

Sandi B. Zellmer  
Professor  
University of Nebraska  
College of Law  
P.O. Box 830902  
Lincoln, NE 68583  
(402) 472-1245  
[szellmer2@unl.edu](mailto:szellmer2@unl.edu)

Via email to: [nepataskforce@mail.house.gov](mailto:nepataskforce@mail.house.gov)

Feb. 2, 2006

NEPA Task Force Committee on Resources  
1324 Longworth House Office Building  
Washington, DC 20515

*RE: Comments to the NEPA Task Force on the NEPA Draft Report*

Dear Committee Members,

I am submitting these comments on the Committee's Report on the National Environmental Policy Act (NEPA), which voiced an array of concerns about the statute and proposals for legislative change. In short, NEPA is by no means "broken," and legislative revision is unwarranted and, indeed, unwise. Although there is room for improvements in implementation, the statute itself is a masterpiece of environmental legislation, as evidenced by the fact that hundreds of other nations and states have emulated its goals and requirements by adopting similar legislation modeled on NEPA.<sup>1</sup>

---

<sup>1</sup> See *The National Environmental Policy Act: A Study of its Effectiveness After Twenty-Five Years* 3 (1997), available at <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf> (reporting that over half of the states have adopted NEPA-like statutes); CHRIS WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 3-4 (1995) (describing NEPA-like statutes of other nations).

By way of introduction, I am a professor at the University of Nebraska College of Law and a member scholar of the Center for Progressive Reform, [www.progressivereform.org](http://www.progressivereform.org). For the past fifteen years, I have researched, taught, and litigated NEPA cases, both as a professor of law and, previously, as a litigator in the private sector as well as the federal government. I am the author of a chapter on NEPA in a casebook entitled *Natural Resources Law and Policy*, to be published later this year. Given these experiences, I have followed the House Resources Committee proceedings with great interest, and am a signatory of the detailed comments submitted by over 200 law professors to the House Committee on Resources last October.<sup>2</sup>

The comments I submit to you today will focus on two primary areas: the proposed changes to the alternatives analysis required by NEPA, and the recommendation to curtail public participation through mandatory deadlines for NEPA analyses and limitations on lawsuits.

### **Alternatives Analysis: The Heart of Environmental Review**

NEPA's "twin purposes," improving federal decisionmaking and informing the public, are accomplished largely through the requirement for an analysis of alternatives.<sup>3</sup> A thorough examination of alternatives is the very heart of the NEPA process. The examination of alternatives is not an exercise in futility, nor does it require agencies to waste time and resources analyzing nonsensical options. Instead, under existing law, the alternatives analysis is guided by a common sense rule of reason.<sup>4</sup>

Although the consideration of alternatives is purely procedural, as agencies are not required to adopt the most "environmentally friendly" alternative, there can be no doubt that this requirement has produced widespread improvement in federal decisionmaking. The analysis informs the decisionmaker of reasonable options as well as potential consequences of various options, enabling the decisionmaker to draw meaningful comparisons between the benefits and detriments of the proposed action and other options. As a result, the analysis of alternatives has led to significant programmatic and individual project improvements. A few examples of project improvements spurred by the NEPA alternatives requirement include:

- Design and operational improvements in water delivery systems, hydroelectric dams, and flood control projects
- More effective contingency plans for fires, spills, natural disasters and other hazards

---

<sup>2</sup> For discussion and analysis of those comments, see Oliver A. Houck, *The U.S. House of Representatives' Task Force on NEPA: The Professors Speak*, 35 *Env'tl. L. Rep.* 10895-10917 (2005).

<sup>3</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-56 (1989).

<sup>4</sup> *Vermont Yankee Nuclear Power v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

- Relocation or reconfiguration of highways to avoid community impacts

NEPA gives federal agencies wide discretion in choosing among options to manage resources, construct highways and facilities, and issue leases and permits. Limiting the alternatives analysis to only those few options supported by certain feasibility and engineering studies, as recommended in the Report, would severely erode the effectiveness of the statute. As it is, no agency is required to adopt an alternative that is not feasible. Yet limiting alternatives in the way recommended in the Report makes no sense. As it is, NEPA is intended to compel an agency (often assisted by the project proponent) to study and determine feasibility via the scoping and drafting process, and this is just as it should be. Otherwise, couldn't the agency completely ignore an alternative route for a proposed highway or pipeline, or an alternative technique or location for conducting mining or timber harvesting, simply because it has not yet studied it? This is the epitome of allowing the ostrich to bury his head in the sand – a technique that NEPA is designed to avoid by requiring agencies to “look before they leap.”

Imposing strict deadlines on the NEPA process – nine months for an EA and 18 months for an EIS – would further restrict a full and fair consideration of reasonable alternatives. While 18 to 24 months might be a representative timeframe for a typical EIS process on a noncontroversial, run-of-the-mill proposal, such a restrictive timeframe may well be impossible for many complex, multi-faceted project proposals *unless* unlimited resources were dedicated to the process. In reality, unlimited resources are not available. As we all know, agencies operate under severely limited budgets, and a restrictive deadline would, in many cases, result in a shoddy, haphazard and potentially misleading analysis. Moreover, where complex scientific issues are involved, reliable data may not be available in a user friendly format in such a short timeframe, and in-depth data analysis can take significant amounts of time. The government's broader interests in “sound science” are served by thorough data collection efforts and comprehensive, transparent data analysis, and these enterprises require open-mindedness, flexibility and, perhaps most of all, time. Finally, strict deadlines could restrict meaningful opportunities for public participation throughout the NEPA process, a topic which is explored further below.

### **Public Participation: Improving Decisionmaking Processes and Outcomes**

Public participation in government is fundamental to American democracy. There can be no doubt that citizen participation has been critical not only to NEPA's success but, more broadly, to the Nation's accomplishments in promoting environmental quality and sustainable development. Legislation that would limit the parties who can bring NEPA lawsuits, and the timeframe in which such lawsuits may be brought, is unnecessary as well as wrong-headed. The avenues for meaningful public participation, including litigation, should not be limited in the fashion proposed in the Report for the following reasons.

First, federal agencies hold no monopoly on good ideas. Citizen participation provides valuable insights throughout the decisionmaking process. If it weren't for NEPA's requirements for information dissemination and timely, informed public involvement, the outcomes of federal decisionmaking would be far worse, and, as a result, adverse environmental and economic impacts would be far more severe. In addition, allowing ample opportunity for public feedback promotes public "buy-in" in the end, as stakeholders become better informed and feel that their comments have been addressed through the decisionmaking process.

As for litigation, citizen suits are already limited both by the realities of litigation and by constitutional and prudential limits on standing. Citizen suits cost money; in fact, complex, fact-intensive NEPA cases can cost hundreds of thousands of dollars. Few citizen groups possess such resources. Accordingly, relatively few EISs are taken to court, and only a few of these cases succeed in enjoining a project, even temporarily.<sup>5</sup> Further, environmental interest groups (also known as "tree huggers") are not the only ones to avail themselves of NEPA litigation. Nearly one-third of all NEPA plaintiffs are state and local agencies, Indian tribes, private property owners, and business associations.<sup>6</sup>

Existing federal law provides more than enough safeguards to ensure against stale claims brought by inappropriate parties. The U.S. Code already provides adequate statutes of limitations for the broad array of federal lawsuits. Why carve out special, more restrictive deadlines for one particular statute (NEPA)? In addition, the Supreme Court's jurisprudence on standing, which limits access to the courts to only those plaintiffs with legally cognizable interests and concrete, imminent and personal injuries-in-fact, within the zone of interests of a particular statute, is more than adequate to ensure against a flood of litigation by those with only attenuated interests.

Litigation serves one more important role. The potential for NEPA litigation ensures that both environmental impacts (from environmental plaintiffs) and economic impacts (from industry plaintiffs) will be fairly and fully considered. The specter of litigation in and of itself serves as a powerful enforcement mechanism by promoting agency awareness, responsiveness and accountability.

## **Conclusion**

NEPA is, by far, the most important environmental legislation in the United States, promoting sustainable development and environmental quality. The recommendations discussed above would diminish and perhaps even defeat NEPA's efficacy. Moreover, legislative amendment is generally unwarranted. The Report does

---

<sup>5</sup> See Robert G. Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act* 15 (Geo. Env'tl. L. & Pol'y Inst. 2005); Council on Environmental Quality, NEPA Litigation Surveys, available at <http://ceq.eh.doe.gov/nepa/nepanet.htm>.

<sup>6</sup> See Council on Environmental Quality, NEPA Litigation Surveys available at <http://ceq.eh.doe.gov/nepa/nepanet.htm>.

not make a single recommendation that could not be accomplished more effectively by regulation of the Council on Environmental Quality and other federal agencies. Regulatory revisions have the advantage of allowing adaptive management, by enhancing the ability to adjust and fine-tune as new requirements evolve and are implemented. This type of flexibility is essential for a program as wide ranging as NEPA, and has served the statutory purposes well over the course of the past three and a half decades since NEPA's enactment.

Thank you for the opportunity to comment on the draft Report.

Respectfully submitted,

,

Sandi Zellmer