

February 6, 2006

Transmitted via e-mail
nepataskforce@mail.house.gov

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

Re: Comments on NEPA Draft Report

Task Force members:

Save The River is a non-profit, member-based environmental organization. Our mission is to preserve and protect the ecological integrity of the Thousand Islands Region of the St. Lawrence River through advocacy, education and research. We were designated the Upper St. Lawrence Riverkeeper in 2003 by the Waterkeeper Alliance and are a founding member (1982) of the international coalition, Great Lakes United.

We are grateful for the opportunity to comment on the effort made by the House Committee on Resources Task Force on Improving and Updating the National Environmental Policy Act in compiling their *Initial Findings and Draft Recommendations*.

For 30 years, Save The River has been successfully confronting the numerous and continuous reincarnations of a single, massive, federal navigation project and the incremental steps government agencies have taken towards its realization. Our interest in this issue is well documented, yet the applicants and industry stakeholders who support the project have attempted to marginalize or blatantly ignore our position. If not for the National Environmental Policy Act (NEPA), we would have failed long ago.

Our failure would have come not because of the navigation project's economic benefits; economically it has been proven that this project would have a significant negative impact on the nation.

We would not have failed to stop the project because our environmental concerns are without merit; the overwhelming majority of environmental research supports our position that this project would do unacceptable and irreversible environmental harm.

The reason failure would have been likely without NEPA is simply that we would have been locked outside of a non-transparent process and privy to none of the critical information necessary to intelligently understand the project's specifications, ramifications, and alternative options. Without the current, sweeping authority of NEPA, we would have been in the dark and therefore unable to speak to the impacts of the project. Our future would have been dictated to us by government agencies unwilling to concede our democratic right of self-determination.

When the St. Lawrence Seaway and Power Project was originally constructed in the late 1950s, NEPA did not exist. The environmental destruction that has befallen our region and the failed realization of the slightest economic gain has educated us to the folly of blind obedience. Those who live along the St. Lawrence River know first hand the horrors that can occur when people are denied both input into the workings of their government and the ability to act as an equal partner in confronting unnecessary or poorly conceptualized projects.

While the Task Force's declared purpose in undertaking this comprehensive examination of NEPA is to improve and update this seminal piece of environmental legislation, Save The River finds that most every draft recommendation would work to undercut NEPA, destroying the essence of the legislation, people's access to the decision-making process, and the sustainability of the environment of the United States.

If, as you state in the beginning of your report, "The original policy goals of NEPA remain valid today," then your recommendations are off target.

There emanates from your report an underlying bias towards development that permeates almost every recommendation. You would have NEPA err on the side of the applicant, providing the developer the means to minimize his short-term outlay of time and money while leaving the long-term environmental ramifications unidentified. Your recommendations would not only promote an unlevelled playing field, but, by eviscerating NEPA, insure that development proceed virtually unchecked.

Your adoption of the premise that "the arguably 'myopic, dishonest, and dumb government' making decisions in the mid to late 1960s has become significantly more aware of the consequences of its actions" is imprudent.

You write that, "Over time it became clear that the level of the federal government's environmental awareness has increased in the years since NEPA was enacted ... Given the increasing awareness, it is difficult to understand how the government would retract or retreat into pre-NEPA practices if the statute were to be amended."

You should note that there are more than a few who consider the actions of government today in line with the actions of governments past (and future). There is, and most likely always will be, those who see their personal profit or their personal vision as having dominion over the environment and the natural resources that belong to the People of this country. Without good laws – and NEPA as it now exists is a good law – the People are left outside the democratic process and without protection.

Since it was enacted in 1969, NEPA has increased its standing as the bedrock of environmental legislation through numerous court rulings. Substantial case law supports justifiable and appropriate understandings of its key concepts. As the writers of our Constitution intended, judicial review has honed NEPA's authority. While this finer edge seems to have apparently driven some to insist that the law needs reform, Save The River strenuously disagrees.

Our Federal system of government, composed of three equal branches, best serves the People when each component is allowed to perform their intended function. It is, of course, Congress's right to revisit legislation, but there is no need to proceed with statutory revisions when the clarity sought is readily available within legal citations.

NEPA, by and large, is achieving the outcome it was created to accomplish without resorting to the proposed statutory or regulatory revisions put forth in the Task Force's report. There are, of course, always areas where improvement can be made, but none would require legislative solutions.

Save The River strongly disagrees with the assumption that "the statute is procedural and offers no protections above other substantive laws...the NEPA process is something that can be changed to ease costs and delays without undermining other substantive environmental protection laws such as the Endangered Species Act, the Clean Water Act or the Federal Land Policy and Management Act."

Recent attempts by the House Committee on Resources to undermine other environmental laws, suggests an agenda not in keeping with its name. There has never been a society able to survive the decimation of its environment. By dismantling the laws that protect the ecosystems of this country, you put us all on that slippery slope toward ruin.

Addressing delays in the process

The Task Force labels as "contentious" the issues of whether to prepare an EIS and what is sufficient analysis of the cumulative effects of a proposed action, exposing its bias toward the applicants, and thus to development without oversight.

The Task Force attempts to attribute delays to litigation "which in turn creates larger NEPA documents which lead to more delays and costs." Considering the small number of litigations, one is led to consider the possibility that the vicious cycle leading to excessive delays is not rooted in the option to litigate but in the need of those concerned about a project to have its implications thoroughly researched and the unwillingness of applicants to complete the necessary documentation. The requirement for detailed analysis of a project as proposed, and its alternatives, is the linchpin of the entire impact statement and the heart of NEPA.

The precautionary principle, recognized in international law, needs to garner more respect within the halls of government. Congress would better serve the country by supporting the model that stipulates those wanting change must insure that it will do no harm.

That a similar NEPA process in Texas "takes only 25-30% of the time it takes a Federal agency" should instruct the Task Force that haste makes for environmental waste. The deplorable environmental record of the State of Texas should raise serious concerns regarding an attempt to put in place so called "efficiencies that are absent from the Federal process."

"Planning difficulties" are to be expected in a democratic environment.

Recommendation 1.1 There should be no amending NEPA to redefine “major federal action”. Existing regulations correctly focus agency attention on a federal action’s potential to have a significant impact on the environment. The proposed definition diverts that focus to other characteristics of the federal action, like cost and time, which may have no relationship to the action’s environmental impacts. Further, the current, substantial case law supports a valid and appropriate understanding of the concept of a Major Federal Action.

Recommendation 1.2 Save The River does not endorse mandatory timelines for completing an EA, an EIS or the completion of the entire NEPA process. Every project should be allowed to run its own course. That said, the Task Force should explore options to require that Federal agencies begin the scoping process as early in the process as possible and not allow agencies to delay such scoping by refusing to begin the process until an application for a permit or license is complete. An agency’s refusal to begin the NEPA review process until after considerable “internal” data is collected is a way that Federal agencies have delayed the issuance of permits or licenses in the past and significantly contributes to the problem of delay and litigation. When people feel they are not getting the full story, they tend to be distrustful.

Recommendation 1.3 Save The River does not support this recommendation. NEPA should not be amended to state “temporary activities or other activities where the environmental impacts are clearly minimal are to be elevated under a CE,” leaving to the agency’s unmonitored discretion the option “to utilize another process.”

Recommendation 1.4 While our reading of this recommendation is unclear, Save The River supports the use of supplemental review of an EIS when a scientist has unique or extensive knowledge or expertise that is very relevant to the proposed action.

Enhancing public participation

A sense of inclusion and collaboration at the beginning of a project would insure that all viewpoints are aired from the onset and would significantly reduce the final cost and outlay of time and improve every aspect of the project process.

The Task Force misrepresents the “cost or consequences” borne by groups who seek to insure that NEPA brings out into the open light of scrutiny possible negative effects of a project. The literal costs are of no greater importance than the costs of a lost river or meadow. Not all costs are easily put into monetary terms.

“The burden of the process” should not be viewed solely from the applicant’s perspective and they should not be allowed to limit the cost of completing the NEPA process.

Recommendation 2.1 It would be contrary to the protection of the environment if regulations were formulated giving weight to localized comments. It is usually local developers who stand to benefit financially from projects and they, therefore, may show bias in favor of proceeding without due caution.

Small, grassroots, environmental groups, habitually without resources, routinely seek assistance from national organizations to oppose a project that they fear will negatively affect their region.

Local activities can have far-reaching, negative environmental impacts. Focusing the agency's valuation of comments to their point of origin has no relationship to the quality and substance of the comment. NEPA applies to federal actions and natural resources that are the common property of all Americans.

Recommendation 2.2 No limit should be set on the length of an EIS It should be as long as it has to be to respond to the project and the region the project will effect.

Better Involvement for state, local and Tribal stakeholders

Recommendation 3.1 While better communication with all stakeholders is essential to the NEPA process, Save The River believes that cooperating agency status only be given to agencies that have a discretionary decision-making role regarding a specific federal action.

Recommendation 3.2 NEPA is a federal law that instructs federal agencies. Handing off this responsibility ... and the associated costs ...to the states is not in keeping with the law's intent. While Save The River supports the utilization of cooperative efforts of state and federal entities in gathering relevant information that will be presented to the public, we do not support amending CEQ regulations to allow state review processes to satisfy NEPA requirements.

Addressing litigation issues

By performing the critical function of policing agency compliance with the NEPA process, private litigation is ensuring that federal agency decision-making continues to be sensitive to environmental concerns. That is what the American public expects and Congress should not undermine that expectation by amending this bulwark of American environmental law.

Litigation is not cheap, and private entities and public interest groups generally employ it only as a last resort. The impact of litigation must also be seen in the larger perspective. One litigation affects many projects. The threat of litigation affects many more.

Recommendation 4.1 NEPA need not be amended to create a citizen suit provision. This time honored right of a citizen to bring suit is well delineated under current judicial review procedures under the Administrative Procedure Act and numerous court rules. Standing has been defined by the federal courts and should be left to judicial precedent.

Recommendation 4.2 Save The River endorses this recommendation as a means toward insuring more uniformity on procedural issues and possibly preventing unnecessary and repetitive aspects of the NEPA process.

Clarifying alternative analysis under NEPA

Recommendation 5.1 NEPA currently makes the completion of an adequate research program a prerequisite to agency action. The adequacy of the research must be judged not only in light of the scope of the proposed program but also with regard to the extent to which existing knowledge raises the possibility of potential adverse environmental effects.

Moreover, it is no excuse under NEPA to argue that the necessary information regarding the uncertainties and unresolved issues is not presently available. Even under the “rule of reason” applicable to NEPA cases, if critical information is lacking, the agency must nevertheless “see to it that the necessary research is conducted.” Brooks v. Volpe, 350 F Supp. 269, 279-80 (W.D. Wash., 1972), aff’d, 487 F.2d 1344 (9th Cir. 1973).

Save The River sees no benefit resulting from amending these practices.

Recommendation 5.2 Save The River opposes this recommendation because it would (1) insert an entirely new set of issues into the NEPA analysis requirements by allowing the consideration of “impacts” other than environmental, and (2) severely cripple one of the most important aspects of a NEPA review, the delineation of all alternatives, including a “no action alternative”.

Recommendation 5.3 We support this recommendation though we believe it can be accomplished without promulgating new regulations. To maintain the integrity of their NEPA analyses, federal agencies should revise their NEPA procedures to preclude hollow promises of mitigation. A mechanism is needed to ensure that promises to engage in mitigation are actually kept. This recommendation is especially relevant to Corps of Engineers projects. According to a study by the Government Accountability Office, the Corps of Engineers fails to implement its mitigation obligations 70% of the time.

Enhanced monitoring of completed projects should also be required through agency procedures to make promised mitigation measures enforceable commitments. On-the-ground inspection and evaluation to make sure mitigation measures are being implemented successfully are essential to make mitigation commitments real.

Better Federal agency coordination

Recommendation 6.1 While the essence of this recommendation is worthy, additional CEQ drafted regulations are not necessary. Sufficient provisions are already in place within NEPA that allow agencies to conduct constructive dialogs with stakeholders.

That said, agencies should maximize stakeholder involvement and not foster an adversarial relationship by preventing early and complete interaction with all stakeholders. Every stakeholder should receive direct communications (at no cost) relative to a project, whether the project is of short duration or ongoing for decades.

Recommendation 6.2 Without further explanation of this recommendation’s intent, Save The River does not support this recommendation, fearing that it would only add to a process this Task Force is attempting to streamline.

Additional authority for the council on Environmental Quality

Recommendation 7.1 While the creation of a NEPA Ombudsman with decision making authority appears at first glance to be a positive step, Save The River believes, as with the selection of a lead agency, this amendment would only serve to complicate the process and further remove the public's ability to determine the outcome of a project's future.

Save The River does support more independent review of projects during all stages of the process.

Recommendation 7.2 There should be no statutory ceiling on NEPA costs.

Clarifying the meaning of “cumulative impacts”

Recommendation 8.1 Save The River rejects this recommendation as totally unacceptable. It would serve as a cover up for previously conducted projects, wiping the slate clean of responsibility for previous harm done to the environment.

The latest version of the USACE project that Save The River has been opposing seeks to have the current environmental condition stand for the pristine environmental baseline that existed prior to the construction of past Corps projects. The loss of species and habitat cannot be dismissed in an effort to make ongoing or future projects appear less destructive.

Recommendation 8.2 This recommendation would critically damage NEPA. The purpose of NEPA is to insure that developers research the ramifications of their action into the “reasonably foreseeable” future to avoid actions that while not seemingly apparent, may adversely impact the environment. By handicapping its visionary requirements and forcing it to look only for concrete impacts, those that are easily discernable, this recommendation is tantamount to revoking NEPA in total. NEPA forces agencies to take a hard look at the impact a project is likely to cause tomorrow and generations from now. It is not unreasonable for the public to ask its government to be forward thinking.

Studies

Recommendation 9.1 Save the River does not endorse this recommendation believing that it attempts to undercut the entire compliment of environmental laws.

Recommendation 9.2 Every study of NEPA implementation has highlighted the problem of inadequate financial and staff resources. Unfortunately, the deficiency in agency NEPA funding continues to get worse: agency NEPA staffs face increasing workloads, but -a majority of agency NEPA offices have nonetheless suffered substantial reductions in both their budgets and staff positions in the past few years. Staff in the Army Corps of Engineers' Office of Environmental Quality, for example, which oversees all environmental aspects of the Army Corps' civil works program, has been reduced over the last several years from 12 to 3 full time employees

Recommendation 9.3 While an evaluation of state mini-NEPAs is in itself not objectionable, Save The River reiterates its opinion that NEPA is fundamentally a federal law and should be implemented at that level.

NEPA is the Bill of Rights for the environment and without it, the air we breathe, the water we drink and the land we stand upon will fall victim to shortsighted and self-serving predators. The Task Force's recommendations seem to overtly favor money interests over the general population and proprietary rights over the commons. The apparent mindset of the House Committee on Resources is contrary to what one would hope to find at the highest levels of government.

If improving NEPA is the true objective of the Task Force, it can do no better service to NEPA, the environment, and the people it serves than to insist that agencies and industry comply with its regulations in an open and honest manner. The law as written and judicially reviewed insures the People that the natural resources of their country will be looked after. We urge you; do not tamper with this law or this trust.

A handwritten signature in blue ink that reads "Karen Nadder Lago". The signature is fluid and cursive, with the first name "Karen" being the most prominent.

Karen Nadder Lago
Program Director
Save The River
Upper St. Lawrence Riverkeeper
409 Riverside Drive
Clayton, New York 13624
315-686-2010