Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act

Committee on Resources
United States House of Representatives

Initial Findings and Draft Recommendations*

December 21, 2005

* This report has not been officially adopted by the Committee on Resources

IMPORTANT INFORMATION ABOUT THIS REPORT

The purpose of this initial report is to present to the general public a collection of draft findings and recommendations for improving and updating NEPA. It is important that these findings and recommendations receive input from those who will be affected by them. To that end, comments are welcome from any interested party. Further, the recommendations set forth in this report are a "floor" and it is appropriate for anyone submitting comments to proffer any additional recommendations that are supported by the findings, testimony or comments provided during the hearing process (e.g., from April 6, 2005 through November 30, 2005).

This report has been prepared by staff to the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act. As such, the initial findings, draft recommendations and conclusions have not been endorsed by any member of the Task Force on Improving the National Environmental Policy Act or Task Force on Updating the National Environmental Policy Act.

Specificity of Comments: Comments must address specific recommendations. For example, comments should express opinions on whether or not a particular recommendation is warranted, possible, or beneficial. As stated above, comments that suggest additional recommendations supported by information provided to the Task Force are welcome.

How to submit comments: Only written comments will be accepted. Comments must include the commenter's name, address and if the comments are on behalf of a company or organization, and the affiliation of the comment's author (i.e., title, company, organization name). Computer generated, bulk or other nonspecific comments will be given their just consideration. The quality, not the volume, of the comments is critical.

Comments can be sent by the following means:

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

Electronic mail: nepataskforce@mail.house.gov

Facsimile: (202) 225-5929

The comment period on this initial report is 45 days. Due to the fact that the 45th day falls on a weekend, comments are due no later than February 6, 2006. Late comments will NOT be considered.

Executive Summary

This initial report represents an initial view on the ways to improve NEPA. It is meant to provide the reader with a summary of comments and testimony, not to provide recitation of every point raised during the hearing period. With such diverse opinions on whether or how to improve and update NEPA and the importance of crafting workable, effective recommendations, it is necessary to provide members of the public the opportunity to express additional and dissenting views.

Findings – The testimony and comments revealed that there are two distinct views of the NEPA process. The first is that the status quo is adequate. This view was expressed by a majority of environmental groups and their members. The other perspective is that NEPA is a landmark law, but could use some improvements. This was the opinion of Federal agencies, tribal representatives, state and local representatives, NEPA practitioners, applicants and some citizen groups.

The findings were grouped around the following themes:

- What does NEPA mean
- The impact of changing NEPA
- Litigation
- Federal, tribal, state and local entities and the NEPA process
- NEPA's interaction with other substantive laws
- Delays with the NEPA process
- Cost of compliance
- Public participation
- Adequacy of agency resources

The findings revealed some interesting facts about the NEPA process. For example, it is evident that, as is the case with any governmental process, problems become interconnected. In other words, delays are based on litigation which in turn creates larger NEPA documents which lead to more delays and costs.

Additional highlights of the findings are:

- With respect to what NEPA means, the Task Force heard a wide range of opinions. Some suggested that the statute is a quasi-substantive "protection" type law whereas others maintained that it is procedural.

- The topic of changing NEPA elicited strong beliefs that changes are necessary and would be productive. There were equally strong emotions that potential changes to NEPA or its regulations, in any way, would undermine the effectiveness of the law.

- Litigation was seen by many as the single biggest challenge with the NEPA process – and one of the most effective tools for ensuring its success. The empirical data paints a picture of few actual lawsuits but it does not address the perception or threat of litigation and the impact it has had on the NEPA process.

- Federal, tribal state and local agencies do indeed interact fairly well within the NEPA process. There is room for improvement in terms of getting more governmental bodies involved in the NEPA process.

- NEPA and other environmental laws do work in concert. However, there are many instances of redundant environmental analysis.

- When "delay" is discussed it centers on the seemingly endless nature of the NEPA process. The process is without question much longer today than it is has been in the past. Delay affects both applicants and those not directly connected to the Federal decision.

- Costs of complying with NEPA are rising, but these costs are seen by some as a necessary evil when weighed against the potential impacts of a federal decision that impacts the environment.

- Public participation is central to the success of NEPA but many groups and applicants feel somewhat disenfranchised. Some groups informed the Task Force that it is difficult to provide meaningful comments and in some instances, the comments were ignored.

Recommendations – This initial report sets out 22 recommendations based on the testimony and comments. The draft recommendations are grouped to address the major issues presented to the Task Force. The draft recommendations are organized as follows:

- Group 1 – Addressing delays in the process
- Group 2 – Enhancing public participation
- Group 3 – Better involvement for state, local and Tribal stakeholders
- Group 4 – Addressing litigation issues
- Group 5 – Clarifying alternative analysis under NEPA
- Group 6 – Better Federal agency coordination
- Group 7 – Additional authority for the Council on Environmental Quality
- Group 8 – Clarifying the meaning of "cumulative impacts"
- Group 9 – Studies

The draft recommendations within these groups speak to legislative as well administrative actions. Finally, these draft recommendations are intended to improve the NEPA process to ensure maximum values for all stakeholders.

Background and Summary of Activities

NEPA, signed into law on the first day of 1970, was the product of over a decade's work in the House and Senate. NEPA established a national environmental policy and provides a framework for environmental planning and decisionmaking by federal agencies. NEPA directed federal agencies, when planning projects or issuing permits, to conduct environmental reviews to consider the potential impacts the proposed action would have on the environment.

Under NEPA, environmental review is an interagency process. One Federal agency assumes the lead role working cooperatively with other Federal and state agencies throughout the environmental review process. This coordinated review process includes input from the public, as well as from other agencies, to guarantee that all environmental protections, as well as other issues are addressed.

The underlying premises of NEPA are that the federal government must take environmental factors into account when rendering decisions and inform the public of the environmental impacts of those decisions. The need for a law like NEPA arose from the rapid pace of development this country was experiencing in the post World War II era.

Many have called NEPA the "Magna Carta" of environmental laws. As such, there is a sense that the law and its edicts should not be changed. In fact, the law has been amended only twice in its history; first to allow states to prepare environmental analyses in some instances and second to make changes regarding administrative matters of the Council on Environmental Quality. Unfortunately, time and again public sector entities, companies, individuals and organizations have raised issues of cost and process burdens. These stories often reach the conclusion that NEPA *must* be changed. Over time it became clear that the level of the federal government's environmental awareness has increased in the years since NEPA was enacted. After 35 years and in light of the myriad of anecdotal accounts, it is a legitimate exercise to review how well or poorly NEPA has evolved.

The impacts of the NEPA process has not been reviewed by the Resources Committee since 1998. A comprehensive examination of NEPA has never been conducted by Congress. On April 6, 2005, Committee on Resources Chairman Richard W. Pombo (R-CA) established the Task Force on Improving the National Policy Act ("NEPA Task Force") to begin the process of reviewing NEPA. The goal of the NEPA Task Force was to study NEPA related issues, discuss possible improvements and to make recommendations to the Chairman and Ranking Member. The method to reach this goal was to conduct field hearings in key areas of the United States as well as provide means for any interested party to provide comments or recommendations.

The NEPA Task Force was a bipartisan collection of Committee members whose viewpoints span the ideological spectrum. The NEPA Task Force members brought a vast array of experience and viewpoints on the subject of NEPA and its impacts. Over the course of seven months, the Task Force conducted seven hearings across the nation. In addition to testimony presented at the hearings, the Task Force also received and reviewed over 3,000 comments submitted by mail, by fax and electronically.

The NEPA Task Force was comprised of the following members of the Committee on Resources:

Chair: Cathy McMorris (R-WA)
***Ranking Member*:** Tom Udall (D-NM)

Republicans	***Democrats***
Rep. Ken Calvert (CA)	George Miller (CA)
Rep. George Radanovich (CA)	Ed Markey (MA)
Rep. Chris Cannon (UT)	Frank Pallone (NJ)
Rep. Jim Gibbons (NV)	Grace Napolitano (CA)
Rep. Greg Walden (OR)	Jay Inslee (WA)
Rep. Stevan Pearce (NM)	Mark Udall (CO)
Rep. Devin Nunes (CA)[1]	Raul Grijalva (AZ)
Rep. Henry Brown (SC)	Jim Costa (CA)
Rep. Thelma Drake (VA)	
Rep. Louie Gohmert (TX)	
Rep. Richard W. Pombo (CA), ex officio	Nick J. Rahall, II. (WV), ex officio

Task Force hearings were held on the following date and locations:

- April 23, 2005; Spokane, Washington
- June 18, 2005; Lakeside, Arizona
- July 23, 2005; Nacogdoches, Texas
- August 1, 2005; Rio Rancho, New Mexico
- September 17, 2005; Norfolk, Virginia
- *November 10, 2005; Washington, DC- Hearing of the Task Force on Updating the National Environmental Policy Act*
- *November 17, 2005; Washington, DC - Hearing of the Task Force on Updating the National Environmental Policy Act*

At the hearings, 66 witnesses presented testimony orally or in writing. The witnesses fell into the following categories:

- Federal entities
- State entities
- Local entities
- Tribes

1 On May 12, 2005 Rep. Nunes resigned from the Committee on Resources and therefore could no longer serve on the Task Force. Rep. Nunes was replaced by Rep. Rick Renzi (AZ).

- Applicants
- Legal scholars/practitioners
- Citizen groups
- Individuals
- Academicians
- Environmental Groups

Additional information and hearing testimony is available on the Committee on Resources website at: http://resourcescommittee.house.gov/nepataskforce.htm.

Major Findings of the Task Force

What is NEPA's intent?

From the outset of this investigation, it was clear that the original policy goals of NEPA remain valid today. There was little debate over NEPA's importance or that its positive results. After 35 years, NEPA has become an integral part of the environmental landscape. One state government witness provided a stark illustration of the state of play in the time before NEPA. Uranium mining in the years before NEPA strongly suggested that there was indeed a need for some type of increased environmental awareness:

> "The federal government, the nuclear energy industry and the atomic weapons program proponents pronounced the uranium boom [in New Mexico] an unqualified boon to America's economy and national security. [This boom] changed forever the makeup of the industry. […] There were deeper and deeper mines, more and more facilities and workers and tragically worse and worse impact to the environment"

NEPA's creation began to address this type of government decisionmaking. Certainly, a number of comments suggested that NEPA remains necessary and pertinent. Council of Environmental Quality Chairman James Connaughton summarized this thought:

> "[NEPA's] foundational objectives, especially those found in section 101 are as relevant today as when Congress passed it"

Despite its significance and the decades of discussion, debate and litigation, there is still division as to what NEPA means. On one hand, it is clear from the comments and testimony received from environmental Groups and those who share their viewpoint that NEPA is an environmental protection statute. For example, many comments expressed the following sentiment:

> "NEPA's purpose is to protect and empower the public."

While this notion was pervasive throughout the environmental groups' testimony, there were others that indicated that NEPA was a really a method to "check" government actions that were seen by these groups as something negative. This opinion exemplifies that feeling:

> "NEPA is an effective means of ensuring accountability by federal managers, whether they are distant bureaucrats or potentially corrupt local managers."

By comparison, it was the position of some state and federal agencies and many applicants that the statute is procedural and offers no protections above other substantive laws. For example, many comments suggested that the NEPA "process" is something that can be changed to ease costs and delays without undermining other substantive environmental protection laws such as the Endangered Species Act, the Clean Water Act or the Federal Land Policy and Management Act.

Environmental interest groups point out NEPA's procedural nature by suggesting in testimony that NEPA is critical in providing "guidance and direction" to Federal agencies.

Similarly, one witness commented that NEPA is a "planning tool" providing citizens the opportunity to better understand impacts and alternatives of a federal project.

Still other comments disputed the statute's procedural or substance value, and suggested that NEPA has become a "tool" used stop controversial projects. This was rejected by several environmental witnesses who stated that NEPA does not "stop" projects. There was evidence presented that suggested that NEPA, along with other environmental laws was utilized to delay contentious projects. In testimony citing a "litigation training manual" the Task Force was presented with the following:

> "In an area devoid of endangered species, impacts to waterways and floodplains, or of federal funding, NEPA may be the only tool that grassroots groups have [to fight highway projects]."

This perception of the NEPA process is obviously contrary to the intent and current interpretation of NEPA.

An issue that goes to NEPA's intended applicability is the divergent views over the definition of a "major federal action." Some stakeholders commented that it appears that <u>every</u> Federal action is seen as "major" when it comes to NEPA. An attorney who deals with agencies throughout the West pointed out:

> "I believe and the congressional record shows that Congress chose those terms 'major federal action significantly affecting the environment' very carefully. Yet, over the years the Courts and CEQ have greatly expanded those words so that federal agencies believe that NEPA applies to all actions, not just major and significant actions."

Federal agencies did not offer any opinions on this assertion. However, it was noted that agencies are defaulting to the preparation of an EIS without fully debating whether or not the action is "major" as currently set forth in regulations.

Reasons for and concerns about modifying NEPA

The question of how to implement any improvements to NEPA was a hotly debated topic. As would be expected, many witnesses and comments suggested that there should be no changes to NEPA or the attendant CEQ regulations. To support these claims, it was suggested that any changes would necessarily weaken the statute by "eliminating public participation." Others suggested that changes to NEPA or the creation of additional regulation would create a better process through increased certainty and clarity. There were no suggestions to eliminate or scale-back any of NEPA's current policy directives.

Notwithstanding the potential benefits of changing NEPA, certain Task Force members and commentors suggested that a "burden of proof" must be met before changes are considered. In this regard, those who advocated changes cited the following specific reasons for their positions:

- Uncertainty that undermines public participation in the NEPA process
- Exclusion of state, local and tribal from the NEPA process
- Costs of compliance that run in the millions of dollars
- Delays that result in cancellation of projects

At a minimum, these reasons sustain calls for modest changes to NEPA or its regulations.

In addition, the state of affairs that existed when NEPA was debated and signed into law is not the same one that exists today. In response to a question from the Task Force, one witness acknowledged the times had definitely changed since NEPA's deliberation and enactment. Indeed, the arguably "myopic, dishonest and dumb government" making decisions in the mid to late 1960's has become significantly more aware of the consequences of its actions. Given the increasing awareness, it is difficult to understand how the government would retract or retreat into pre-NEPA practices if the statute were to be amended.

It must be pointed out that there were no calls for meeting a "burden of proof" when NEPA was initially debated. Rather, history shows that the events of the time supported the creation of the statute and policymakers responded with all due speed. Consistent with this history, it would be similarly responsive to make necessary changes to address issues raised before the Task Force.

Litigation –The Facts, Figures and Effects

A significant number of comments to the Task Force focused on NEPA related litigation. Moreover, it was a subject of every hearing. The Task Force heard that litigation has shaped the meaning and applicability of NEPA. A recent lawsuit that was presented in testimony from the Lakeside, Arizona hearing, shows the breadth of applying NEPA to meet a desired goal. In this case, environmental groups sued the Departments of Housing and Urban Development, Veteran's Affairs as well as the Small Business Administration suggesting that their loan programs did not have adequate NEPA analysis. As noted by the witness providing this testimony, if this is the intent of NEPA the question is "where will it end." At the hearing focused specifically on litigation, the Task Force was told that there was an argument to be made that NEPA played a role in blocking a floodwall project that may have prevented the flooding of New Orleans in the aftermath of Hurricane Katrina and that grazing permittees would have been forced off public lands if certain NEPA related injunctions were left in place. In response, it was stated by those representing environmental groups, that NEPA litigation was not responsible for any such consequences.

The statistics reveal that there is relatively little in the way of NEPA lawsuits as a percentage of the total number EISs filed each year. The Task Force was presented with following statistics regarding NEPA litigation:

> "In the last year for which CEQ has made public statistics on NEPA litigation dispositions (which it assembles in collaboration with the Justice Department) -- 2004 -- 156 NEPA cases were filed, and in only 11 of those cases did the judge grant an injunction. In 2002 150 NEPA cases were filed, and injunctions were issued in 27 of them. In 2003 128 NEPA cases were filed, of which 6 resulted in injunctions. By way of larger comparison, in […] 2004, 281,338 civil cases were filed in the U.S. District Courts. During the same year 998 cases were filed in District Courts involving environmental matters. Of these, 548 involved private parties only (i.e., not the U.S. Government), and of the balance, which involved suits to which the United States was a party, the government was the plaintiff in 171 cases and defendant in 279. Environmental cases therefore represent a miniscule portion of the Federal court caseload, and NEPA cases a modest part of even that small fraction. In summary, with respect to NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, a 99.97% rate of NEPA actions successfully completed without injunctions does not provide a factual basis to prompt an excessive caution on the part of agency personnel. Even looking at the relatively modest number of NEPA cases filed, in 2004 in 93% of them the judge did not issue an injunction."

It was further noted by a number of environmental commentors that of the approximately 50,000 EISs filed each year only 0.2% resulted in litigation.

Many commentors, especially those that participate in the NEPA process as applicants, suggested that the number of suits has little meaning when examined against the actual impact of these suits. In other words, the impact of litigation is significant if a lawsuit impacts numerous federal decisions or actions in several states. It was suggested to the Task Force that whether there is one case or 100 cases, the result is that agencies are becoming

more cautious – but not necessarily more deliberative - in issuing NEPA documents. For those waiting for a government decision, there is a "ripple effect" of lost economic opportunities. Moreover, a number of witnesses expressed the thought that the "threat" of litigation has had a profound effect on the manner in which Federal agencies move through the NEPA process.

Several comments and some testimony suggested that NEPA litigation serves an important purpose. In essence, private litigation serves as a method to "police agency compliance" with NEPA. In response, other witnesses and commentors noted that allowing courts to monitor compliance has resulted in gross inconsistencies across the country. Further, these comments suggest that NEPA policy itself is being created from the bench.

The Task Force also received commentary that the range of plaintiffs in NEPA related lawsuits is not limited to environmentalists and like-minded citizen groups. It was stated that businesses and associated business groups sue federal government agencies when they feel aggrieved. In response, one witness representing ranching interests stated:

> "other organizations … throughout the West have gotten in the litigation game as well not because our industry is litigious by nature, but because that is where the game is being played."

Interestingly, the Task Force was told that certain groups who have a direct stake in the issue under litigation do not actively intervene. The Task Force asked for supplemental information to clarify if this situation was one where groups chose not to intervene or if they were prohibited from doing so. In response one witness stated that the Ninth Circuit has "repeatedly held that industry parties cannot intervene as a right in NEPA cases, asserting that the government is the only proper defendant." This is one example of an interested party not being able to participate in NEPA litigation.

The effect of NEPA litigation is much different on an applicant than on an interest group. In other words, for an applicant, a lawsuit filed to enjoin a construction project will create planning difficulties. It becomes nearly impossible to adequately plan to undertake a project if there is no end point to the suit.

Numerous comments were aimed at reducing the amount of litigation. But "reducing" the comments did not suggest excluding any legitimate claim from proceeding in court. To effect a reduction of litigation several legislative options were proposed including the posting of bonds and a requirement to exhaust all administrative remedies before filing suit. Most importantly, the notion of bringing clarity – through legislation or regulation – to NEPA's most contentious issues (e.g., whether or not to prepare an EIS, what is a sufficient analysis of the cumulative effects of an proposed action) would be the most productive way to decrease the amount of litigation.

It bears pointing out that some comments suggested that legislative and regulatory options were not the only method to reduce litigation. One environmental legal advocate suggested that litigation will be reduced when agencies involved in a project collaborate effectively with all interested parties. It was noted that because of an excellent collaborative dialogue in the southern U.S. between the Forest Service and interested parties, there is no active litigation involving National Forest in Alabama, Louisiana or Mississippi.

Federal, tribal, state and local entities and the NEPA process.

NEPA requires Federal agencies to coordinate their efforts. However, there are instances where agencies have been in conflict on a particular NEPA related decision. This conflict has had the effect of delaying the attainment of a particular decision. For example, there is a significant NEPA component to the Federal Energy Regulatory Commission (FERC) relicensing process for hydroelectric projects. The Task Force was told that during the relicensing process FERC is required to accept any license condition issued by a conditioning agency necessary to protection of public lands.[2] In many cases the "conditioning agencies" are the Department of the Interior and the Forest Service. In the example presented to the Task Force, the Department of the Interior filed conditions prior to the release of FERC's Final EIS. However, the Forest Service filed their conditions after the FERC EIS was issued. Interestingly, the FERC EIS did not endorse the agency conditions and the Department of the Interior did not support the conclusion proffered in the FERC EIS. All the while the application continues to wait for the license to operate the facility. This example clearly demonstrates the problems that can arise where there is a significant lack of coordination in the NEPA process among Federal agencies.

In the tribal context, the NEPA process demonstrated value in allowing tribes to express to federal decisionmakers the importance of protecting certain significant lands. Apart from this benefit, some tribes feel that having to engage in the NEPA process is an affront to their sovereignty. These tribes make the case that their lands are not Federal lands and thus should be exempt from NEPA. However, since decisions related to tribal lands are in many instances governed by the Department of the Interior, NEPA comes into play. The frustration with the NEPA process was expressed by one witness as follows:

> "NEPA review adds delay to the federal approval of tribal leases, rights-of-way, and land-related transactions. Additionally, NEPA [has] become the tool of choice of public citizens groups to block the decisions of federal agencies, not just as to public lands, but also as to tribal lands. We know this from personal experience, both with respect to settlement of our water claims and with respect to energy development."

The inability to navigate the NEPA process for oil and gas permitting forced some tribes to seek alternative methods outside of NEPA.

It was evident that state resource agencies are inextricably linked with their federal counterparts on environmental issues. Because of this relationship it was expressed by state government representatives that the NEPA process must account for the mandates and requirements that face state agencies. Other testimony suggested that, again, because of this connectivity that state agencies should be deemed a "cooperating agency" when they request it – as opposed to the current practice of allowing the Federal agency to allow it when they feel it is appropriate.

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2 See, Section 4(e) of the Federal Power Act.

The issue of how states address environmental reviews was specifically addressed at two of the field hearings. The Task Force was told that state agencies responsible have the ability to complete environmental reviews more quickly than their federal counterparts. In the context of oil and gas permitting, the state of Texas has environmental procedures similar to NEPA yet the process of a permit takes only 25-35% of the time it take a Federal agency such as the Bureau of Land Management. This demonstrates that there is some efficiencies that are absent from the Federal process.

NEPA and other substantive laws

The Task Force sought input on how the NEPA process worked with other substantive environmental laws. As was suggested by some commentors, NEPA is an "umbrella" statute that contains or references the requirements of other substantive laws. The Task Force was told that the current manner in which NEPA and other environmental laws are applied to a particular project can result in duplicative analyses that do not result in a more informed decision.

A bit of history of the succession of major environmental laws is appropriate. Passed in 1970, NEPA was the first in a wave of environmental laws such as the Clean Water Act, Clean Air Act, Endangered Species Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The following list is illustrative of the number of environmental laws that followed NEPA.

1970	**National Environmental Policy Act (NEPA)**
1970	Clean Air Act (CAA)
1972	Federal Water Pollution Control Act/Clean Water Act (CWA)
1973	Endangered Species Act (ESA)
1976	Federal Land Policy and Management Act (FLPMA)
	Resource Conservation and Recovery Act (RCRA)
	The Toxic Substances Control Act (TSCA)
1977	Surface Mining Control and Reclamation Act (SMCRA)
	Clean Water Act Amendments (CWAA)
1979	Archaeological Resources Protection Act (ARPA)
1980	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
1984	Hazardous and Solid Waste Amendments (HSWA)
1986	Superfund Amendments and Reauthorization Act (SARA)
1990	Clean Air Act Amendments (CAAA)

In the cases where these laws cover the same policy objectives as NEPA, it was suggested that the NEPA process was duplicative and counterproductive. To illustrate this point, the Task Force heard testimony that the Magnuson-Stevens Fisheries Management Act contains a rigorous set of requirements to protect fisheries. When the requirement to follow the NEPA process is added to Magnuson-Stevens, the results is a drawn out analysis where decisions are based on out-dated information.

To address the effects and conflicts between redundant process some comments suggested that NEPA be amended to recognize the "functional equivalence doctrine." This doctrine was first espoused in *Environmental Defense Fund v. EPA* 489 F.2d 1247, 1257. Put simply, the functional equivalence doctrine exempts federal agencies from complying with NEPA requirements provided the agencies utilize other "substantive and procedural standards [that] ensure full and adequate consideration of environmental issues." To support this concept, the Task Force was provided with the following statement:

> "Federal permits required for mining operations under laws administered by the Bureau of Land Management, the Office of Surface Mining, the United States Forest

Service, and other agencies cover the same environmental concerns as the NEPA review, leading to duplicative environmental analysis.

Clearly, with the wide ranging number of environmental laws, there is bound to be some overlap. It was recommended the effect of this overlap be studied to determine if it is merely redundant analysis that does not plainly lead to better analysis.

Delays to the NEPA Process

The Task Force was presented with numerous examples and reasons that "delay" has become synonymous with the NEPA process. It was clear from testimony and comments that "delay" was a reference to the time it takes for an agency to reach the end of the decisionmaking process. One NEPA historian testified that on occasion there is indeed delay attributable to factors such as a lack of timelines and milestones. Another reason is lack of coordination among all agencies involved in the NEPA process. Many other commentors, however, suggested that delay (as well as the costs associated with the NEPA process) is a function of the increasing length of the NEPA documents. In turn, this trend of "larger and larger" NEPA documents is attributable to non-statutory requirements imposed by court decisions.

The increased length and complexity of NEPA related documents cannot be disputed. Cambridge Scientific Abstracts noted that in 2000, the average Final EIS was 742 pages. Compare this with CEQ regulation 1502.7, which states that an EIS, "shall normally be less than 150 pages and for proposal of unusual scope or complexity shall normally be less than 300 pages." The increasing length of the EIS has led to Federal tomes with little meaning. Indeed, under the Clinton Administration, CEQ noted that "what is...lacking in EISs is not raw data, but meaning[.]"[3] There were 597 EISs filed with EPA in 2004, which is the greatest number since 1995. The number of EISs filed has been growing steadily since 2000.

A number of comments suggested that the NEPA process is opened-ended. Indeed, while there are minimum timeframes established by regulations,[4] there are no end dates. In the 1981 memorandum commonly called the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" CEQ spoke to the length of time a project level EIS should take. The answer to Question 35 "Time Required for the NEPA Process" was:

> "The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process."

While current projects may be somewhat more complex than those in 1981, there was little to suggest that this timeframe was met. Further, there was concern that in the current framework of the statute and its regulations that there is no ability for any one entity to be "in charge" of monitoring the NEPA process. In other words, there is no one governmental body that can take responsibility for agency mismanagement of the NEPA process.

To exemplify the effects of delays, the Task Force was provided the facts on the amount of time it takes to salvage timber in the wake of a forest fire. One witness testified that:

> "In 2002, 5,000 acres burned on Mt. Leona on the Colville National Forest located less than 15 miles from our mill in the tiny town of Republic, which was the town's

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[3] NEPA: A Study of Its Effectiveness After Twenty-five Years, at p. 28

[4] See, e.g., 40 CFR 1506.10.

> largest employer. As a result of the initial cumbersome NEPA process, it was determined that only 1,500 acres would be salvaged. Additional NEPA process delays and appeals further reduced this to only 220 acres that were actually salvaged, and this only happened because of the attention of high level officials at the Department of Agriculture. Salvaging only 4 percent of the burned and devastated area, over a year after the burn occurred, resulted in less than 2 weeks worth of timber for the Republic mill."

The Task Force also heard that NEPA-related delays effect more than applicants. One witness testified that business plans and work schedules are built around final agency actions. Therefore, when the NEPA process is stalled, work cannot begin. For example, it was noted that four years after the Record of Decision on the U.S. 95 highway, work was halted due to a NEPA-related lawsuit. One economic effect of this standstill was that construction costs increased by three million dollars and was borne by the local taxpayers.

In some cases there are alternative arrangements that expedite the NEPA process available to Federal agencies. Examples of the application of alternative arrangements are the expedited removal of trees following the 1999 blow down in the Davy Crockett National Forest and the response to Hurricane Katrina. Clearly these alternative arrangements are necessary and effective in particularly catastrophic examples. However there is an open question whether the most efficient method to utilize alternative arrangement is administratively (e.g., by request from an agency to CEQ) or for it to be built into the statute and incorporated directly into an agency's NEPA procedures.

Another way delay manifested itself was the "reopening" of the NEPA process when an end point appeared to be reached. For example, there are numerous examples of supplemental EAs and EISs being required after the process was concluded. While there are standards for the issuance of supplemental documents[5], there is a perception – and some evidence – that there is no consistent application of these standards.

An additional reason cited for delay in the NEPA process is the requirement that agencies sort through an array of alternatives to a proposed project. The NEPA regulations require an examination of "reasonable alternatives." Moreover, the Task Force was told repeatedly that alternatives analysis "lie at the heart" of the NEPA process. The main point of contention was not that analysis of alternatives should be eliminated, but which alternatives actually met the test of being "reasonable." Several comments suggested that agencies are often wading through alternatives that are not "technically or economically feasible." In order to address this, one witness suggested that a way to measure the reasonableness of alternatives is a determination of feasibility based . Another suggestion from a number of witnesses related to alternatives is to make mitigation actions found in proposed alternatives mandatory. The foundation of this idea is that if agencies are bound by their mitigation proposals, these proposals will be more than "hollow promises."

5 See, e.g. 40 CFR 1502.9(c).

Finally, a number of citizen groups disputed the fact that there is an attenuated NEPA process. While in some cases indicating that the process indeed takes longer than in past years for similarly complex problems, these commentors claimed the additional time resulted in "good" or "better" decisions. The premise of this argument is that however long is needed to make an environmentally sound decision is time well spent. It should be noted that, unlike an applicant or community that is advocating for a particular project, these groups typically do not incur any costs or bear any consequences connected to the length of the NEPA process.

NEPA Compliance Costs

The concept of NEPA related "costs" was a subject in many hearings. NEPA related costs were most often expressed in terms of what was spent by applicants. Several witnesses and comments detailed that the cost to prepare NEPA related documents is increasing at a significant rate. For example, in the 1980's an EIS for a mine cost approximately "[$]250,000-$300,000 whereas in 2005 the same EIA can cost "$7-8 million or more." The costs are associated with the amount of information required to address potential litigation.

An indirect cost related to the preparation of NEPA documents can be measured in lost opportunities. For example, one witness suggested that NEPA compliance costs are particularly onerous when added to other permitting costs which in and of themselves run several hundred thousand dollars. The result is a follows:

> "[A] trend [is emerging] that speaks volumes about the burden of the process. In some cases we conclude to not develop resources that would be available to us so that we can avoid interaction with the NEPA process and the delays associated with it."

Another observation on NEPA costs put the burden on the agencies responsible for creating the documents. One witness observed that there is nothing in NEPA that requires agencies to "spend millions of dollars" to prepare NEPA documents. The agency response to this assertion is that litigation – or the threat of litigation – has in effect "forced" them to spend as much as necessary to create "bullet proof" documents. One witness advised the Task Force that there should be a cost ceiling in order to control agency EA and EIS expenditures.

Echoing comments related to delays in the NEPA process, some commentors dismissed the impact of costs. These comments suggested that the costs are negligible in light of the need for "sound agency decisions."

Public Participation

Public participation, usually through scoping and public comments, is a central part of the NEPA process. Nearly every witness and comment that mentioned public participation suggested that without it, NEPA would not be successful. The public participation requirement affords agencies to get input directly from those individuals and groups directly impacted by a Federal action. This point was made quite clear by one witness:

> "[R]anchers and allotment owners must be involved in the NEPA process at the onset and throughout the process. These are the people that are on the ground every day and they know what's going on and are the most likely to have pertinent data. They are the ones who must live with the consequences of [the agency's] decisions." (emphasis added)

This was echoed by a group of environmental organizations:

> "When agencies use the NEPA process to evaluate proposals to graze livestock on federal lands, information about the proposals, their benefit and consequences and the health of the land are available to ranchers, the public, and other state and local officials[.]"

In fact, public participation reduces the amount of controversy associated with Federal project. As was noted by an environmentalist witness:

> "[The cooperation afforded by pubic participation] leads to areas of agreement and also provides for resolving conflicts before final decisions are made."

When stakeholders, including project proponents may be excluded from deliberations during the NEPA process, the result is inevitably more appeals and litigation. This has the unfortunate effect of creating an attenuated NEPA process. Again, this highlights the need for meaningful public participation throughout the NEPA process.

Despite the necessity of public participation, the Task Force was informed of at least one instance where the NEPA process was not followed thus cutting out public participation.[6] It appears that the agencies decision to not follow the NEPA process – including public participation – was purely political. Indeed where a federal decision will have significant environmental impacts an EIS is required. Under current law there is no occasion where an agency can choose (or "opt out") of the NEPA process. Furthermore, the Task Force was told that there is little or no accountability – save legal review – for the decisions made by federal agencies. A state government witness shared the following thought on this subject:

> "[T]hrough the interpretation of federal agencies NEPA has become in many instances a blunt instrument that results in frustrating public involvement and makes

6 See, testimony of William Kennedy referencing the Bureau of Land Management's decision to not prepare an EA or EIS for the Klamath Project in 2001. Also, see testimony of Howard Hutchinson, discussing a 1990 decision to issue interim guidelines related to the Mexican spotted owl without NEPA analysis. Finally, see testimony of Stella Montoya, stating that agencies will use NEPA to justify a predetermined decision.

> it much more difficult to arrive at thoughtful tradeoffs among transportation needs, project costs, community values, and environmental issues."

Environmental groups testified that the public participation element of the NEPA process provides a mechanism to mobilize when a Federal project involves issues of importance to their constituencies. It is unclear what this mobilization entails. In some cases the mobilization came in the form of many form comment letters designed to fill the administrative record. In others there were substantive comments with a purpose of informing the agency of particular concerns and offering constructive proposals.

One of the attorney witnesses cautioned that the NEPA process should not be driven by the volume of comments suggesting one type of agency action over another. Of note however, is that agencies must be responsive to public comments in some meaningful way. If they are not, it will erode confidence in NEPA's public comment requirement and thus degrade the importance of the Act.

Finally, it can be said that the increasing length and complexity of NEPA documents is having a negative impact on public participation. The groups who are the strongest advocates for increased public participation often have the least amount of time and resources to digest and comment on NEPA documents that can run in the thousands of pages. The practical effect is that the "quality" of comments is becoming subordinate to the "quantity" of comments.

Do Federal Agencies Have Enough Resources?

Many witnesses and written comments suggested that providing Federal agencies with additional resources – e.g., money and personnel – would help reduce the amount of delay in the NEPA process. The point is that staff at the CEQ and agency level is "overwhelmed." However, one witness suggested that additional resources might not reduce the time it takes to complete the NEPA process. Another suggested that the "excessive time and money" spent on NEPA documentation is not making for better decisions or for a better environment.

Several comments focused on the need to provide stability with respect to personnel charged with administering NEPA throughout the agencies. Lack of skilled personnel and adequate resources is said to be a contributing factor in delaying the NEPA process. In particular, the "revolving door" for NEPA staff has trained, skilled personnel exiting, and inexperienced workers entering. The net result is that many applicants feel as though there are a number of times, especially when the NEPA process takes place over a period of years, when the process starts over. The lack of funds and personnel is also problematic when it comes to an agencies ability to development and implement positive reforms to their NEPA procedures.[7]

Another interesting development related to a lack of agency resources is the effect it has on third party (e.g. project proponent) participation. Some agencies have asked project proponents to volunteer to pay some costs of NEPA documents – or in some instances prepare draft documents for agency review. However, as was noted by one witness:

> "[T]here's still a significant delay in getting a third party contractor analysis through the process, mainly because the agencies have so many other responsibilities to fulfill with a limited number of resource specialists."

Further, the Federal government witnesses did not indicate that additional resources would reduce delay. In fact, the Forest Service suggested that one problem with resources is that they are being shifted to litigation support and away from Forest management. The Task Force was told that the danger of this "resource shifting" is that forests, watersheds, wildlife habitats and rural communities are less likely to be protected.

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7 For an extensive list of potential methods an agency "can improve its NEPA compliance" see testimony of Sandra Nichols, Staff Attorney of WildLaw, Nacogdoches, TX hearing, June 23, 2005.

Draft Recommendations

The Task Force received from, witness and other commentors, multiple recommendations on every possible aspect of NEPA. However, the need to proffer recommendations to improve and update NEPA was not unanimous. Some witnesses and comments suggest that "no changes to NEPA or to the regulations promulgated by the Council on Environmental Quality and other federal agencies to implement NEPA" are warranted. Others suggested that if there were changes to the statue or regulations, the Task Force proceed with caution.

In order to address the issues raised and to improve NEPA for all of its stakeholders, the following draft recommendations are offered for review and comment. It is important to understand that these recommendations should be considered "holistically." In other words, many of these recommendations will work best in concert rather as stand alone actions.

Group 1 - Addressing Delays in the process

Recommendation 1.1: Amend NEPA to define "major federal action." NEPA would be enhanced to create a new definition of "major federal action" that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and

bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).

Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.

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. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term "political subdivisions" to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.

Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:

- Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.
- Clarify that parties must be involved throughout the process in order to have standing in an appeal.
- Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit

activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.

- Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;
- Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

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. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).

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. A provision would be created that require an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the

mitigation requirement should be made a legally enforceable condition of the license or permit.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied "horizontally" to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws.

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. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.

Recommendation 7.2: Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies.

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. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions.

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. CEQ would be instructed to prepare regulations that would modify the

existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable."

Group 9 - Studies

Recommendation 9.1**:** CEQ study of NEPA's interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:

a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:

a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA's enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

Conclusion

After carefully reviewing the testimony and comments, it is clear that NEPA is a valid and functional law in many respects. However, there are elements of NEPA that are causing enough uncertainty to warrant modest improvements and modifications to both the statute and its regulations. To do nothing would be a disservice to all stakeholders who participate in the NEPA process.

This initial report represents the next step in developing a set of measures that will update the statue to ensure that NEPA is meeting its goal. The draft recommendations are aimed at beginning a conversation on specific elements of NEPA worthy of updating.