

COMMENTS

**Report On
Initial Findings and Draft Recommendations
Task Force on Improving the National Environmental Policy Act
and
Task Force on Updating the National Environmental Policy Act
of the
Committee on Resources
U.S. House of Representatives
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by

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INTRODUCTION

I, Roger P. Hansen, am the Principal of an environmental consulting firm, Hansen, Environmental Consultants, located in Aurora, Colorado. An attorney and member of the American Institute of Certified Planners (AICP), I have been involved with the National Environmental Policy Act (NEPA) process since the Act was signed on New Year's Day, 1970. During the early 1970s, I served as a member of the President's Council on Environmental Quality (CEQ) Legal Advisory Committee. As a NEPA practitioner with 35 years' experience in preparing NEPA compliance documents (e.g., EISs and EAs), I have provided services for federal and state governments, private industry, and non-profit environmental organizations. I have also taught NEPA and environmental law at several colleges and universities. Thus, my comments are based on extensive experience with clients and organizations having diverse perspectives on NEPA and related environmental issues.

Although the Committee's Report requests comments on specific recommendations, I find it necessary to also comment on the Report and Major Findings of the Task Force which constitute 24 pages of the 30-page report. My comments are based on the electronic version of the Report and are organized according to report section titles, page numbers, and paragraph numbers. The comments are organized under two main headings: **General Comments** and **Comments on the Draft Recommendations**.

GENERAL COMMENTS

1. Council on Environmental Quality Regulations, Guidance, and NEPA Task Force.

Almost all of the Report's initial findings and recommendations (e.g., public participation, cooperating agencies, related environmental laws and regulations, redundancy of analyses, timelines, cumulative effects, and alternatives) are addressed in the CEQ regulations in 40 C.F.R. Parts 1500-1508 and numerous guidance documents. Clarifications and additional guidance regarding these requirements can and should be undertaken by CEQ *without amendments to NEPA or the regulations*. It is important that the Committee and its staff become thoroughly familiar with CEQ regulations and guidance documents already in place.

The CEQ established its own NEPA Task Force on April 10, 2002. After receiving extensive comments from federal, state, and local governments, Tribes, public interest groups, and organizations, it issued its report on *Modernizing NEPA Implementation* in September 2003. Several "roundtables" with interested citizens were also held. The CEQ report contained recommendations in all of the areas being addressed by the House Resources Committee but did not propose amendments to either NEPA or the CEQ regulations. The CEQ is now implementing many of those recommendations. The Committee should monitor closely what the CEQ NEPA Task Force is doing in order to avoid redundancy and duplication of effort. The CEQ is *not* defending the status quo.

2. Litigation. The CEQ was not established in the Executive Office of the President as a regulatory agency with NEPA enforcement authority. Other than consultation by federal agencies with the CEQ, judicial review under provisions of the Administrative Procedure Act is the primary and often only enforcement mechanism available to applicants, public interest groups, private citizens, or other parties aggrieved or otherwise affected by federal agency action [see Mandelker, Daniel, *NEPA Law and Litigation*, Ch. 3, Thomson West (2004)]. Closing the courthouse door to potential litigants and setting an arbitrary statute of limitations is not a solution.

3. Project Delay Attributed to the NEPA Process. Project delays attributed to compliance with the NEPA process have been greatly overstated and misrepresented. There are numerous other reasons for project delay that have nothing to do with NEPA. (See comments on Group 1 Draft Recommendations below.)

4. Increased Role for CEQ. There are a number of findings and recommendations in the Report that call for the CEQ to exercise an enlarged role in the NEPA process with additional duties. In order to fulfill such a role, the CEQ will need considerably more funding and staffing. While consideration might be given to removing the CEQ from the Executive Office of the President and elevating its

role to that of a regulatory agency [like, for example, the Environmental Protection Agency (EPA)], this is not presently recommended by the reviewer.

5. Cost of NEPA Compliance. Like everything else in American society, the cost of NEPA documentation preparation and public/agency involvement is increasing. However, placing some sort of artificial cost “ceiling” on NEPA compliance is unrealistic and unworkable. One size does not fit all in the NEPA process. Projects requiring NEPA compliance vary enormously in scope and complexity. For example, there is a big difference between constructing five miles of four-lane highway in an urban area and building a dam and reservoir that would flood 25 miles of a wild and scenic river. On the other hand, some small projects can be more environmentally complex and controversial than large projects.
6. Amending NEPA. All of the NEPA amendments initially recommended by the Committee staff are unnecessary. Some are unworkable, counterproductive, or raise constitutional questions. The issues raised by the proposed amendments can be addressed and resolved by (1) the CEQ and (2) the various federal agencies. Most of these issues are already being addressed by the CEQ NEPA Task Force and by NEPA “streamlining” and similar efforts being undertaken by federal agencies, e.g., U.S. Forest Service, National Park Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and Federal Highway Administration. Efforts to amend NEPA will open the proverbial Pandora’s Box with every interest group wanting its own axe ground. The result will be evisceration of the Act so as to make it ineffective. *If anything, federal agencies should be required to rigorously comply with the law and the regulations as currently written and interpreted by the courts.*
7. Task Force Report Bias. Like some of the Committee staff news releases, the staff Report reflects some unfortunate bias that places NEPA compliance in an unfavorable light in terms of cost, delays, and economic development. A few examples follow:
 - Page 3, para. 4. All “delays” (and increased costs) are not based on litigation nor is litigation alone responsible for larger NEPA documents. Many other factors are involved (see Group 1 comments below).
 - Page 3, para. 7. The “threat” of litigation is no more a factor in NEPA compliance than it is with other environmental laws and regulations (e.g., Clean Air Act, Clean Water Act, and Endangered Species Act). If agencies rigorously comply with NEPA, litigation is not a major obstacle.
 - Page 5, para. 3: Attaching the need for NEPA to the “World War II era” makes NEPA seem antiquated and irrelevant in today’s world. NEPA was signed 25 years after the end of World War II and had been needed ever since U.S. federal agencies started undertaking “proposed actions.”
 - Page 8, para. 5: “Despite its significance and decades of discussion, debate and litigation, there is still division as to what NEPA means.” This sounds like NEPA is confusing and unintelligible. It may be to those who

have never read the Act, the CEQ regulations, or any of the court opinions. Of course, there was “division” from the beginning in that applicants, industry trade groups, those opposing “federal control” on ideological grounds, anti-environmentalists, etc. have always challenged NEPA and wished it could be obliterated along with other environmental legislation seen as a threat to the “free enterprise system.”

- Page 9, para.2: Selecting a quotation to the effect that “grassroots groups” (meaning environmentalists or property owners) use NEPA to “fight highway projects” if there are no endangered species or floodplain issues itself reflects bias.
- Page 112, para. 1: The charge that “NEPA played a role in blocking a floodwall project that may have prevented flooding of New Orleans in the aftermath of Hurricane Katrina and that grazing permittees would have been forced off public lands” has no place in a Congressional report without documentation and references. This seems designed to inflame readers against NEPA with no credible basis.
- Pages 18-19 Quotation: The economic impact of the Mt. Leona fire is unfortunate, if true, but cannot be laid solely at the feet of NEPA. Selection of this quotation reflects a bias of giving economic considerations priority over environmental considerations as a matter of course. (The Report reflects this bias in several other places.)

COMMENTS ON DRAFT RECOMMENDATIONS

Group 1: Addressing Delays in the Process

As noted above, project delays attributable solely or primarily to the NEPA process are often greatly overstated or exaggerated. There are numerous other reasons for project delay. A survey conducted several years ago by the Federal Highway Administration (FHWA) of 55 offices and 89 projects found the sources of highway project delays, in order of priority, to be (in terms of survey responses): lack of project funding (18%); local controversy (16%); low priority (15%); project complexity (13%); agency review (8%); change in scope (8%); ESA review (7%); ; historic preservation review (6%); wetlands review (4%); law suits (3%); and hazardous materials (2%). Thus, at least 72% survey responses identified delay sources that had nothing to do with NEPA or other environmental reviews.

Recommendation 1.1: Amend NEPA to define “major federal action.” The CEQ regulations define this term in 40 CFR § 1508.18. Numerous court cases have also defined the term in both holdings and dicta. The logical alternative to this amendment is to request CEQ to issue additional guidance based on existing CEQ regulations, agency procedures, and court interpretations. The recommendation is not warranted, necessary, or beneficial.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. The CEQ regulations address “time limits” in 40 CFR § 1501.8. They are not mandatory because CEQ believed them to be “too inflexible.” The regulations encourage federal agencies to set time limits for an EIS at the request of the applicant and lists eight (8) factors to be considered. Again, one size does not fit all. See General Comment No. 5 above on cost ceilings. Again, having CEQ issue guidance on NEPA documentation timeframes based on 35 years of agency experience would be useful. This recommendation is not warranted or beneficial.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). The CEQ regulations in 40 CFR § 1507.3 *require* agencies to include in their NEPA compliance procedures “specific criteria for an identification of those typical classes of action that “normally”: (1) do require an EIS; (2) do not require either an EIS or an EA (categorical exclusion); or (3) require an EA but not necessarily and EIS. Most, if not all, agencies subject to NEPA have already adopted and often revised their own procedures for determining when EISs, EAs, or CEs apply to a proposed action. Requirements for using CEs for “temporary activities” or where impacts are “clearly minimal” are already in place. Again, additional CEQ guidance may be appropriate. For the reasons given, the recommendation is not warranted, necessary, or beneficial.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. If the language for this amendment is already in the CEQ regulations in 40 CFR §§ 1502.9(c)(1)(i) and (ii) [as well as (2), (3), and (4)], why is it necessary to codify it in the statute? Agency compliance would not be any greater than it is now. This recommendation is not warranted, necessary, or beneficial.

Group 2: Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. The purpose of this recommendation is not clear unless it is to “pack” the commenting process with “interests” that favor the project, whatever it is, due to perceived economic benefits and limit or foreclose comments by “outside groups” like state, regional, or national public interest organizations. Who is to distinguish those “directly” affected from those “indirectly” affected? “Weighting” interests is problematic because there is generally no consensus on weighting criteria or methodology. Many of the projects proposed by federal agencies are on public lands which belong to all citizens of the United States. “Weighting” one type of public interest over another type of public interest could raise constitutional 14th amendment questions, particularly if a state agency was involved. This recommendation is not only inappropriate and unnecessary, it is injurious to the public interest. Further, such an amendment would almost certainly generate litigation.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. There is no doubt that many NEPA documents (both EISs and EAs) are too long,

bulky, and difficult to understand. The CEQ regulations include a section on “reducing paperwork” in 40 CFR § 1500.4. Agencies are *required* to set appropriate page limits and prepare EISs that are “analytic rather than encyclopedic.” [§§ 1500.4(a) and (b)] If agencies do not now comply with the regulations, what short of litigation will compel them to comply with a statutory codification? This recommendation may only serve to invite litigation, over EISs that are deemed too long or too short. Further, CEQ guidance or an Executive Order would be more effective. This recommendation is not warranted and may be counterproductive.

Group 3: Better Involvement for State, Local, and Tribal Stakeholders.

Recommendation 3.1: Amend NEPA to grant tribal, state, and local stakeholders cooperating agency status. Under the CEQ regulations in 40 CFR § 1501.5(b), federal, state, or local agencies including at least one federal agency may act as “joint lead” agencies to prepare an EIS. Further, federal agencies are required under 40 CFR § 1506.2(b) to cooperate with state and local agencies “to the fullest extent possible” to avoid duplication of effort. This cooperation can include joint planning processes, environmental studies, public hearings, and environmental assessments. Given these CEQ requirements, there is no need to expand the cooperating agency provisions of 40 CFR § 1501.6 beyond federal agencies with “jurisdiction by law” or “special expertise.” The ability of Tribal, state, or local agencies to serve as cooperating agencies is often limited by lack of funding, staff, or expertise. If state, local, or Tribal agencies are to be given greater NEPA implementation responsibility, they should be required to enact “mini-NEPA” legislation as have 15 states and the District of Columbia. This would provide them with eventual expertise and legal authority now lacking. The “mini-NEPA” states include, but are not limited to, California, New York, Washington, North Carolina, Montana, and Wisconsin. Any expansion of state, local, and Tribal cooperating agency status can be accomplished by CEQ. The recommended NEPA amendment is not needed and will not accomplish the desired effect.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process (sic) to satisfy NEPA requirements. See comment on Recommendation 3.1 above regarding existing CEQ requirements to avoid duplication of effort by making federal agencies cooperate with state agencies. Nevertheless, it would be highly unusual for state environmental reviews to be the “functional equivalent” of NEPA. Also, the courts have generally limited application of the “functional equivalency” doctrine to EPA which has environmental protection as its sole mission. There would be an exception for some (but probably not all) of the 15 states that have “mini-NEPA” legislation that is (or may be) the equivalent of NEPA. [See Mandelker, Daniel, *NEPA Law and Litigation*, Ch, 12, Thompson West (2004).] This recommendation should be discussed further with CEQ which could advise on how to determine which if any state agency procedures may be the “functional equivalent” of NEPA procedures.

Group 4: Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision. This recommendation seems designed to “close the courthouse door” to environmental and other public interest groups and protect business and other economic interests from NEPA litigation. As the Committee’s Report states on page 11, 99.97% of NEPA-related actions in 2004 were successfully completed without court injunctions and only 0.2% of the approximately 50,000 EISs filed each year result in litigation. The Administrative Procedure Act (APA) has worked fairly well for NEPA lawsuits and a long line of judicial opinions have addressed the “standing” issue on a case-by-case basis. The establishment of a 180-day time period for filing a court challenge may be “a reasonable time period” for some NEPA-related agency actions and totally unreasonable for others. Again, one size doesn’t fit all.

Some courts have held that the statute of limitations (SOL) for actions brought under the APA applies to NEPA actions while at least one court has said that applying the APA SOL would be a “blind application of a statute. . .and would result in illogical and capricious administration of an important environmental statute” [*Park County Res. Council vs. U. S. Dept. of Agriculture*, 817 F.2d 609, 617 (10th Cir. 1987)]. There are too many imponderables surrounding the environmental consequences agency actions for Congress to establish an arbitrary and capricious statute of limitations. This recommendation is ill-advised and not warranted.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre-clear” projects. There is nothing wrong with the idea of providing additional CEQ guidance and consultation for federal agencies that are correcting their NEPA procedures under a remand from a court. However, if the CEQ is to provide this type of clearing house and monitoring assistance, it will need considerably more budget and staff. This recommendation should be discussed with the CEQ.

Group 5: Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. CEQ’s memorandum of March 23, 1981 on “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” states in Question 2a.A that “[R]easonable alternatives include those that are practical and feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.” Alternatives considered “in detail” under 40 CFR § 1502.14(b) are required to analyze historic, cultural, socioeconomic, natural resource, and other consequences. Such an analysis would include an analysis of employment consequences and overall community impact but *it would not be limited to these considerations*. If such an analysis were absent from an EIS, the document would be deficient and subject to challenge. Since the NEPA process and the CEQ regulations already accommodate these concerns, there is no need for this recommended amendment.

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. EISs or EAs that fail to provide a detailed impact analysis of the no-action alternative are deficient under the CEQ regulations, court decisions, and long-established NEPA documentation practice. CEQ’s “Forty Most Asked Questions” memorandum referenced above addresses the no-action alternative in Question 3. The no-action alternative must be *included in the analysis* (not merely listed) as the analysis “provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives.” For the reasons given, this recommendation is not warranted or beneficial.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. NEPA requires in § 102(2)(C) that an EIS discuss “any adverse environmental effects which cannot be avoided.” The CEQ regulations require a discussion of mitigation measures in §§ 1502.14(f), 1502.16(h), and 1505.2(2)(c). However, as to “a binding commitment to proceed with the mitigation,” the U.S. Supreme Court has distinguished between a detailed discussion of mitigation in an EIS and “a substantive requirement that a complete mitigation plan be actually formulated and adopted.” Thus, under *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), there is no substantive NEPA requirement that a mitigation plan be formulated, finalized, adopted, or enforceable. (See Mandelker, Daniel, *NEPA Law and Litigation*, § 10:43 discussion.) In light of *Methow Valley*, this recommendation is not appropriate or beneficial.

Group 6: Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. The CEQ regulations in 40 CFR § 1506.6 require that agencies *shall* “[M]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” Detailed instructions are provided to enable agencies to meet this requirement. However, the type, scope, and degree of public involvement varies widely from agency to agency. Some agencies (e.g., the U.S. Forest Service) do a generally admirable job while others seem to want to avoid public involvement at all costs. This recommendation deserves support although its implementation does not require new or amended CEQ regulations. The CEQ could strengthen its role in public involvement if it has adequate budget and staff. The same is true of most federal agencies as public involvement takes time and money.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. This recommendation may necessitate additional guidance on the lead agency role from the CEQ. An amendment to NEPA is not warranted nor will it provide any additional benefit.

Group 7: Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality. CEQ could create such a position or office on its own initiative without a NEPA amendment if it had the necessary budget and staff. This recommendation is not necessary or warranted.

Recommendation 7.2: Direct CEQ to control NEPA related costs. See General Comment No. 5 above on the undesirability of creating artificial cost “ceilings” for implementing the NEPA process generally. Implementation and enforcement of cost ceilings would be problematic given the enormous differences in complexity, controversy, and significance of impacts among projects subject to NEPA. Of course, agencies should do all they possibly can to control costs on a case-by-case basis. This will require negotiations and discussion with other agencies having environmental review responsibilities, applicants, and NEPA documentation preparation contractors. It should never be assumed at the start that any EIS will cost X millions and take Y months to prepare. Improved scoping of NEPA documents would help to control costs. Discussion with the CEQ, and other agencies, would be appropriate.

Group 8: Clarify meaning of “cumulative impacts”

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. The explanation of the recommendation is unclear. Does it mean that existing conditions should be equated with past actions? The CEQ published a guidance report in January 1997 on *Considering Cumulative Effects Under the National Environmental Policy Act* that has been very helpful to NEPA practitioners. Assessing cumulative impacts is a complicated task requiring varying methodological approaches. Amending NEPA itself to “clarify” how this task should be undertaken is not appropriate, and not really feasible. If current CEQ guidance is not adequate, the issuance of additional guidance would be appropriate. This recommended amendment is not warranted or beneficial.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. See the above comments on Recommendation 8.1. This recommendation is also not appropriate or beneficial.

Group 9: Studies

Recommendation 9.1: CEQ study of NEPA interaction with other Federal environmental laws. Such a study, which may already be underway or contemplated by the CEQ, has merit and should be discussed further with the CEQ. The topic was addressed in the CEQ NEPA Task Force September 2003 report on *Modernizing NEPA Implementation* and in several of the CEQ NEPA Task Force Roundtables held at various locations. The recommendation is warranted and would be beneficial.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. This recommendation has merit and is warranted as being beneficial. However, both *budget* and staff needs should be addressed.

Recommendation 9.3: CEQ study of NEPA interaction with state “mini-NEPAs” and similar laws. This recommendation also has merit and is warranted as being beneficial.

However, it is another instance calling for increased CEQ budget and staff. While some of this work (and other recommended CEQ tasks) could be undertaken by contractors, additional funding is needed.