

Hello:

I have reviewed the *Initial Findings and Draft Recommendations* dated December 21, 2006 (Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act; Task Force). I submit the following comments and suggested edits for consideration.

In general, I believe that the address the *Initial Findings and Draft Recommendations* would be very much improved, and the National Environmental Policy Act (NEPA) put in its' proper context, if the relationship of the Employment Act (15 U.S.C. section 1301) and NEPA were explained. The NEPA is modeled on the 1946 version of the Employment Act, and, NEPA constitutes notice that the human and natural environments are economic attributes important to the nation's well being. Consideration of the beneficial and negative impacts an activity or program may have on to the natural and human environment are fundamental to informed economic evaluation. This is true for the government, firms, and individuals. While it is common to focus attention on accounting costs and benefits, an understanding of the full economic costs and benefits of an action is actually much more informative. There is no reason a government agency, which is the overseer of public resources, including tax dollars, and allocations of desirable and undesirable facilities in our communities, should externalize costs. Externalized costs and benefits are born by the public anyway. The failure of government agencies to consider the true economic costs and benefits of their actions led to the public concerns that triggered passage of the NEPA. Government agencies were, prior to 1970, simply misleading Congress, themselves, and the public about what their activities cost the American people.

There is no evidence that current implementation of the NEPA provides a true understanding of the costs and benefits of government actions. However, the interdependence of the Employment Act and NEPA is important enough that it should be a critical frame of reference, or reality check, for all elements of the *Initial Findings and Draft Recommendations*.

The Employment Act sets four goals:

- Promote full employment,
- Foster long run growth and increasing productivity,
- Stabilize prices, and
- Balance budget and trade.

The NEPA, passed about 14 years after the first Employment Act, has three policy goals:

- Foster and promote the general welfare,
- Create and maintain productive harmony, and
- Fulfill social, economic, and other requirements.

Viewed in proximity, it is readily apparent that the NEPA represents procedural reform, and clarification of the Employment Act. The NEPA should represent a significant step forward in the transparent, accurate, and precise reporting on the Employment Act's goals.

It is worth noting that the March 10, 1983 document *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* (Water Resources Council), implicitly links the Employment Act and NEPA. The 1983 document requires certain agencies using to identify and assess economic costs and benefits from the perspective of National Economic Development. Which means that government agencies must assume full employment per the Employment Act, and the guidance establishes criteria for valuing human and natural environments. An interesting feature of linking the National Economic Development model to NEPA decisions is that only a net increase of employment at the national level meets the Employment Act goal. Otherwise, local employment and economic growth must be assumed to come from an equivalent loss elsewhere in the nation.

The 1983 document lacks 20 years of advances in valuation of resources and the discount rate should be updated, but it represents an existing tool that could greatly enhance the NEPA's true utility as a decision support tool. The 1983 guidance is an important strategy for ensuring that the NEPA supports and augments the Employment Act. The *Initial Findings and Draft Recommendations* should be revised to make the linkage explicit, and that linkage should be used to evaluate the Task Forces' findings and recommendations.

My recommendation specific comments are:

Recommendation 1.1

The implication of this suggestion, that the NEPA contains ambiguities that should be clarified, has merit. However, focusing on the terminology of "major federal action" appears to be a case of ignoring the elephant in the living room.

The NEPA is intended to be an environmental charter, as the draft findings suggest. An environmental charter was and remains necessary so long as federal agencies have no other universal guidance on how to assign values to public resources such as public health, community cohesion, historical structures, wetlands, or changes in sea level. In accordance with the Employment Act, funding bills, and other Congressional directives, agencies aim to facilitate job availability through economic growth by allocating those public resources. This tends to provide opportunities for individuals and firms to hide the true cost of products by externalizing such costs to public resources described in NEPA as human and natural environments.

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decision-making sheds some light, however imperfect, on such allocations of public goods for private gain. In general, this allocation is regressive, not progressive.

The costs to individuals and firms of reported delays in decisions caused by the NEPA do not appear to be greater than the net benefit of utilizing public resources to externalize costs. If the opportunity costs of NEPA process delays outweighed the benefits associated with authorization to use public resources, such allocations would not be sought out to the extent that they are. The NEPA is an imperfect tool to ensure equity in the market place, and consumer trust. The tool works through public disclosure and analysis of the costs and benefits of federal actions. There is reason to believe that a conflict of interest may exist for many of those who complain delays in the NEPA process, and about confusion over what constitutes a “major federal action.”

In my opinion, the subject recommendation should be modified to reflect the range of activities that provide substantial subsidies but are not currently covered by the law. Programs such as FANNIE MAE, flood insurance, tax and other incentives for home ownership, operations of the Federal Reserve, and more are impairments to the health of our market economy, and should be considered “major federal actions.” The types of activities requiring NEPA analysis and disclosure should explicitly include any program that transfers public resources for to select population segments, including the siting of facilities. In addition to programmatic analyses, NEPA analysis should be conducted at the level of specific allocation decisions. It would be informative for the individual “mom and pop” and corporate beneficiaries of such social engineering to have documentation of their subsidy.

Recommendation 1.2

The implication of this suggestion, that the NEPA analysis and decision making process is too lengthy, is undermined by objective, non-anecdotal evidence available to the Task Force. The costs to individuals and firms of reported delays in decisions caused by the NEPA do not appear to be greater than the net benefit of utilizing public resources to externalize costs. If the opportunity costs of waiting for the NEPA process to work out outweighed the benefits associated with authorization to use public resources, such allocations would be sought out as much as they are. The NEPA is an imperfect tool, but setting time limits does not appear to address the imperfections.

It goes without saying that hasty decisions tend to be poor ones; and that poor decisions generally cost more than good ones if all costs and benefits are considered. This recommendation can only add to the costs shifted from the accounting profits of firms and select individuals to the public as a whole by activities covered under the NEPA. The recommendation represents a major, practically blind, but definitely undemocratic, giveaway of public assets.

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accordance with the Employment Act, funding bills, and other Congressional directives, agencies aim to facilitate job availability through economic growth by allocating those public resources. This tends to provide opportunities for individuals and firms to hide the true cost of products by externalizing such costs to public resources described in NEPA as human and natural environments.

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All decisions require information. The availability and quality of real world information for specific NEPA-related decisions is generally awful. Which means that the uncertainties and risks of being wrong are high. In keeping with the notions of sound scientific practices and good government, federal decision makers should be encouraged to take the time necessary to ensure the available information has been properly analyzed, and, if necessary, supplemented with new research.

A more important concern is the uncertainty associated with decision making. There are two broad types of uncertainty, one type associated with the lack of information (elevation relative to storm surge, or degree of community cohesion), and the other about probability (how likely is it that a hurricane will hit the area next year, or what chain of events, at what expected frequency, will lead to a propane gas farm exploding in a given neighborhood). Further, any value used in analysis and prediction has variance, associated with accuracy and precision biases, and with normal fluctuations. Understanding, addressing, and reducing as warranted these uncertainties is much more important to good decisions about allocating public goods for private gain than is the time frames of such decisions.

This recommendation should be modified by removal of all references to timelines or time limits, to be replaced by guidance to establish statistical standards of risk. In my opinion, the appropriate standard for allocating resources owned in part by me, to entities that will use those resources for private gain or implicit regressive taxation, should be high. Decisions subject to NEPA, from program level to “mom and pop” permits, should be made with the minimum practicable level of uncertainty.

Recommendation 1.3

This suggestion seems to underestimate the mix of political, risk, and scientific considerations that go into decisions about the type of analysis conducted by action agencies. Furthermore, the suggestion that agencies bear the burden of proof, or must show “compelling evidence,” before exceeding the minimal required consideration for a categorical exclusion, seems to ignore the suspicion that agencies do not have adequate resources for decision support analyses under the current system. Creating a statutory incentive for agency leaders to accept inadequate analysis in the face of uncertainty or other potential extraordinary circumstances seems does not appear likely to enhance the integrity and efficiency of the executive branch.

There is nothing wrong with erring on the side of the public resources that the agencies have stewardship over. Conservative decision making, on behalf of present and future generations of the American people, especially in questions about allocating their resources to individuals and minorities, or about allocating undesirable facilities in ways that will create winners and losers, seem perfectly reasonable to me.

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The subject recommendation is concerned with the apparent bias of agencies to conduct a more thorough analysis than may be necessary given the level of impact asserted. This apparent bias may or may not be accurate, but if so, it is a bias in favor of the American people at the cost of those who would benefit by the diversion of public resources to them. On the other hand, the costs to individuals and firms of reported delays in the NEPA do not appear to be greater than the net benefit of utilizing public resources to externalize costs. If the opportunity costs of waiting for the NEPA process to work out outweighed the benefits associated with authorization to use public resources, such allocations would be sought out as much as they are. The NEPA is an imperfect tool to improve the market place, and consumer trust through public disclosure and analysis of the costs and benefits of federal actions.

The subject recommendation could be implemented in a manner that provides a public service if it were revised to stipulate four sub-elements. First, all effects should be reported in terms of the resource itself, and in terms of the economic value of unmitigated adverse effects on the human and natural environments.

Second, statutory guidance about categorical exclusions should be provided to the Council on Environmental Quality. The guidance should reinforce the current set of extraordinary circumstances, with a few refinements. The precedence used to qualify types of activities for categorical exclusion status should be statistically valid, with set alpha and beta values that are protective of public resources (agencies should be discouraged from using anecdotal, incomplete, or inadequate information in decision making). Further, the notion of “controversy” should be characterized both in terms of scientific uncertainty and in terms of public discord over a proposal.

Third, the federal agencies opting to utilize the categorical exclusion option should, as part of the implementation process, cooperatively support a global, regional, and local monitoring network of broad and specific indicators of environmental health; and, each type of categorical exclusion should incorporate a specific adaptive management plan, identifying broad and specific monitoring data to be used, assumptions used by the agency, thresholds for changing management, and mechanisms for regular reviews.

Fourth, the distinction between Environmental Assessments and Environmental Impact Statements should be based on analytic need, the total value of unmitigated adverse effects on the human and natural environment, and other criteria, such as uncertainty, variance, and the risks associated with the information used in decision making.

Recommendation 2.1

As currently stated, this recommendation may harm, rather than enhance, sound scientific practice and the principles of good government. Since the NEPA process is only applicable to federal decision making, it stands to reason that almost everyone has an interest in the decision. Decisions subject to the NEPA are allocations of public resources, including tax dollars and authority to externalize certain costs. As such, each decision can be presumed to create opportunity costs for everyone who does not benefit. As mentioned previously, the National Economic Development model requires us to assume that the United States is at full employment, which means that unless a proposal’s local benefits are actually a net increase in jobs to the Nation, those jobs come at the expense of another locale.

It is counterintuitive to suggest that the opinions of the recipients of public subsidies be assigned a superior value in decision making, especially at the expense of those who own the allocated resource or who will ultimately pay for the subsidy.

This is because most actions subject to NEPA are, in essence, allocations of public resources that allow “local interests” to externalize the true costs of their proposals. Those externalized costs are generally born by current and future citizens of the United States, who bear the opportunity costs associated with the externalities. A common

example is disaster mitigation and relief. For example, natural events like floods, fires, wind, earthquake, and even tsunamis become catastrophes when local interests put people and developed property in harm's way; the resulting disaster generally exceeds the capacities of local and state governments, and so federal agencies and funding are used to support the prevention, response, and recovery from such events. Other examples currently in the news include efforts to incite businesses to relocate facilities for jobs and secondary investments. In many cases, a federal action may be necessary to accommodate such a relocation. All present and future citizens will be expected to subsidize the action, through sewer grants, loss of wetlands, unemployment, health, and education funding, and more.

There is absolutely no reason to believe that local interests are in a position to provide the best available information, or that they hold better informed opinions, than any other stakeholder, regardless of distance from the proposed action.

A related consideration is that the NEPA is a means of avoiding the uninformed foreclosure of options for future generations. Obviously, local interests cannot lay superior claim to speak for future generations.

The subject recommendation could also reinforce institutional discrimination through service mismatch. The market model of public participation generally leaves those individuals and communities which are weakest and most in need in the position of least able to lobby effectively for their needs. Those in the local area who are not represented by powerful or elite local interests are generally unable to activate and effectively "shop" for governmental support. The availability of information and participation is not equivalent to access and utilization of the same. In many areas, this service mismatch creates racial, age based, and economic discrimination. The recommendation appears to set up a sliding scale, in effect providing the best reward to the most entrepreneurial local interests (see, for example, Klinenberg, Eric, 2002, *Heat Wave: a Social Autopsy of Disaster in Chicago*. Chicago, IL: University of Chicago Press).

The NEPA itself speaks need for subject matter experts from a number of disciplines to support the analyses and decisions, and the value of (a) soliciting the public for information through scoping and draft document reviews, and (b) enlisting other entities as cooperating agencies, particularly those entities with special expertise or jurisdiction by law.

The NEPA is intended to be an environmental charter, as the draft findings suggest. An environmental charter was and remains necessary so long as federal agencies have no other universal guidance on how to assign values to public resources such as public health, community cohesion, historical structures, wetlands, or changes in sea level. In accordance with the Employment Act, funding bills, and other Congressional directives, agencies aim to facilitate job availability through economic growth by allocating those public resources. This tends to provide opportunities for individuals and firms to hide the true cost of products by externalizing such costs to public resources described in NEPA as human and natural environments.

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The NEPA is an imperfect tool to ensure equity in the market place, and consumer trust. The tool works through public disclosure and analysis of the costs and benefits of federal actions.

The subject recommendation should be modified by removing all references to local interests, and instead to direct CEQ to promulgate two regulations. The first should require agencies to identify and favor proposals or alternatives that maximize contributions to national economic development, as characterized in the March 10, 1983 *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* (Water Resources Council). The regulations should provide for modernizing discount rates). The second regulation should provide clear guidance to agencies, decision makers, and stakeholders on effective participation in the NEPA process, in particular, what types of information, and the presentation methods, action agencies should favor.

Recommendation 2.2

This recommendation does little to enhance the read-ability of NEPA documents. The NEPA describes an analytic process to be used to support decision making. The length of a NEPA document should depend upon the range and complexity of issues that are addressed in a NEPA document, including descriptions of alternatives, the predicted effects of each alternative, discussion of mitigation options, and disclosure of public and agency comments. There is reason to believe, however, that CEQ could improve it's guidance in terms of presentation styles and techniques, and in terms of deciding which issues are relevant for inclusion in a NEPA analysis.

The public has a right to understand the implications of agency actions, and to participate in decision making. Agencies owe it to Congress, themselves, and the American people to lay out the information and assumptions used to support decisions about the allocation of public resources.

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There is reason to believe that the volume of material included in NEPA document is correlated with the utility of the NEPA analysis. Good government practice suggests that the NEPA documentation should provide material that reflects the likely costs and benefits to present and future generations inherent in a proposal, including exposition of the risks and uncertainties, the assumptions and biases, and strategies for monitoring and adaptively managing public resources.

The subject recommendation should be deleted as irrelevant to good decision making. I am not aware of any evidence before the Task Force suggesting that reading and comprehending documents that exceed 150 to 300 pages in length are beyond the capabilities of most Americans. If evidence leading to such a conclusion exists, the Task Force owes it to America and democracy to drop it's investigation into NEPA and to wage a single-minded campaign for adult literacy.

If, on the other hand, there is evidence that the inclusion and consideration of substantial amounts of irrelevant material may be making the NEPA process less effective than it could be, then the recommendation should be modified to reflect the need for NEPA practitioners to focus on the quality and relevance of decision-related information. This could be accomplished a number of ways, but is more relevant to the recommendations contained in the Group 9 recommendations.

Recommendation 3.2

The subject recommendation appears to reverse the general requirement that federal agencies address issues within their assigned missions and statutory authorities. Currently, agencies do not accept at face value NEPA documents approved by other federal agencies. Nor should they. Each agency has distinct: (1) jurisdiction by law, (2) implementing regulations, (3) institutional biases, (4) litigation history, (5) employment and training policies for subject matter and policy experts, and (6) cultures of decision making and support. This is reasonable because each agency serves different constituents, and the laws they operate under serve multiple goals and objectives. The distinctions between State and federal agency decision making should, almost by definition, be even more pronounced. In any case where state and federal agencies

overlap to the extent that a single analytic decision support document serves both levels of government, the federal agency retains some sort of oversight and quality control role for its' decisions. This recommendation seemingly eliminates such oversight by agencies accountable to the American people, present and future, and with balancing societal values. Since the NEPA process is limited to instances where federal jurisdiction is used to partially or wholly administer public resources, the removal of agency discretion would eliminate accountability to the true owners of those resources.

Where States have equivalent “mini-NEPA” regulations in place, the two levels of government, should work together as much as practicable to eliminate redundancies and provide project proponents with “one-stop shopping.”

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While states tend to have jurisdiction over, say, surface water, there is a Commerce cause nexus for federal jurisdiction, too. Further, federal funding for wastewater, water supply, electricity, roads, and many other elements nominally managed by States suggests that federal resources are allocated to support State administration and jurisdiction, too. The recommendation would reduce the States' accountability to those who pay for the allocated benefit.

The subject recommendation should be removed. If the Task Forces have concluded that existing statutory and other guidance directing federal agencies to eliminate or minimize paperwork and redundancies has not been as successful as desired, then the problem is more global than NEPA implementation. The more relevant, universal statutes should be amended.

Summary

I appreciate the opportunity to comment on the subject “*Initial Findings and Draft Recommendations.*” I urge the Task Forces to reconsider the findings and recommendations in light of interdependence of the NEPA to the Employment Act. It is important that decision support analyses used by the federal government be as transparent, accurate, and precise as is reasonable, given the decision at hand. It makes no sense what so ever for Congress to create statutory incentives for agencies to hide the economic costs and benefits of their actions from Congress and the American people.

Thank you,

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