

Kathleen A. Garland, Ph.D.  
15930 Manor Square Drive  
Houston, TX 77062

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

**BY ELECTRONIC MAIL TRANSMISSION**

February 6, 2006

RE: Comments on NEPA Draft Report

Dear Chairman McMorris:

I am currently a Participating Adjunct at the University of Houston-Clear Lake in the Environmental Management Program. My career has included development geology for Chevron in Louisiana, regulatory work for New Mexico in the Environment Department and in Energy and Minerals, and private environmental consulting as both an employee and in my own business. During my career, I have worked with the NEPA process from the perspectives of a project proponent, a regulatory contributor, and a stakeholder. As an adjunct professor, I now teach both undergraduate and graduate classes in environmental assessment. NEPA and NEPA related issues form a significant part of that subject. I was extremely interested when I first heard of the Task Force's mission, and have been following its progress over the past year. After reading the Draft Report, I would like to offer the following comments on the report and on the specific recommendations provided in it.

Please note that my comments are personal, and do not reflect the policies or opinions of the University of Houston-Clear Lake.

**Introduction**

The Task Force report states on page 8, "From the outset of this investigation, it was clear that the original policy goals of NEPA remain valid today. There is little debate over NEPA's importance or that its positive results." I agree with the Task Force's statement. At the same time, I understand that no piece of legislation can stand unaltered for thirty-five years without requiring some cautious updating. Times have changed. But the fundamental policy that NEPA itself states has enormous value, and is as relevant today as when it was first passed.

In certain areas, NEPA has never been fully implemented. Agency decision-making is necessarily influenced by political and career time frames—the duration of legislative

and executive terms, the extent of employee tenure—and those terms do not coincide with the time scale of environmental systems, which often evolve over decades or even centuries. The timing of economic processes—balance sheets, profit and loss statements, stockholder satisfaction—also do not lend themselves to supporting a long-term environmental policy that directs government decision-making on private interests toward sustainability, rather than short-term profitability. One of NEPA’s roles has been to counteract the natural, short-term view of government actions by requiring cumulative impact analysis, and projections of impacts throughout a project’s life. This role remains an important one, and my comments reflect that perspective as a whole.

I also believe that codifying procedures is a mistake. NEPA was originally drafted in a purposely broad manner in order to accommodate the enormous diversity in the types of federal actions performed by our government. Regulations are the natural home for procedural issues. There they can be modified, updated, adapted to agency needs and political and public demands without necessitating the actions of Congress. Items such as page and time limits are the purview of agencies that implement the NEPA process, and do not belong in the parent legislation. Codifying such requirements slows the process of adapting NEPA implementation to inevitable changes in political, social, and scientific conditions.

The following recommendation-specific comments provide my rationale for agreement or disagreement with the draft report findings. My comments follow the format of the report. Recommended changes to NEPA or the regulations are shown in italics. I have included several thoughts at the end on areas not addressed in the report.

## **Comments to Specific Recommendations**

### **Group 1 – Addressing Delays in the process**

- 1.1 Disagree. The definition of major federal action in NEPA is purposely broad, so that individual agencies can determine which of their activities should be subject to the NEPA process. It would be more appropriate to require agencies to define which of their activities constitute “major federal actions” within their own NEPA procedures. Indeed, many agencies already have such definitions.
- 1.2 Disagree. Timelines for completion belong within agency procedures, rather than in NEPA itself. NEPA stands as a policy document; procedures have been and should be defined in the regulations of CEQ and of individual agencies who lead the process. The CEQ regulations provide that the scoping process may be used to set time limits for document preparation based on the conditions of the action under consideration. Scoping is the ideal forum for setting timelines, because all stakeholders may participate in discussions, share their reasons and concerns over delays, and gain greater understanding of each others viewpoints, if not reach a consensus.
- 1.3 Disagree. The CEQ regulations already provide clear criteria for the use of Cat-X, EAs, and EISs. The confusion lies in the way individual agencies use these

categories, so the changes needed should be made at the agency level, not by amending the statute or the regulations. At the statutory level, given the diversity of federal actions, one could not draft “unambiguous” criteria.

1.4 Disagree. Clear criteria for the use of supplemental documents already appear in Section 1502.10(c) of the CEQ regulations.

### **Group 2 – Enhancing Public Participation**

2.1 Disagree. Many environmental matters suffer from conflicts between representatives of local interests (commonly project supporters), and representatives of national environmental groups (commonly project opponents). Such conflicts are very uncomfortable to mediate, but they serve to inform federal agencies of the more far-reaching effects of local actions. It would be unwise to place a different value on representatives of national vs. local interests. The public is best served by having both interests treated equally, and having the agency weigh these groups’ respective concerns on the factual bases for them, rather than on the group’s proximity to the impacts.

2.2 Same comment as for recommendation 1.2. The scoping process also provides for the setting of page limits based on the action to be considered.

### **Group 3 – Better Involvement for State, Local, and Tribal Stakeholders**

3.1 Disagree. The CEQ regulations currently govern the selection of cooperating agencies, and this provision should remain in those regulations. The current regulations, however, restrict assignment of cooperating status to other federal agencies. *I would support modifying this provision to allow the lead agency to offer tribal, state, and local governmental agencies cooperating status. I do not support any requirement that they be given cooperating status, and I do not support extending its offer to “stakeholders” in general.*

3.2 Disagree. Regulations allowing existing state environmental review processes to satisfy commensurate NEPA requirements already exist in Section 1500.4 (j), (k), (n), and (o). CEQ has the ability to require agencies to abide by these provisions.

### **Group 4 – Addressing Litigation Issues**

4.2 Disagree. CEQ is currently understaffed and overtaxed. Monitoring of court decisions affecting the procedural aspects of preparing NEPA documents belongs with the legal arms of individual agencies whose procedures have been successfully challenged. Only when such decisions affect NEPA as a whole should they become the purview of CEQ itself. *In that case, additional resources should be provided to CEQ in order to carry out a clearing-house function.*

### **Group 5 – Clarifying Alternatives Analysis**

5.1 Disagree. Limitations on the choice of alternatives belong in the regulations, not the statute. The current regulations allow, but do not specifically state, that choice of alternatives be part of the scoping process. *I support a modification of the regulatory description of the scoping process to include a statement that discussions and determination of the alternatives to be analyzed should be required as a part of the scoping process.*

5.2 Disagree. The current CEQ regulations specifically require consideration of the “No Action” alternative, and that it be considered with the same weight as all other alternatives. It is appropriate at times for the “No Action” alternative to be ruled out for reasons of public welfare, and requiring discussion of it in every case would lead to delay and useless expense.

5.3 Agree with the concept; one of the weaknesses of NEPA is lack of follow-through on identified means for reducing impacts. A legal question arises here, however, of whether or not NEPA itself would allow CEQ to mandate enforcement action on an agency. *It might be more appropriate for CEQ to recommend to agencies that they enforce mitigation measures through the details of the proposed federal action (permit, license, etc.), rather than incorporating a requirement for enforcement into the NEPA regulations.*

#### **Group 6 – Better Federal Agency Coordination**

6.1. Strongly agree. Current NEPA regulations require that stakeholders be included only during the scoping process. Beyond that, consultations and discussions are strictly at the behest of the lead agency. A recent thesis completed by one of our graduate students on the NEPA process as conducted on Liquid Petroleum Gas projects along US coastlines clearly indicated that those proposals with the most success were conducted by a lead agency and project proponent with a sincere commitment to honest, open, and ongoing communication with stakeholders. *A regulatory requirement to conduct additional discussions and consultation (not necessarily formal) with stakeholders would compel agencies to implement a strategy that has been shown to result in a better and faster NEPA process, and one that results in less litigation.*

6.2. I do not see the need for this recommendation.

#### **Group 7 – Additional Authority for the Council on Environmental Quality**

7.1 Agree. Creation of an Ombudsman position on the CEQ would be useful, and the Act is the right place to do it.

7.2 Agree.

#### **Group 8 – Clarify meaning of “cumulative impacts”**

8.1 Disagree. The purpose of this recommendation is unclear based on the discussions in the report. The appropriate methodology for assessing the effects of past actions must be determined based on the type of activities that caused them. If they are similar activities to the one being considered, then methods for assessing existing conditions may be sufficient. If, however, such conditions result from other types of activities, different methods may be required. These decisions should be left to the lead agency.

8.2 Strongly disagree. To restrict analysis of future analysis to concrete proposed actions ignores the extended time frames on which environmental systems evolve and respond. It also would forbid agencies to take advantage of their knowledge of progress and development in their areas of responsibility. Such a provision would undermine the objectives of NEPA.

### **Group 9 – Studies**

9.1 Agree.

9.2 Agree.

9.3 Agree.

### **Areas not Addressed by the Draft Report**

The draft report never takes up the issue of whether our National Environmental Policy Act, as drafted in 1969, truly represents the environmental policy of the United States in the year 2006. *I believe that at least two environmental concepts, developed since NEPA was first drafted, should be given a place in our national policy. Those two concepts are sustainability, and environmental justice.*

We as a nation have certainly adopted sustainable development principles in our approach to international aid for developing countries. We have participated in international discussions on what these principles should be and how they should be applied. Both industry and environmental representatives agree that sustainability as a goal serves everyone's purpose when a resource-consuming development project is considered. *It seems natural that our commitment to these principles should at least be mentioned in our national environmental policy, and be applied to our analyses of federal actions here at home.*

Government agencies have been directed, through Executive Order 12898, and compelled, through Title VI of the Civil Rights Act, to consider environmental justice impacts of their actions, just as they have been directed, through NEPA, to consider other environmental impacts. Considerations of environmental justice have become a yardstick for project approvals of international development projects as supported by both US and international aid agencies. All NEPA EISs completed since the Environmental Justice EO was issued have included analysis of impacts on disadvantaged and minority populations. *As a civil rights matter, environmental justice supersedes political boundaries and*

*reaches back to our fundamental principles of equal treatment under the law. It appears to me that such a concept should appropriately be considered for inclusion in NEPA.*

Thank you for this opportunity to comment on the draft report of the Congressional Task Force on Improving NEPA. I hope these remarks provide useful to the committee.

Sincerely,

Kathleen A. Garland, Ph.D.