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The Honorable Cathy McMorris
Chair, Task Force on Improving the
National Environmental Policy Act
House Committee on Resources
United States House of Representatives
1324 Longworth House Office Building
Washington, DC 20515

Dear Congresswoman McMorris:

The National Environmental Policy Act was passed more than 35 years ago with overwhelming bipartisan support. It is a marvelous example of legislative craftsmanship, of setting our sights high as a nation, and of Congress working together to achieve national priorities. As you know, Senator Henry Jackson, from your great State of Washington, believed it was one of his great legacies.

I commend your efforts to review the statute and how it is working for the good of American citizens and the environment to which they are linked. I hope you too will reach high, avoid partisanship, and ensure that the intent of NEPA is met.

I have worked with the NEPA for more than 25 years after discovering it as an employee of the State of Alabama. It was astounding to me then, and continues to astound me, that this statute could be used to make the federal government responsive to the concerns of average citizens, local and state government. I finished my federal career as the Assistant Secretary of the Army for Installations and Environment (Acting) and before that I was Principal Deputy Assistant Secretary of the Army. In these positions I was responsible for some 2,000 military installations covering approximately 14 million acres, 12,000 historical structures, and \$10.5 billion in military construction funding, base operations and \$1.4 billion in environmental management. I have been teaching a course in the implementation of NEPA at Duke University for the last 15 years. I offer you some thoughts and modest proposals on your report.

I agree with your conclusion that the status quo in NEPA implementation is not adequate. The NEPA process often takes too long, often costs too much, and often counts for too little. This is not always the case, but there is enough of this to warrant a review. There are reasons for this and I offer my thoughts on reasons and offer recommendations.

NEPA LITIGATION: The courts have done no favors to NEPA; they always rule in favor of the government except in the most egregious cases. I am sure you are aware that changing NEPA will not alter the fact that federal agencies will continue to get sued

under the Administrative Procedures Act. It is important to understand how the APA came into being because I think it sheds light on much of my other analysis and recommendations.

In the 1930s, apple growers in your region of the country used methyl mercury for treating fungus on apples. The U.S. Department of Agriculture decided that the fungicide was harmful to humans and banned it. The apple industry argued with USDA that this was an arbitrary and capricious action and they had not been allowed to argue against the ban. According to Samuel P. Hays, this debate continued for many years and was a major cause for the APA. After the passage of the APA, agencies had to propose such actions in the Federal Register and the public was invited to respond. To force the government to be responsive to its citizens, no matter which side of the issue you believe to be right, is a public service.

COSTS OF COMPLIANCE: While I agree with the Task Force that NEPA implementation costs too much, I think the Task Force has looked at the wrong metrics to come to its conclusions. Generally the costs of EISs have been about two percent of the cost of the project and the costs of projects have escalated dramatically. It would have been useful to determine whether EISs have increased as a percentage of the cost of the project. It is less helpful to just cite rising costs. The cost of a house in Alexandria Virginia that was \$75,000 in the 1980s now sells for \$700,000; a new pickup truck that cost \$7500 in the 1980s now sells for \$25,000. More to the point, defense systems costs have escalated, Corps water resource projects have escalated and the federal budget has increased dramatically and was \$2 trillion in 2003.

I do not dismiss the costs of EISs. They simply should not cost as much as they do. My view is that this stems from several things:

- Poor management by the government
- Over reliance on contractors to do the analysis
- Failure to define the purpose and need of a project
- Internal review processes of the agencies
- Too many legal reviews attempting to reduce risk
- preparing the analysis too late in the process
- Lack of trained NEPA staff

But your suggestion that runaway costs are related to the increasing number of EISs is misleading. You cite that there are 597 EISs filed with EPA in 2004, but this ignores the fact that these include draft, final, and supplemental EISs. In fact, there may be less than half that number of projects that have been subjected to an EIS. Certainly less than 300 projects in the federal government's \$2 trillion budget in 2003 were subject to an EIS. One would have expected more growth in EISs than has occurred. What is occurring is that agencies are preparing a lot more Environmental Assessments and these costs are growing.

I do not agree with the Task Force that NEPA makes it “impossible to adequately plan to undertake a project...” I have been involved in planning large construction projects for a number of years. Major construction projects take a long time from plan to implementation. A major construction project plan will take much longer than it takes to complete the NEPA analysis. If the construction planning and the NEPA are done simultaneously, however, the project will be better, the NEPA analysis will be better and it will cost less. Contrary to some assertions, NEPA is not duplicative of other laws. Few of the other environmental laws allow citizens to participate in government decision-making. For instance, CERCLA allows the government to make decisions, and then tell the public what they decided, even though the impacts of these decisions could have major consequences for a community.

DELAYS IN THE NEPA PROCESS: CEQ has urged for years that agencies not duplicate analyses, and have urged the agencies to integrate the NEPA process with other review processes. The resource agencies that have authorities for wetlands, endangered species or other resources should get involved early enough in the process to help design alternatives and not deliver “late hits” to the proposing agency.

Your NEPA historian who testified that the delay is a result of lack of timelines and milestones has some merit. But this is not unique to NEPA. This is true of government processes. The increase in the length of documents is lack of management. CEQ regulations mandate that EAs be brief and concise and that EISs be no more than 150 pages and rarely do agencies heed this guidance.

I don't think the Task Force solution to force an analysis to be concluded by a certain timeframe or be considered complete. Imagine a situation where the Forest Service proposed designating an area “roadless”. At the end of 18 months the project could go forward even if it blocked ranchers from reaching their allotments against the wishes of the ranchers.

Your recommendation to complete engineering and feasibility studies before an alternative can be included appears to require an analysis before you can start an analysis. This will not help with the issues of costing more, delaying more and litigating more. When an alternative is “reasonable” it should already meet the test of economically and technically feasible. An alternative can be dropped from detailed study at any point in the process that the agency finds it is not reasonable.

There is some suggestion in the report that CEQ's alternative arrangements are causing delays in dealing with disasters. However, there have been no NEPA analyses to date for Hurricane Katrina. For the last five months federal agencies have been dumping waste in an open dump that was closed more than 20 years ago because it did not meet ANY standard. There will be a day in the future when the U.S. Government will pay the costs of the clean up of this dump because there has been no look at alternatives, no look at environmental consequences and no thought by the federal agencies as to the bill Congress will be presented in the future. The U.S. and the City of New Orleans will be the Principal Responsible Parties for this site and my guess is that New Orleans will not

have the money to help clean up this site. There has been NO delay on NEPA's account and by almost any estimation a little delay may have been a very wise and strategic decision. To delay leaping before one looks is sometimes helpful.

FAILURE TO THINK STRATEGICALLY: Federal agencies more often react than plan for the future. Federal agencies should have been able to see over the horizon that offshore wind was becoming technically and economically feasible. Even a casual reader of the newspaper would have known that such projects were reasonably foreseeable. Yet, when a wind power company, Cape Wind, applied for a permit off Nantucket, there was confusion over which federal agency even had any decision making authority regarding such permits. In the case of Cape Wind, an applicant was required to pay a huge sum of money for an EIS for which they never should have been responsible. Now after the resources have been spent for an EIS, the government has now decided that the Corps is not the decision maker after all, that Minerals Management Service has that authority. Had the federal agencies cooperated years ago to prepare a programmatic EIS on offshore wind facilities, it would have provided more certainty for the wind developers and perhaps even prompted more wind power applicants elsewhere. The federal government must do a better job of thinking strategically, following where the technologies are leading, and preparing analyses at the programmatic level before there is a project facing them.

COMMUNITY INPUT: Perhaps the most distressing part of the Task Force report is the theme that the public is involved too much in the process. Throughout the report, the public role is undervalued, while the agencies are painted as just trying to get a project accomplished. For instance, the report values an applicant that is "advocating for a particular project", yet there is no value given to a community that perhaps wants an agency to evaluate new information on the environmental, economic or social impacts to a community. It appears as these are unnecessary delays. NEPA is one of the few statutes that allow the communities to review and even disagree with what the federal government is doing in their backyard. I sincerely hope that the Task Force does not propose to curtail the ability of the public to review these proposals that affect their lives and livelihoods. The report does recognize this point when it says that there needs to be more meaningful public participation.

I am in complete agreement that the length and complexity is harming the role of the public. While agencies contract for everything in the NEPA process from planning meetings, holding meetings, writing the analyses, and even the decision documents, families who are concerned about projects often don't have the time or expertise to participate in the lengthy process that NEPA has become.

Your desire to codify page limits set out in CEQ regulations is admirable and I support that. However, you do not have to change NEPA. Simply codify the entire body of CEQ regulations.

RECOMMENDATION

NEPA does not need to be changed; the implementation of NEPA does require change. The following are some modest recommendations that I believe will give the statute a renewed vigor.

CODIFY THE CEQ REGULATIONS: All of the recommendations of the task force to reduce delays enhance public participation, gain better involvement for State, local and tribal stakeholders can be reached by simply codifying the CEQ regulations. There are page limits that would become law, requirements to allow cooperating agency status to other governments with special expertise or jurisdiction by law, and a requirement for integration with other laws.

Thank you taking the time to review these comments. If you wish to discuss further, I can be reached at 202.544.8200.

Sincerely,

Ray Clark