

Society for Animal Protective Legislation

PO Box 3719, Washington, DC 20027

telephone: (703) 836-4300

www.saplonline.org

facsimile: (703) 836-0400

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BY ELECTRONIC AND REGULAR MAIL

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515-6201

To Whom It May Concern:

The Society for Animal Protective Legislation (SAPL), a division of the Animal Welfare Institute, submits the following 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 (hereafter "NEPA Task Force Report").

As a preface to its specific comments, SAPL asserts that the National Environmental Policy Act (NEPA) is the preeminent law in the United States requiring federal agencies to consider the impacts of federal actions on the environment before those actions are taken and to compel those agencies to involve the public in their decision-making processes involving programs, policies, actions, or plans that impact the quality of the human environment. NEPA is a procedural statute. The statute, Council on Environmental Quality (CEQ) regulations implementing NEPA, and individual agency implementing regulations dictate specific procedures that federal agencies use in determining when NEPA is triggered by a federal agency action, what level of NEPA review (i.e. Categorical Exclusion, Environmental Assessment, Environmental Impact Statement) is appropriate, the information that must be contained in such a review document, standards for defining the scope of the review, procedures for involving the public in the decision-making process, environmental impact analysis standards, and for when supplemental or new NEPA documents are appropriate. NEPA requires the government to be accountable to the public with respect to any agency decision that impacts the environment. The law works. It is not broken and it does not require any modifications intended to weaken the law or to permit a greater role of industry or other parties that profit from the exploitation of the environment in the process. If anything, NEPA and its implementing regulations must be strengthened to improve the ability of

the law to ensure that the agencies engage in a fair and objective analysis of the environmental impacts of their actions before those actions are taken.

Though specific provisions of CEQ's NEPA implementing regulations would suggest otherwise, NEPA does not require an agency to always choose the most environmentally friendly alternative. Indeed, as a consequence of agency inertia, tradition, or political interference, agencies frequently choose alternatives that are not the most beneficial to the environment. Allegations that NEPA is not working, is too cumbersome, is not being implemented efficiently are, to the extent that they can be verified, a product of agency failures or political pressures. For issues related to environmental and animal protection – the issues of concern to SAPL – the fundamental problems with NEPA are the lack of agency skill, training, and expertise in understanding and implementing the law.

The agencies, such as the U.S. Forest Service, National Park Service, Bureau of Land Management, Animal and Plant Health Inspection Service, National Marine Fisheries Service, and U.S. Fish and Wildlife Service, have varying levels of expertise in implementing NEPA. As a consequence of the lack of expertise, training, and understanding of the statute and its implementing regulations, agency officials responsible for NEPA compliance make mistakes that open the door for interest groups to challenge NEPA documents in court. Mistakes that have led to legal challenges include: 1) agency decisions to subject an action to an inappropriate level of review; 2) failure of agencies to evaluate a reasonable range of alternatives; 3) deficiencies in the quality of information disclosed in the NEPA document; 4) a predetermination of the outcome of the NEPA process; 5) failure to disclose all information critical to the analysis; 6) inadequacies in the evaluation of the environmental consequences of an action; 7) the inability to properly define the scope of the NEPA document; 8) agency decisions to ignore public comment that are inconsistent with the agency objective; 9) failure of agencies to provide a rational explanation for the decisions made; and 10) the inability of agencies to consider and evaluate the full range of impacts, including cumulative impacts. While it is easy for those critical of environmentalists to blame conservation organizations for alleged problem with NEPA, the blame falls squarely on the agencies for their failure to properly and consistently implement NEPA and on CEQ for its failure to oversee the NEPA process, to provide comprehensive training to agency officials responsible for NEPA compliance, and for ensuring that the law and its implementing regulations are consistently applied as intended by Congress. If the House Resources Committee wants to improve NEPA, it should allocate additional funds to CEQ and mandate that CEQ embark on a multi-year educational effort to improve the ability of agency officials to comply with NEPA.

It should also be noted that some of the alleged problems with NEPA are neither the fault of the agencies nor of the interest groups, rather those problems are due to the politics inherent in the protection of the environment. Unfortunately politicians at all levels of government frequently insert themselves, overtly or covertly, in a particular NEPA process resulting, in some cases, in a change in agency perspective or in the decision-making process that may result in an outcome more acceptable to the politician and his/her supporters. Changes in the administrations also have resulted in delays or

changes in NEPA processes for higher-profile NEPA issues because of differing perspectives on the importance of environmental protection and of agency accountability to the public.

The role of the public in the NEPA process is of critical importance. While, admittedly, agencies frequently ignore public comment that is in opposition to the agencies' objectives or predetermined outcome of the NEPA process, the process itself allows the public, including scientists, interest groups, landowners, and others, to educate themselves about an issue, to challenge or question an agency's analysis or information, and to provide an opportunity for the submission of informed and substantive public comment. If the agencies complied with the existing law and did not predetermine the outcome of a NEPA process and fairly considered all substantive public comment, controversy associated with the NEPA process could be lessened. Indeed, by complying with the law, the agencies would be seen to be more receptive to changes in a proposed action based on public input versus the current attitude of implementing a predetermined outcome regardless of public comment. Simply put, when agencies do consider public comments, the decision-making process and final decision are improved. Conversely, when agencies ignore public input, the quality of the final decision is compromised. While agency consideration of public comment may or may not reduce the prospects of litigation, it empowers the public to believe that the agencies care about their perspective on a particular issue.

As currently implemented (and as has been the case under both Republican and Democratic administrations), while submitting a comment letter is necessary to exhaust administrative remedies, it has become all too clear to conservation organizations that regardless of the quality of the critique of an agency's NEPA document, litigation is necessary to challenge an agency decision that will harm the environment and that is arbitrary and capricious. Agencies do not listen to the public. They listen to the courts.

In regard to the NEPA Task Force Report, the following comments focus on specific information or proposals identified in the document:

1. The tenor and tone of the NEPA Task Force Report is biased in favor of those who believe NEPA must be amended and weakened. Such a bias is not surprising considering that the report was produced by a political committee based on testimony given by various persons many of whom were likely selected based on their experience with or perspective on NEPA. The bias in the NEPA Task Force Report, however, is not appropriate, nor is it conducive to promoting a useful dialogue on the future of NEPA, and it may serve only to further polarize the various groups and individuals who are concerned about NEPA.
2. Whether NEPA can be used to stop an agency action depends on the agency. If an agency believes a particular action is necessary for whatever reasons, if its action is stopped by a court because of insufficient NEPA compliance, the agency is free to supplement or reinvent its NEPA document as many times as may be necessary until a court determines that it has complied with the law. It

is rare for NEPA litigation to permanently stop a project unless the project's window of usefulness was limited or if any agency elects to terminate the project after an adverse court ruling.

3. Those proposing changes to NEPA that would weaken the statute should provide evidence to justify such changes. Requiring that a "burden of proof" be met before such proposed changes are advanced is appropriate and necessary given the controversy that will result from such changes. Justifying such changes with valid and reliable concrete evidence will make it more difficult for concerned organizations to defeat such changes. Conversely, claiming that such changes are essential but not being able to prove the need for the change (other than citing anecdotal information) will generate claims of political gerrymandering of the NEPA statute to appease certain interests, including those interests who may be regular contributors to political parties, campaigns, and politicians. The fact that no "burden of proof" was discussed when NEPA was initially debated is irrelevant as the law was new and the benefits or consequences of its implementation were unknown.
4. The evidence presented in the NEPA Task Force Report regarding the amount of litigation associated with NEPA documents provides clear and compelling evidence that the NEPA statute has not created a judicial backlog of cases and that, indeed, a miniscule number of NEPA documents are subject to challenge each year. As revealed in the NEPA Task Force Report, only .2% of the 50,000 environmental documents filed each year are subject to litigation. Moreover, in 2004, of the 156 NEPA court cases, injunctions were granted in only 11 cases. While it is unclear whether an injunction refers to any court decision in favor of a plaintiff or if it specifically only refers to the issuance of a temporary restraining order or preliminary injunction, the fact that only 156 NEPA cases were filed in U.S. federal courts in 2004 demonstrates that the law, as written, is working and requires no changes.
5. What role the "threat" of litigation has had on agency implementation of NEPA is not clear. The agencies have a general understanding of what issues are more controversial and, therefore, what NEPA documents are likely to receive the greatest level of attention. Even then, agencies have elected to prepare insufficient NEPA documents on controversial project which practically guarantees litigation. If the agencies better understood the NEPA process and the components of a NEPA document, they would be more efficient at implementing the NEPA process. As the case law on NEPA grows, agencies or agency solicitors must also understand how the courts have interpreted NEPA and apply such interpretations in the preparation of NEPA documents. The fact that various courts have interpreted provisions of NEPA differently should be of no surprise considering that differences of opinion of legal interpretation are commonplace in the judicial system in its analysis of all civil and criminal laws. To the extent that such legal interpretations are believed by some to complicate the NEPA process, that is a consequence of the system and should not be the basis for any proposal to weaken the statute.
6. The NEPA Task Force Report identifies delays to the NEPA process as an issue of concern. First, it claims that the average number of pages in a Final

EIS in 2000 was 742 (citing Cambridge Scientific Abstracts) compared to CEQ regulations recommending that an EIS consist of no more than 150 pages or, for complex issues, 300 pages. What is unclear from these statistics is whether this is an example of comparing apples to oranges or apples to apples. The reference to CEQ regulations applies to the text portion of the Final EIS while the Cambridge Scientific Abstracts data may include various Final EIS appendices, public comments, responses to public comments, and other attachments. Whether a Final EIS is 300 pages or 700 pages should not be of concern to Congress as it is the complexity of the issue under analysis, the quality and quantity of the information disclosed in the document, and ultimately the strength of the final decision that is of greatest importance. If Congress, however, remains concerned about the length of NEPA documents, it should ask CEQ to compile such information for all NEPA documents prepared in 2005. Second, the NEPA Task Force Report claims that a lack of timelines in the NEPA process is another cause for delays. In this case, other than citing a passage from CEQ's Forty Most Asked Questions about NEPA, the NEPA Task Force Report contains no summary statistics for the amount of time the agencies expended per NEPA document. If this is a genuine concern of Congress, then such information should be obtained from CEQ or the individual agencies. Ultimately, any delays associated with the NEPA process are rarely the result of deficiencies in the law but, rather, are a consequence of the agencies failing to have a sufficient number of trained staff to prepare NEPA documents and/or failing to allocate sufficient funds to ensure that such documents can be completed in a timely manner. If Congress wanted to address this alleged concern, it should allocate more money to the agencies through the appropriations process earmarking the funds for NEPA compliance activities.

7. Costs of implementing NEPA are also identified as a concern in the NEPA Task Force Report. The report, however, provides no statistical evidence to justify this concern except for a claim that a EIS for a mine that would have cost \$250,000-\$300,000 in 1980, would now cost \$7-8 million because of concerns associated with potential litigation. Considering, as conceded in the NEPA Task Force Report, that the vast majority of NEPA documents are never subjected to litigation (only .02% of 50,000 documents per year on average), justifying a claim that the cost of NEPA compliance is too high based on a single example that may, itself, be inaccurate is inappropriate. If Congress is concerned about such costs, it should seek additional information about the costs of NEPA compliance for each agency from each agency or from CEQ.
8. Public participation is a fundamental and critical part of the NEPA process. Agencies are required, under most circumstances, to solicit public input into their NEPA processes. When such public input is not clearly required by the law, the agencies generally recognize (and the case law supports) that the public must still be afforded an opportunity to participate in the decision-making process. While long NEPA documents may hinder public participation, most agencies prepare executive summaries of the more

controversial and complex NEPA documents allowing those interest groups who may not have the time to review the longer documents to still participate in the process. Difficulties associated with the role of the public in the NEPA process are both the fault of the agencies and the public. The public, if they are interested in a particular area or issue, must make sure that they are “in the loop” so that they don’t miss out on any particular development of importance. Monitoring the Federal Register on-line is one way of tracking the activities of an agency but it does not provide the public with a full accounting of NEPA activities of an agency because the law does not require the agencies to publicize the availability of draft Environmental Assessments (EA) in the Federal Register. Therefore, if the interested party has not asked to be placed on an agency mailing list for environmental documents, he/she may miss an opportunity to submit comments on an EA even if he/she is religious about checking the on-line version of the Federal Register. Agencies are required to place newspaper advertisements announcing the availability of EAs in the local area but a party who does not live in the area would likely not be privy to the advertisement. Requiring the agencies to publish notice of the availability of all environmental documents in the Federal Register could help empower more people to participate in agency decision-making processes. The other problem affecting public participation in the NEPA process is agencies expanding the use of Categorical Exclusions to avoid NEPA compliance requirements. There is no required reporting of Categorical Exclusion decisions in any public fora thereby making it difficult for the public to know when such a decision has been made or to determine the basis or legality of such a decision. Though the Categorical Exclusion category was intended to be used only for agency actions with no to minimal environmental impacts, agencies are expanding the terms of when Categorical Exclusions can be used to avoid more detailed NEPA compliance and to cut the public out of the decision-making process.

The remainder of this comment letter will provide specific feedback on the draft recommendations for amending NEPA contained in the NEPA Task Force Report.

Recommendation 1.1: Amend NEPA to define “major federal action.” This recommendation is unnecessary as the definition in CEQ regulations is clear and sufficient.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. This recommendation is unnecessary as it could result in the preparation of inadequate documents resulting in final decision that are not fully informed, complete, or based on the best available scientific evidence. This would also likely result in increased litigation by all interest groups challenging final agency decisions. To address this concern, Congress should allocate more money to the agency for the purpose of enhancing their NEPA compliance efforts and, in so doing, expediting the completion of environmental documents.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements. This recommendation is unnecessary as the criteria contained in the CEQ regulations are sufficient.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. This recommendation is unnecessary as the CEQ regulations contain language that is sufficient to determine when supplemental documents are required.

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. This recommendation is unnecessary and will discriminate against persons with legitimate interests in a particular project based solely on where they live. As NEPA is limited to federal agency actions, most of which occurs on federal lands – lands administered for the benefit of all Americans – providing local persons with a greater role in an agency’s NEPA decision-making process is entirely inappropriate. Whether a person lives in Florida, Maine, Alaska, California, or is an American citizen living overseas, he/she should have an equal opportunity to participate in, for example, a National Park Service decision regarding a management issue in Yellowstone National Park.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. This recommendation is unnecessary and will only serve to reduce the quality of the NEPA documents produced and of the final decisions made by agency officials. As a consequence of such a change, there will likely be increased litigation as the quality of the NEPA decisions declines simply because of a limitation on the number of pages allowed in a NEPA document.

Recommendation 3.1: Amend NEPA to grant tribal, state, and local stakeholders cooperating agency status. This recommendation is unnecessary because the existing CEQ regulations clearly define who qualifies to be a cooperator and when the lead agency should seek cooperating agency participation in a particular NEPA process. It is also unclear whether the term “stakeholder” refers to any interest group or if the recommendation is limited to “tribal, state, local, or other political subdivisions.” Under no circumstances should stakeholders representing private party interests be allowed to be cooperators in a NEPA process (though agencies should be encouraged to initiate appropriate discussions with all potential stakeholder groups to try to avoid litigation at the conclusion of the NEPA process). Moreover, the lead agency must control who is invited to be a cooperating agency based on a case-by-case analysis of the pros and cons of involving cooperating agencies in a NEPA process. Forcing the lead federal agency to come up with clear and convincing evidence that a request for cooperating status should not be granted is an inefficient and wasteful use of federal resources and the time of federal employees and will serve only to further complicate and delay the NEPA process.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. This recommendation

is unnecessary. If a project requires federal approval or action, the agency must comply with NEPA. If a project requires state approval or action then a state NEPA law (in those states that have promulgated such laws) is applicable. Where an action requires both state and federal approval, the federal NEPA should be the relevant law because it is the same throughout the country and so that the federal agency expends the majority of the resources preparing the document, albeit with an appropriate level of input by the state agency. A state agency should not, under any circumstances, be able to substitute its review process for an action that has a federal nexus and presumably, few states would want the economic burden (a potential unfunded mandate) of doing so. Furthermore, there are only 13 states with so-called “little NEPA” laws. Whether those laws are identical to NEPA is unknown but considering that such laws can be amended by state legislative action, allowing state NEPAs to take the place of the federal NEPA law could significantly affect the quality of the environmental analysis if the existing state law is or can be made through state legislative action weaker than NEPA. Considering that only 13 states have laws that are at all comparable to NEPA, requiring CEQ to spend time creating regulations to allow the substitution of state NEPA documents for federal NEPA documents is a waste of taxpayer dollars.

Recommendation 4.1: Amend NEPA to create a citizen suit provision. This amendment would be acceptable if it did not contain various caveats as delineated in the NEPA Task Force Report. The inclusion of a citizen’s suit provision would not likely increase the number of NEPA related cases as such litigation is currently filed pursuant to the Administrative Procedures Act. While such a provision should be added with no strings attached, some of the caveats included in the NEPA Task Force Reports are worthy of some discussion. SAPL agrees that parties that pursue litigation should be required to exhaust all reasonable administrative remedies before filing suit as is currently the requirement unless there are extenuating and legitimate circumstances that prevented such involvement. Under no circumstances should NEPA be amended to allow any non-party to a lawsuit to be part of settlement negotiations. If a party is interested in a particular issue that is in the courts, it must seek and be granted intervention status in order to be part of any settlement agreement. Finally, though standing law should be changed to broaden the ability of affected parties to bring suit, establishing specific standing provisions in NEPA is unnecessary and inappropriate.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects. This recommendation is unnecessary though CEQ could and should assist agencies in interpreting relevant legal opinions and applying those interpretations to the preparation of new NEPA documents.

Recommendation 5.1 Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. This recommendation is unnecessary. The existing NEPA regulations require that all alternatives be reasonable and feasible. Whether an alternative is economically feasible is somewhat out of the hands of the agencies as

economic feasibility largely depends on whether Congress will allocate sufficient funds to the agency to carry out a particular action. The proposal to require that all alternatives be supported by feasibility and engineering studies will significantly increase the time and expense incurred by an agency in preparing a NEPA document. Moreover, such a requirement would unfairly penalize individuals or organizations that propose alternatives for consideration by the agencies as most such parties would not have the funds, time, or expertise needed to prepare such analyses even though their suggested alternative may be appropriate, sensible, feasible, and supported by the scientific evidence. Finally, there is no need to amend NEPA to require the consideration of the socioeconomic impact of alternatives as the existing regulations already require the consideration of such impacts in a NEPA document.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. NEPA should not be amended for this purpose. As some agencies avoid the analysis of the so-called no-action alternative preferring to analyze the status-quo alternative, clearly requiring a detailed analysis of the no-action alternative can be achieved through a regulatory change.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposal mandatory. SAPL supports the intent of this recommendation but cannot support the actual regulation until it can be reviewed.

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. This recommendation is unnecessary as there is already sufficient opportunities for the agencies to formally consult with the stakeholders throughout the NEPA process. In addition, the agencies can exercise other means of engaging the stakeholders in discussions about a certain issue of concern when and if necessary.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. This recommendation is unnecessary as CEQ regulations already clearly delineate the role of a lead agency in a NEPA process.

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality. While there is a need to expand the role of CEQ in the NEPA process – particularly in regard to providing training to agency officials responsible for implementing NEPA – a NEPA Ombudsman position to resolve conflicts within the NEPA process is unnecessary. Considering that such a position would be highly political and easily influenced by the political leanings of whatever party is in power, the decisions made by a proposed Ombudsman would rarely be objective or without the taint of political influence.

Recommendation 7.2: Direct CEQ to control NEPA related costs. SAPL supports the intent of this recommendation but cannot support or reject any recommendations

brought to Congress by CEQ for cutting or trimming NEPA costs until such recommendations can be reviewed.

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. This recommendation is unnecessary as the existing regulations along with the available case law already provide guidance as to how to interpret and evaluate cumulative impacts in any NEPA document.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future action are appropriate for consideration under the cumulative impact analysis. This recommendation is unnecessary as an agency should be able to determine what future actions are reasonably foreseeable. Requiring that cumulative impact analysis be limited to only “concrete proposed actions” will diminish the quality of future NEPA document and final NEPA decision by preventing the decision-makers from understanding how a specific decision may be affected by future actions that are reasonably foreseeable, whether those actions are implemented or not.

Recommendation 9.1: CEQ study of NEPA’s interaction with other Federal environmental laws. SAPL supports the intent of this recommendation but cannot support or oppose the accuracy or sufficiency of the CEQ report until the report can be reviewed.

Recommendation 9.2: CEQ study of current Federal agency NEPA staffing issues. SAPL supports the intent of this recommendation but cannot express an opinion on the results of the study until that study is made available to the public.

Recommendation 9.3: CEQ study of NEPA’s interaction with state “mini-NEPAs” and similar laws. SAPL supports the intent of this recommendation but cannot express an opinion on the results of the study until that study is made available to the public.

Based on the foregoing comments, SAPL believes that the correct course of action in regard to the future of NEPA is to maintain the statute. It is working. Thank you in advance for considering these comments.

Sincerely,

D.J. Schubert
Wildlife Biologist