



Western Lands Project

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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC

Dear NEPA Task Force:

The Western Lands Project ("WLP") is a non-profit, membership organization conducting research, outreach, and advocacy for reform in public lands policy. Janine Blaeloch, WLP director, presented oral and written testimony at the NEPA Task Force hearing in Spokane, Washington. She and I review approximately 50 NEPA documents (EIS's and EA's) each year and are very familiar with the NEPA process. General comments on the Initial Findings and specific comments on draft recommendations of the Task Forces on Improving and Updating the National Environmental Policy Act are below.

Initial Findings

The Initial Findings imply there is still debate as to whether NEPA is a procedural or substantive statute. In fact, the Supreme Court settled this debate more than twenty years ago with a series of cases concluding that NEPA is indeed a procedural statute, with the only role for a court "to insure that the agency has considered the environmental consequences" of the proposed action. Kleppe v. Sierra Club, 437 U.S. 390, 410, n.21 (1976). Of course, simply because the statute is procedural does not mean that comments you cite such as "NEPA's purpose is to protect and empower the public" are wrong. A procedural statute, much like procedural due process, serves to protect the public by requiring consistency in the process or method by which actions are evaluated.

The Findings also includes a statement that "the federal agencies believe that NEPA applies to all actions, not just major actions" from an "attorney dealing with agencies throughout the West." This is wrong in two ways. One, the agencies do not believe this. In fact, both the Bureau of Land Management and the Forest Service have recently proposed additional categories of actions that would be presumptively excluded from NEPA analysis. Two, although environmental impact statements are necessary only for major federal actions that may significantly affect the environment, this does not mean that NEPA only applies to major federal actions. Federal agencies prepare environmental assessments to determine whether proposed actions may significantly affect the environment. One would expect the NEPA Task Force to know this. If it did not, the public should have little faith in the remainder of the findings or the recommendations. If the Task Force did know this, why was this particular quote included in the report?

The Findings note that agencies are “defaulting to the preparation of an EIS without fully debating whether the action is ‘major.’” Unfortunately, no examples or context were provided for evaluating this statement. There are certainly *categories* of actions for which an EIS is the default document to be prepared, but that is because agency experience has shown that those categories typically result in significant impacts to the environment and therefore require an EIS. It would be a waste of time and money to first prepare an EA, when it is already known that an EIS will be required. It is likely there are far more *categories* of actions for which EA’s, and not EIS’s are the default documents prepared, and there is no dispute that far more EA’s are prepared each year than EIS’s. This is not surprising, given the greater time and expense necessary to prepare an EIS.

The Task Force should not be so naïve as to profess that “given the increasing awareness, it is difficult to understand how the government would retract or retreat into pre-NEPA practices” if NEPA were amended. NEPA is a primary reason why our government “has become significantly more aware of the consequences of its actions.” Why should the public assume that the “myopic, dishonest and dumb” government of the late 60’s would be visionary, honest and smart if NEPA were amended? Despite the claims in the Initial Findings, applicants have greater influence upon the agencies than the general public, and from the tone of the Draft Recommendations it seems the Task Force hopes to codify changes to NEPA that would give applicants even greater influence.

The Task Force states that it was told that “there was an argument to be made that NEPA played a role” in blocking a project that may have prevented the post-Katrina flooding of New Orleans. It also states that environmentalists disagreed with this statement. Given these opposing views, the Task Force had an obligation to investigate the issue and present the evidence supporting or discrediting these views. The fact that none was provided makes it appear as if the federal government is trying to place responsibility for the post-Katrina fiasco on environmentalists rather than on itself.

Amazingly, the conclusion drawn from the litigation statistics (99.97% of NEPA actions are completed successfully without an injunction, 0.2% of EIS’s result in litigation) is not that the environmental community is not nearly as litigious as portrayed. Rather, it is that the statistics are irrelevant because “whether there is one case or 100 cases, the result is that agencies are becoming more cautious – but not necessarily more deliberative - in issuing NEPA documents.” If the Task Force believes 0.2 % litigation and 0.03% injunction rates are truly having a profound ripple effect of lost economic opportunities, the Task Force will probably need to recommend entirely prohibiting NEPA litigation if it wishes to eliminate this “profound ripple effect.”

Regarding industry parties intervening in NEPA cases, the Initial Findings neglected a very significant point. While the Ninth Circuit has held that the government is the only proper defendant for the merits phase of NEPA litigation, it has made no such holding for the remedy phase of NEPA cases. This makes sense. The federal agencies review NEPA documents and independently decide whether to proceed with proposed actions. Because the industry parties do not take part in agency decisions (industry parties would surely not argue otherwise), then it is proper that they do not have a role in defending the merits of decisions they did not make. On the other hand, if a court rules that an agency violated NEPA, then the industry party is typically allowed to intervene in the subsequent remedy phase so that its interests and concerns are presented when the court decides how to resolve the inadequacies of the NEPA analysis.

The Findings state that some parties believe that “allowing courts to monitor compliance has resulted in gross inconsistencies across the country” and suggest that the courts are creating NEPA policy from the bench. These statements fit neatly within the broader agenda of instilling the idea that “activist” judges are creating, rather than interpreting, law, but the public is unable to evaluate such claims when no evidence, even anecdotal evidence, is provided. Besides, with our government’s separation of powers, it is an independent judiciary’s role to review claims that executive branch agencies have violated a statute.

The Task Force shows its bias when it quotes a ranching interest claiming that the ranching industry is not litigious by nature but has taken to filing lawsuits because “that is where the game is being played.” Environmental groups could just as easily claim that they are not litigious by nature, but that the only way to get obstinate agencies to comply with the law is to bring lawsuits.

Despite finding that only 2 in 1000 EIS’s end up being litigated, the Task Force discusses several ways of reducing the amount of litigation. One of the suggestions – requiring plaintiffs to exhaust all administrative remedies before bringing suit– is already the law of the land. Another suggestion is to bring clarity to the process by rigidly delineating certain issues, such as when an EIS should be prepared and how cumulative effects should be analyzed. This sounds good in theory, but it is not possible to craft definitions or rules that cover every conceivable action, effect or situation. In the end it will still be left to the courts to determine how NEPA applies to unforeseen issues. Litigation will be reduced when the agencies adhere to the spirit of NEPA and prepare documents that objectively describe the impacts of proposed actions, rather than prepare documents with pre-determined conclusions and decisions.

Specific Recommendations

Recommendation 1.1 - As mentioned above, attempts to define terms such as “major federal action” will ultimately fail because one cannot foresee or account for all possible actions. The recommendation also neglects to identify the most important element in determining whether a federal action is “major,” that is whether the action is likely to have significant impacts on the environment. This recommendation looks like an effort to raise the bar as to which federal actions deserve NEPA analysis and should be rejected.

Recommendation 1.2 – This looks like another effort by industry groups to add “certainty” to their planning, but it is likely to result in more, not fewer, delays. How are courts supposed to review analyses that are not concluded by the deadlines? Courts will likely rule that agency decisions based on incomplete analyses are arbitrary and issue injunctions prohibiting projects from going forward until the analyses are completed. If NEPA were amended to somehow protect incomplete analyses from judicial scrutiny, then the agencies will have a major incentive to miss deadlines and go forward with incomplete analyses. This recommendation should be rejected.

Recommendation 1.3 – It is true that EA’s are not prepared or used as intended under NEPA. The purpose of an EA is to determine whether an EIS must be prepared because the proposed action may significantly affect the environment. The reality is that agencies decide whether proposed actions will require EIS’s long before they begin preparing EA’s. If an agency decides to prepare an EA, one can be certain that the EA process will conclude with a finding of no significant impact.

If the agencies actually prepared environmental assessments with the goal of objective analysis to determine whether an EIS was necessary, this recommendation would not be necessary.

Recommendation 1.4 – As noted, the CEQ regulations already specify the criteria for the use of supplemental NEPA documentation. This recommendation should be rejected, as no purpose is served by amending the statute because regulations also have the force of law.

Recommendation 2.1 – This is almost certainly the worst, most unworkable recommendation offered by the Task Force. What constitutes local? Should non-local interests' comments be given no weight? If not, how would an agency weigh local versus non-local comments? The recommendation does not explain how the courts would review decisions in which local interests' comments were given more weight. The purpose of public comments is to improve analysis of environmental impacts and there is no explanation as to how giving greater weight to localized interests will lead to better analysis. The Task Force seems to be under the impression that public comment periods serve as referenda to determine whether agencies are to proceed with proposed actions. This recommendation should be rejected.

Recommendation 2.2 – Enforceable page limits are just another means of reducing the amount of analysis that a proposal receives. Like the recommendation to impose strict deadlines, this recommendation will simply lead to greater judicial scrutiny and result in more injunctions and delays. It should be rejected.

Recommendation 3.2 – This recommendation looks to be another effort to give local interests control of the NEPA process. NEPA applies to federal actions, and it is the duty of the federal agencies to consider the best interests of all Americans. Local and state agencies have a duty to look out for the best interests of their narrower constituencies. It is precisely because federal and state/local interests diverge that state environmental review processes should not satisfy NEPA requirements. This recommendation should be rejected.

Recommendation 4.1 – Several components of this recommendation are unnecessary and others ill advised. Parties looking to challenge agency decisions in court on NEPA grounds are already required to have been involved throughout the NEPA process. Though there is no explicit NEPA requirement that a plaintiff demonstrate that an agency did not use the best available information/science, the "arbitrary and capricious" standard of review employed in NEPA cases effectively demands it. It is exceptionally difficult to show that an agency acted in an arbitrary and capricious manner if it considered the best available information/science. The third component of this recommendation – essentially giving businesses veto authority over settlement negotiations – gives industry far too large a role. The federal judiciary has already established intervenor rules that provide an avenue for affected parties to join lawsuits and there is no reason to provide an exception to the normal rules for NEPA cases. The "standing" component of this recommendation is duplicative, as there is well-established federal standing jurisprudence covering the concerns raised. Reject this recommendation.

Recommendation 4.2 – There is merit to the recommendation that CEQ advise federal agencies about the applicability of NEPA.

Recommendation 5.1 – The first two aspects of this recommendation (that agencies take cost and existing technologies into account when preparing alternatives) are unnecessary, as federal caselaw already holds that agencies have no obligation to

consider alternatives that are not reasonable. Economically and technically infeasible actions are, by definition, not reasonable and need not be considered. The third part of this recommendation – taking socioeconomic consequences into account – lacks merit, because it is susceptible to agencies artificially localizing such consequences in order to make alternatives seem unreasonable. For example, the socioeconomic consequences of an alternative that eliminated ten jobs in a rural town of 50 people might be considered unreasonable if the analysis were limited to the boundaries of the town itself, but entirely reasonable if the area of analysis were the entire county in which the town is located. This recommendation should be rejected.

Recommendation 5.2 – This recommendation is duplicative, as CEQ regulations already require that agencies consider the no action alternative for all proposals, and should be rejected.

Recommendation 5.3 – Making mitigation proposals mandatory is a positive proposal, but the listed exceptions swallow the rule. The recommendation fails to state whether the public would be able to enforce mandatory mitigation or whether it would be limited to the agencies. If enforcement is limited to the agencies there will be little benefit to making mitigation proposals mandatory, as the agencies will be reluctant to enforce them.

Recommendation 6.1 – Greater consultation with the public, not greater consultation with “stakeholders,” is what is needed. Prior to NEPA, consultation was exclusively between the stakeholders and the agencies and it is what led to the myopic and dishonest agencies of the late 1960’s lamented in the Findings. This recommendation should be rejected.

Recommendation 7.1 - Creating a NEPA ombudsman position within CEQ would add another layer to the NEPA process, but it is an idea worthy of more thorough consideration.

Recommendation 8.2 – The recommendation to amend NEPA to only consider concrete proposed actions - and not proposals that are “only” reasonably foreseeable - under cumulative effects analysis is a bad idea. This recommendation would simply lead to delays in announcing projects so they would not need to be considered “concrete” and would not be considered when analyzing cumulative impacts. If a project is reasonably foreseeable, why is it not reasonable to consider its impacts? Reject this recommendation.

The studies proposed in the Group 9 Recommendations have merit, so long as the studies are independent and not politicized.

Thank you for the opportunity to comment on the Initial Findings and Draft Recommendations.

Sincerely,

A handwritten signature in black ink that reads "Christopher J. Krupp". The signature is written in a cursive, slightly slanted style.

Christopher J. Krupp, Staff Attorney