

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

Re: Comments on the Initial Findings and Draft Recommendations of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, applauds the efforts of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act (NEPA Task Force) to improve and update the National Environmental Policy Act of 1969¹ (NEPA) and is pleased to provide the following comments on the Initial Findings and Draft Recommendations of the NEPA Task Force. The Chamber fully supports the use of NEPA to improve federal planning, but believes that after 37 years it is in need of critical improvements. Specifically, NEPA should more clearly define the end points of the review process, balance costs and benefits, and provide a clear vision for achieving the action's stated goals.

Background

Since its enactment 37 years ago, NEPA has been the subject of considerable debate. It is widely acknowledged as one of the most controversial environmental laws.² NEPA was originally intended to help federal agencies make better, more informed decisions. Unfortunately, this intent has been frustrated as special interest groups have utilized NEPA to indefinitely delay federal projects.

¹ National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (1970).

² "NEPA: What Needs Fixing, What Doesn't, And How Would You Fix it?", *ELJ: The Environmental Forum*, May/June 2005, page 34.

The NEPA process itself is relatively straightforward. For every proposal to undertake a major federal action significantly affecting the quality of the human environment,³ the agency must issue a statement detailing environmental impacts of the project. This statement must include any potentially adverse impacts associated with the project, as well as any viable alternatives to the project. The statement must also include an analysis of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁴

NEPA does not dictate the specific outcome for a review, but instead puts in place the mechanisms to ensure that environmental factors are considered by federal decisionmakers. In the seminal Calvert Cliffs decision, the United States Court of Appeals for the District of Columbia Circuit noted that:

*Perhaps the greatest importance of NEPA is to require...agencies to **consider** environmental issues just as they consider other matters within their mandates.*⁵

In the years since Calvert Cliffs, the NEPA process has been frequently misused and its intent distorted. Often, federal agencies are forced to spend time and money in anticipation of and in response to potential litigation. These expenditures lead to paralysis by analysis and ultimately a project's death.⁶ As a result, the intent and expectations identified in NEPA and Council on Environmental Quality (CEQ) regulations for a compact, clear and efficient environmental analysis and decisionmaking process have not been met in practice.⁷

Even relatively routine federal actions can be indefinitely delayed as they are subjected to a long and protracted NEPA process. Straightforward permitting applications that otherwise warrant only minor review, such as renewal of longstanding grazing permits⁸ or completion of timber sales⁹, are routinely mired in paperwork delays that significantly increase expense and uncertainty. Thus, rather than helping planners make an informed decision, NEPA has become a tool of last resort for political opponents who simply want to stop development at all costs.¹⁰

³ 42 U.S.C. §§ 4332.

⁴ *Ibid.*

⁵ *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 at 1112 (D.C. Cir. 1971)(emphasis in original).

⁶ November 10, 2005 testimony of Senator Bennett Johnson (D-La) to the NEPA Task Force. In his testimony to the NEPA Task Force, Senator Johnson described how the delays associated with the NEPA process were ultimately responsible for the failure of the Army Corps of Engineers to implement the "Barrier Plan" to reinforce levee protections along Lake Pontchartrain and Lake Borgne in order to better protect New Orleans from catastrophic flooding.

⁷ Balancing Natural Gas Policy – Fueling the Demands of a Growing Economy, National Petroleum Council Study (2003).

⁸ November 10, 2005 testimony of Brenda Richards, Federal Lands Committee Chairman, Idaho Cattle Association and Idaho Director, Public Lands Council to the NEPA Task Force.

⁹ Communication from Joel D. Holtrop, Deputy Chief for National Forest System, U.S. Forest Service to Representative Greg Walden (R-OR), June 24, 2005. In his letter, Mr. Holtrop indicated that nearly 1.6 billion board feet, or nearly 80% of the average annual sale of timber from national forestland, is currently tied up in litigation.

¹⁰ Rick Krause, Time For A New Look at NEPA, ELI: The Environmental Forum, (May/June 2005) page 38.

NEPA is Ripe for Repair

The NEPA process is not an appropriate tool to unreasonably delay or stop projects for political purposes. NEPA review needs to occur in a thoughtful, reasonable manner, designed to encourage consideration and understanding of a project's environmental impacts and foster a reasonable discussion of the efforts needed to mitigate them. While discussion about whether environmental costs might ultimately outweigh the economic benefits of a project is proper, NEPA review is not the appropriate time or place to revisit the need for a project in general. Instead, those arguments are best addressed by local planning commissions and through the political process.

To this end, there are three main themes that must be incorporated into any serious effort to fix NEPA. First, the NEPA process must have a clear end point. Second, any analysis of environmental impacts must be rational and must appropriately weigh the desires and concerns of the local government entities most impacted by the project. Third, the NEPA process must be focused on the project's ultimate purpose and allow only realistic alternatives and mitigation measures to be considered.

1. The NEPA Process Must Have an End Point

Identifying clear end points for NEPA review is essential for planning and budgetary purposes. Too often, projects are delayed by surprises such as new, last-minute data submissions that an agency must consider, or lawsuits to reopen the record because a new development or report emerges that an agency initially failed to consider.¹¹

It is not surprising, therefore, that one of the more common complaints that stakeholders voice about the NEPA process is the difficulty in developing accurate business plans.¹² The inability to determine how long the NEPA process and potential litigation will last makes scheduling a project extremely difficult. The resulting uncertainty and delay increase project costs, put delicate financing arrangements at risk, and impede new opportunities for economic development.¹³

NEPA should be amended to redefine its terms. A more precise definition of "major federal action" that clearly limits NEPA's applicability to new and continuing projects that require substantial planning, time, resources or expenditures would eliminate much of NEPA's current misuse. Setting forth unambiguous criteria to encourage the appropriate use of Environmental Impact Statements, Environmental Assessments, or Categorical Exclusions would allow the NEPA

¹¹ See generally the June 3, 2005, comments of the National Stone, Sand & Gravel Association to the NEPA Task Force.

¹² *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion and Environmental Assessment Processes*, as prepared by Trans Tech Management, Inc., for the National Cooperative Highway Research Program, American Association of State Highway and Transportation Officials Standing Committee on Highways, October 2000.

¹³ <http://www.environment.fhwa.dot.gov/strmlng/baseline/section2.asp>.

review to avoid frequent sources of early conflict and run more efficiently. As the Healthy Forest Restoration Act of 2003 has shown, establishing firm deadlines for completion of NEPA review documents and adopting reasonable limits on the time litigation can be used to delay a project will also do much to improve the act.¹⁴ Likewise, the ability of parties to demand supplemental documentation should be limited to those occasions where an agency has made substantial changes to a proposed project and where the proposed changes are relevant to environmental concerns or where there are significant new circumstances.

2. The NEPA Process Must Rationally Consider Environmental Harms

NEPA was never meant to eliminate all environmental harm. Instead, it was intended to bring those harms to the attention of decision makers so that they can be considered, when planning a project, and responded to and mitigated where practicable.¹⁵ This, unfortunately, has not been the actual experience. Instead, NEPA is wielded as a weapon to delay and eventually terminate, through attrition, proposed projects that some people oppose. Any meaningful attempt to correct NEPA must correct this misuse. The focus must be only on those real harms that are of sufficient weight to truly impact the overall value proposition of the project. Once a decision to invest in a project's development is made, the NEPA process should only be used to address any potential harm the project might cause while still striving to ensure preservation of the project's ultimate underlying goals.

3. The NEPA Process Must Be Focused on the Project

The NEPA process is so often extended, and projects indefinitely delayed, because NEPA reviews often lose sight of the project's purpose. Too frequently, NEPA reviews will explore improbable alternative proposals that are not consistent with the project's purpose.¹⁶ While these types of far fetched alternative proposals might make for an interesting point of political debate, the fact of the matter remains that they are inapposite to the goals of the proposed project. Since they are not practicable alternatives, it is an inappropriate use of limited resources to debate their merits.

Accordingly, NEPA should not treat all alternatives with the same degree of deference. Rather, NEPA should only require consideration of those reasonable alternatives that are supported by feasibility and engineering studies; that are capable of being implemented after taking into account existing technologies and their availability; that consider the direct costs of adopting an alternate solution; and that consider the socioeconomic consequences of adopting an alternative, including the loss of jobs and overall impact that the alternative has on local and national economies.

¹⁴ Healthy Forests Restoration Act of 2003, (P.L. 108-148), (2003).

¹⁵ NEPA, 42 USC §§ 4331(b)

¹⁶ Ibid footnote 11.

Conclusion

The U.S. Chamber strongly recommends that the NEPA Task Force consider amendments to improve and revitalize NEPA. These amendments should protect both the environment and the ability of local communities to engage in economic development by establishing clear time frames for conducting and challenging a NEPA review and by appropriately weighing environmental costs in relation to the economic value of a project. Further, they should ensure that the NEPA review process is focused on practicable avenues for efficiently executing projects and ensure that the views of local governments are given due consideration.

The U.S. Chamber thanks the NEPA Task Force for the opportunity to comment on its Initial Findings and Draft Recommendations on improving NEPA. Please feel free to contact me if you have any questions or require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten". The signature is fluid and cursive, with the first name "R." and last name "Josten" being the most legible parts.

R. Bruce Josten