technical feasibility are not uniformly defined or applied, resulting in EISs with too many alternatives.</p> <p>This recommendation would limit the range of alternatives that would have to be evaluated in an EIS. Only economically and technically feasible alternatives would have to be evaluated.</p>
<p>5.2 Amend NEPA to clarify that the alternatives analysis must include consideration of the environmental impact of not taking an action of any proposed project</p>	<p>Currently, the rules for evaluating the “no-action alternative” are governed by the CEQ NEPA regulations (40CFR 1502.14) and are not very detailed.</p> <p>This recommendation would codify the requirement for evaluating the “no-action alternative” and would provide more detailed direction as what such evaluation must include.</p>
<p>5.3 Direct CEQ to promulgate regulations to make mitigation measures mandatory</p>	<p>Currently, there are no standard rules for adopting or requiring mitigation measures identified in NEPA documents.</p> <p>This recommendation would require mitigation measures identified in NEPA documents to be adopted and would require some type of enforceable commitment by agencies and applicants.</p>



Group 6 – Better Federal agency coordination	
<p>6.1 Direct CEQ to promulgate regulations to encourage more consultation with stakeholders</p>	<p>At the current time the nature and extent of Lead Agency consultation with stakeholder groups is informal and varies greatly from agency to agency.</p> <p>This recommendation would provide for more periodic and formalized consultation with affected stakeholders.</p>
<p>6.2 Amend NEPA to codify 40 CFR 1501.4 regarding Lead Agencies</p>	<p>At the current time, the authority of Lead Agencies is found only in the CEQ regulations (40 CFR 1501.5) and is not broad enough to cover many of the activities for which lead agencies are responsible.</p> <p>This recommendation would codify and expand the responsibilities of Lead Agencies now found in the CEQ Regulations, including a new requirement that Lead Agencies would be responsible for maintaining a <i>consolidated administrative record</i>.</p>
Group 7 - Additional Authority for the Council on Environmental Quality	
<p>7.1 Amend NEPA to create a “NEPA Ombudsman” within CEQ</p>	<p>Although CEQ currently has oversight responsibility for NEPA, no single person in CEQ has authority to resolve conflicts that arise within the NEPA process.</p> <p>This recommendation would create a NEPA Ombudsman within CEQ and would vest that person with the authority to resolve conflicts.</p>
<p>7.2 Direct CEQ to control NEPA-related costs</p>	<p>Despite its oversight authority, CEQ currently does not monitor the cost of NEPA compliance.</p> <p>This recommendation would require CEQ to monitor NEPA compliance costs and report to the House Committee on Resources, including making recommendations for policies on “cost ceilings.”</p>
Group 8 – Clarify the meaning of “cumulative impact”	
<p>8.1 Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts</p>	<p>Currently, practices regarding the evaluation of “past actions” vary widely from agency to agency.</p> <p>This recommendation would allow agencies to include the impacts of <i>past actions</i> when they assess existing conditions. No individualized analysis of past actions would be necessary.</p>



<p>8.2 Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis</p>	<p>Currently, the consideration of future actions includes those that are “reasonably foreseeable (40CFR 1508.7). This recommendation would focus the analysis of future impacts on “concrete” proposed actions rather than actions that are merely “reasonably foreseeable.”</p>
<p>Group 9 – CEQ to conduct studies</p>	
<p>9.1 CEQ is required to conduct a study of the interaction between NEPA with other Federal environmental laws</p>	<p>Currently, CEQ only conducts occasional studies at its discretion and has never studied the integration of NEPA with other laws. This recommendation would require CEQ to conduct a study and report to the House Committee on Resources how NEPA interacts with other environmental laws to determine the amount of duplication and overlap and how to reduce it. The study would have to be completed within one year.</p>
<p>9.3 CEQ is required to conduct a study of current federal agency NEPA staffing issues</p>	<p>Currently, CEQ only conducts occasional studies at its discretion and has never studied agency NEPA staffing. This recommendation would require CEQ to conduct a study and report to the House Committee on Resources on federal agency NEPA staffing, including recommendations for necessary recruitment and retention of experienced staff.</p>
<p>9.3 CEQ is required to conduct a study of the interaction between NEPA and state “mini-NEPAs”</p>	<p>Currently, CEQ only conducts occasional studies at its discretion and has never studied the NEPA-“little-NEPA” relationship. This recommendation would require CEQ to conduct a study and report to the House Committee on Resources on how NEPA interacts with similar state laws, and to determine the amount of duplication and overlap and how to reduce it.</p>

While the task force has not yet developed specific legislative language for introduction in the House of Representatives, some of these recommendations are likely to become controversial in the eyes of various interest groups. However, in the spirit of NEPA, the task force is providing an opportunity for further public review and comment before it drafts legislation. Individuals or organizations that wish to comment on these recommendations may submit them to the task force by February 6, 2006 by any of the following means:

Mail:

NEPA Draft Report Comments
C/o NEPA Task Force
Committee on Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20001

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The task force is asking that comments address the specific recommendations summarized above and must include the name, address, and organizational affiliation of the author.

Further information about the Task Force and its initial report, including the testimony of those who spoke at the hearings, can be found on the web site of the Committee on Resources:

<http://resourcescommittee.house.gov/nepataskforce.htm>