Considering NEPA:

Comments to the National Environmental Policy Act Task Force

February 6, 2006

Comments of the
Environmental Law Institute to the
Task Force on the National Environmental Policy Act
House Resources Committee

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Basis for Comments

The Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act (collectively "Task Force") seek comments on draft recommendations made in the December 21, 2005 report of "Initial Findings and Draft Recommendations." The Environmental Law Institute (ELI), an independent, nonpartisan education and policy research organization whose mission is to "protect the environment by improving law, policy, and management," submits comments in response to this invitation.

Throughout its entire history, ELI has been recognized as the leading nongovernmental source of information on the National Environmental Policy Act (NEPA) and its implementation. Incorporated on November 22, 1969, on the day that NEPA passed the Senate, ELI began its operations in 1970, the year NEPA began to inform U.S. government actions and decisions. ELI prepared the first study of NEPA litigation in 1973,[1] and prepared a commissioned series of studies of NEPA compliance among federal agencies for the Council on Environmental Quality.[2] ELI is the publisher of the standard reference work, *The NEPA Deskbook,* now in its third edition (2003), and other NEPA studies including *Rediscovering the National Environmental Policy Act: Back to the Future* (1995), and *Judging NEPA: A 'Hard Look' at Judicial Decision Making Under the National Environmental Policy Act* (2004). ELI has published nearly a hundred articles on NEPA and NEPA practice in its standard reference reporting service, *The Environmental Law Reporter*, and retrospectives on NEPA at its 20th, 25th, and 30th anniversaries in *The Environmental Forum*. ELI has organized evaluations, continuing education courses, training for federal agencies, and policy forums considering NEPA. ELI's authoritative posture with respect to NEPA has been recognized by this Task Force, which prominently features ELI's Forum on NEPA options and issues on the Task Force home page on the House Resources Committee's website.[3]

For 36 years, the Environmental Law Institute has provided sound, reliable, unbiased information to decision makers, and has not engaged in lobbying for or against particular legislation. ELI has in the past offered testimony and advice on legislation at the invitation of lawmakers, and it is on this basis that we accept the Task Force's invitation to comment on potential amendments to this important environmental law.

Overview

The Task Force has requested that comments be directed to specific recommendations. Several important aspects of NEPA should inform the Task Force as it considers potential changes to NEPA in response to desires to improve the process.

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[1] Frederick R. Anderson, Environmental Law Institute, *NEPA in the Courts* (1973).

[2] Environmental Law Institute, *NEPA in Action: Environmental Offices in Nineteen Federal Agencies, A Report to the Council on Environmental Quality* (1981).

[3] http://resourcescommittee.house.gov/nepataskforce.htm.

Maintaining stability of expectations is important. Research from the first decade of NEPA implementation confirms that changes in legal standards lead to litigation, greater need for agency controls and coordination, and initial uncertainty for government agencies and private applicants. NEPA is currently a mature program based on a concise statute and regulations whose every substantive word has been litigated.[4] The CEQ regulations are stable, well-settled, and receive extraordinary deference from the federal courts.[5] This has produced predictability, making it possible for people to make federal decisions, business decisions, and local government and private decisions with a clear understanding of likely legal outcomes. Indeed, NEPA practice has evolved into conditions under which most actions are handled through simple environmental assessments, or mitigated FONSIs,[6] and where new litigation is quite rare.[7] Because of these conditions, the Task Force should beware of making changes that risk the re-opening of litigated issues (*e.g.* defining "major federal action" with another term, or codifying regulations without using the same terms used in the regulations).

NEPA does not assume that the federal government is always right. NEPA uniquely requires the federal government to consider recommendations of citizens, businesses, and local governments who have reasonable solutions or alternative approaches that may work better, and requires federal agencies to address environmental issues and alternatives that officials or technical personnel may have overlooked. The NEPA regulations expressly provide for public participation in scoping (identifying potential alternatives to the proposed actions and environmental issues for consideration)[8] and in commenting on draft environmental impact statements;[9] they also authorize agencies to seek comments on environmental assessments.[10] These regulatory provisions are critical, because they do not presume that government agencies have thought of everything before they begin a decision-making process. NEPA's participation provisions protect state and local governments and Indian tribes, as well as individuals and businesses. Federal agencies are required to respond to all substantive comments, either by making warranted changes in the analysis or by *explaining* why the comments do not warrant further agency response.[11]

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[4] *See generally* K. Sheldon & M. Squillace, *The NEPA Litigation Guide* (American Bar Assoc. 1999) (discussing court decisions interpreting each term of the statute and regulations); *see also* William Cohen, *Issues in NEPA Litigation* (2005) (annual updated annotated outline prepared by the former chief of the Environmental Defense Section in the U.S. Department of Justice).

[5] The Supreme Court and lower courts show "substantial deference" to the CEQ regulations, which were adopted as a "single set of uniform, mandatory regulations." *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979). This is a remarkable level of deference; indeed, no NEPA regulation has ever been struck down.

[6] The mitigated "finding of no significant impact" (FONSI) is a means of modifying a proposed action in predictable ways to bring it below the impact threshold that would require preparation of an Environmental Impact Statement.

[7] New NEPA cases are only in the 100-150 per year range, less than in the early 1970s, even though the U.S. population has increased by two-thirds and the size of government and number of governmental decisions have increased dramatically since NEPA was enacted.

[8] 40 CFR 1501.7.

[9] 40 CFR 1503.1.

[10] 40 CFR 1501.4(b). FONSIs must also be made available to the public thirty days in advance of the decision if the proposed action would normally require an EIS under agency procedures or if the nature of the proposed action is unprecedented. 40 CFR 1501.4(e)(2).

[11] 40 CFR 1503.4.

This accountability results in better decisions, and in most instances prevents disputes from reaching courts that should be, and can be, resolved by the agency with sound information. Flexibility with accountability makes NEPA one of the most imitated laws around the world.[12]

Comments on Draft Recommendations

1.1. Redefining "major federal action" will have the unintended effect of increasing litigation.

The determination of what was and was not a "major federal action" produced a vast quantity of NEPA litigation in the 1970s and 1980s, but minimal litigation since that time. The 1978 CEQ regulations made it clear that the determination of "major" with regard to "federal action" was not a separate inquiry from whether the action "significantly" affected the human environment,[13] and the courts subsequently ratified this view. Thus, under current law and practice there are not two determinations – one of how major an action is, and the other of how significant the impacts may be – but only one. The draft recommendation, to define "major federal action" based on the amount of "planning, time, resources, or expenditures" going *into* a proposed action, would bifurcate this determination once again. This would complicate the determination of whether and to what extent NEPA applies and reopen issues that were settled two decades ago.[14]

Apart from this new level of complexity, the proposed approach outlined in the draft recommendation would apparently exempt from NEPA numerous activities that require little planning or expenditure, but that could have significant impacts. For example, the draft proposal would evidently define as non-major an administrative decision (without large commitments of planning, resources, or expenditures) to close an area to logging or to off-road vehicles, even though impacts on the human environment might be significant – *e.g.* displacement of ORV uses to other lands, loss of fire prevention and management opportunities on the closed lands, potential impacts on private lands. This would deprive interested parties of opportunities for orderly engagement with the potential decision. A new statutory definition based on scale of the inputs would invite litigation over what thresholds should apply and whether they were properly applied in individual cases. Rather than a statutory redefinition of a core NEPA term, the judicious development by agencies of tailored "categorical exclusions" under current regulations would be a better way to handle routine measures that have little environmental impact.[15]

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[12] NEPA is America's leading environmental law export. More than 80 countries have "emulated" the U.S. by adopting laws based on NEPA. Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years* (1997), at 3.

[13] 40 CFR 1508.18 ("Major reinforces but does not have a meaning independent of significantly.").

[14] Review of a database of NEPA decisions maintained by ELI reveals that of the 400 cases decided by U.S. district courts and courts of appeal during the period 2001-2004, an issue of "major federal action" was raised in only eight. The fact that only *two* cases per year nationwide even raise this issue indicates very little controversy in the current application of this portion of NEPA.

[15] 40 CFR 1507.3, 40 CFR 1508.4. *See* discussion of draft recommendation 1.3, *infra.*

1.2. Mandating uniform statutory time limits would create perverse results.

The draft recommendation that Congress mandate time limits for environmental assessments (EAs) and Environmental Impact Statements (EISs), with the proviso that the required analyses would be "considered complete" when deadlines are missed, would create perverse incentives for federal employees to miss these deadlines. Such a provision would make NEPA wholly optional, which would defeat the statute's purpose of informed decision-making. Moreover, the risk of agency misfeasance would fall entirely on the public, including the local governments, tribes, and business organizations that also rely on NEPA.[16]

Establishing such time limits for EAs may have a further unintended consequence – leading some agencies to require EISs for some decisions that are now handled as EAs. Projected inability to meet a statutory time frame for an EA may lead an agency routinely to require an EIS in order to assure sufficient time to complete the analysis. This is most likely to be the case for EAs for fairly complex projects that currently often produce "mitigated FONSIs" (such as many mining, oil and gas drilling, and other resource projects that require substantial field data).[17]

The CEQ examined time lines in the first decade of NEPA practice and determined that agency flexibility was extremely important. "The Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible," but it authorized federal agencies to set their own "time limits appropriate to individual actions."[18] Little use of the existing authority to set time limits has been made by federal agencies, which are in the best position to determine what needs are likely to drive timing.

Prescribing uniform time limits by statute is also problematic in the absence of empirical data on the basis for current delays. In fact, there are *no data* on federal agencies' actual length of time from scoping to final EIS, or from the beginning of a decision process to the release of an EA/FONSI – neither in CEQ's 1997 NEPA Effectiveness Study, nor in the CEQ's 2003 Task Force study.[19] Data on actual time and performance by agencies would make it possible to identify problem areas and instances where time limits could be shortened or where more time might be needed for certain types of activities. For example, research might discern that 90 percent of an agency's EAs are completed in 75 days, while 10 percent took 9 months to a year. Such data could inform targeted reforms in NEPA practice and expediting of decisions in matters of greater complexity by focusing resources in these areas. To avoid unintentionally producing perverse results while not addressing the real areas of difficulty, Congress might –

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[16] Although California's Environmental Quality Act (CEQA) has time limits which apply only to private actions (applications for leases, permits, certificates, and entitlements), the remedy for delay is not to deem the analysis complete, but to allow an aggrieved party to file suit seeking enforcement of the limits. Cal. Pub. Res. Code §§ 21100.2, 21151.5, 21168.9.

[17] The Task Force proposal recommends a 9-month limit for EAs, but this may not provide sufficient time for EAs that require more field data. *See* NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (2003), at 65 ("Large EAs typically…require from 9 to 18 months to complete.").

[18] 40 CFR 1501.8.

[19] The latter document offers some ranges, saying that "small" EAs "typically" require 2 weeks to 2 months, "large" EAs 9-18 months, and EISs "from 1 to more than 6 years." NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (2003), at 65-66. But there are no data to support these estimates on an agency-by-agency, or government-wide basis.

before moving to impose uniform limits – consider directing CEQ and the agencies to collect such data and report back.

1.3. Introducing new "unambiguous" criteria for each NEPA threshold will create new litigation issues while addressing concerns less effectively than existing processes.

The draft report recommends establishment of new statutory criteria defining the boundaries between categorical exclusions, environmental assessments, and environmental impact statements, and further suggests, "for example," that categorical exclusions would be the default standard of review for certain described activities unless compelling evidence called for review through an EA or EIS.

However, unless the statutory language directly tracks existing regulations, such an approach will create new litigation issues over the meaning of these criteria (such as "clearly minimal," "compelling evidence," "temporary activities") and their application to proposals.[20]

An alternative approach would be to use the existing mechanisms for creating categorical exclusions to address identified concerns. While categorical exclusions can be created by agencies, [21] many have not undertaken the process to do so in many years due to lack of initiative, funding, or staff time.[22] Because a categorical exclusion can be tailored by each agency to its own needs and because objections and comments are addressed upon adoption, litigation issues can be forestalled.[23] Encouraging or funding agencies to initiate a new review of categorical exclusions under the existing regulations could result in achieving the desired outcome without the adverse unintended consequences of defining new criteria by statute.

1.4. Criteria for supplemental NEPA documents are appropriately addressed in current regulations.

The draft recommendation proposes to codify the existing regulations governing when to prepare supplemental NEPA documentation. However, perhaps inadvertently, it incorrectly states the existing test as "and" rather than in the alternative "or."[24] Changing

[20] The boundary between an EA and EIS is already well understood. It is the "finding of no significant impact" that results from the EA. 40 CFR 1501.3, 1501.4(e), 1508.13.

[21] 40 CFR 1508.4 (defining categorical exclusions), 40 CFR 1507.3 (requiring agencies to adopt categorical exclusions in 1979 or within five months after establishment of the agency).

[22] CEQ's recent interagency Task Force noted that "developing and updating categorical exclusions occurs infrequently" and that "Most agencies have lists of categorical exclusions that were approved 10 or more years ago. Several Federal agencies have recently updated their categorical exclusion lists and others are considering doing so." NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (2003), at 58.

[23] The CEQ regulations define a categorical exclusion as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and *which have been found to have no such effect in procedures adopted by a Federal agency*…." 40 CFR 1508.4 (emphasis supplied). They also require the agencies to provide for "extraordinary circumstances" under which a normally excluded action might require evaluation in an EA or EIS.

[24] 40 CFR 1502.9(c)(1)(i)-(ii) (stating that agencies "Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that

the definition in this way would prevent supplementation of the analysis even when significant new circumstances arise, or when substantial changes are made to the proposed action that have not been analyzed in the original document, thus reducing the value of the analysis and excluding critically important information from agency and public consideration.

2.1. Specifying the "weight" given to "local" comments would introduce substantive litigable issues and increase analytic complexity, controversy, and delay.

The draft report recommends that CEQ be directed to prepare regulations that would require agencies to give greater "weight" to comments from local interests than from other commenters. This innovation would be highly unwise, as it would for the first time introduce into NEPA's environmental impact assessment a substantive element that prefers a specific outcome. Adopting this recommendation would introduce an entirely new set of litigable issues concerning whether such weight had been given and whether comments had been weighed appropriately against other comments or scientific findings.[25]

Such a proposal would complicate the NEPA analysis and render decisions vulnerable to challenge and potential litigation on entirely new grounds. For example, how should an agency "weigh" or evaluate the "locality" of comments from: two residents with summer homes, two ranchers, a dozen students and professors from the university in the nearest town, a corporation with headquarters in another state but an ownership interest in the project at issue, county commissioners and town officials from different parties, a national trade association, a statewide sportsmen's federation, and a scientist now retired to Florida who led 20 years of prior studies of the project area? A proposal to "weigh" some comments more than others could also mean that, for the first time in 36 years, the volume of comments based on proximity would matter more than their content.

In contrast, NEPA and the regulations currently require an agency to consider or "weigh" only the substantive content of the comment – *viz.* does it raise a genuine issue that must be addressed in order for the decision maker to understand the environmental consequences of the proposed major federal action?[26] Moving away from this sensible standard would convert the NEPA process into a version of polling, with a significant likelihood that the methodology would be litigated by those disappointed with the outcome. This would be a serious step backward, as it would produce campaigns to recruit competing "local" commenters and supply them with canned comments, while creating new grounds on which to challenge agency decisions.

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are relevant to environmental concerns; *or* (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.") (emphasis added).

[25] Contrast *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227, n. 47 (1980): "Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.'"

[26] 40 CFR 1502.9(b), 1503.4 (requiring consideration of, and response to, all substantive comments).

2.2. Page limits provide useful guidance.

The draft recommendation on page limits apparently would duplicate the existing regulations.[27] Such limitations, however, should not apply to the compilation or summary of substantive agency and citizen comments.[28] Page limitations should not be used to prevent transparency of issues relevant to the interested public.

3.1. A presumptive grant of cooperating agency status to tribal, state, and local stakeholders needs more support and funding to operate effectively; otherwise the result may be further delays.

The granting of cooperating agency status to tribal, state, or local governments is already authorized by the regulations, provided that the cooperating entity either has jurisdiction or special expertise with respect to any environmental issue that should be addressed.[29] CEQ has made express efforts to increase the extension of cooperating agency status to these nonfederal entities, and is actively evaluating agencies' experience in doing so.[30] However, CEQ notes that not all eligible entities have the technical capacity or expertise to serve as cooperating agencies, and that a presumptive grant of cooperating status, *if* unaccompanied by resources and support for the collaboration, may produce delays.[31] CEQ's own interagency Task Force recommends establishment of a Federal Advisory Committee to provide advice on how to improve cooperation in this area, and additional support for training and informational materials if such an approach is to be pursued effectively.[32] In addition, procedures will be needed to support termination of cooperating agency status if it results in extensive delay or missed deadlines.

3.2. Development of new regulations to substitute "state environmental review processes" for NEPA is premature.

Currently, most states with directly comparable "little NEPA" provisions already prepare joint documents with federal agencies under NEPA. This is expressly authorized and encouraged by the current CEQ regulations.[33] However, further regulation, and especially regulation substituting state processes for federal NEPA requirements, is premature before the CEQ study of state processes (draft Rec. 9.3 of this Task Force) has been concluded. Although 15 states and the District of Columbia and Puerto Rico have "little NEPAs," many of these programs lack key features of the federal statute, such as public comment, judicial review, and application to an equal range of activities.[34]

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[27] 40 CFR 1502.7.
[28] 40 CFR 1503.4.
[29] 40 CFR 1508.5, referencing 1501.6.
[30] Memorandum from James Connaughton to Heads of Federal Agencies, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002).
[31] NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (2003), at 26.
[32] Id. at 34.
[33] 40 CFR 1500.5(h) ("Agencies shall reduce delay by…eliminating duplication with State and local procedures by providing for joint preparation" of NEPA documents.); 40 CFR 1506.2(c) (one document meeting both state and federal standards).
[34] J. McElfish, "State Environmental Law and Programs" in S. Novick & Envtl. Law Institute, Law of Environmental Protection (Clark Boardman, updated annually), at 7:11.

This draft recommendation is also premature in the absence of results from the pilot program authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) enacted in 2005, which allows California, Texas, Ohio, Alaska, and Oklahoma to apply for delegation of the Department of Transportation's (DOT's) NEPA responsibilities under certain conditions, including passage of enabling regulations and waiver of sovereign immunity for judicial review. This pilot program could provide important insights into opportunities, problems, and necessary conditions.

4.1. Adding new litigation provisions is unnecessary and may introduce complexity into a simple system.

NEPA litigation is currently operating effectively to address governmental failures to consider meaningful information when making a decision. In general, fewer than 150 NEPA cases are filed in any year, even though the NEPA process is applied to 50,000-70,000 actions each year.[35] This suggests that the current legal rules and settled NEPA precedents have given rise to a great reluctance on the part of lawyers and litigants to litigate, save for a small subset of cases in which there is a high probability of demonstrating government error. A recent study by ELI of judgments in all 217 NEPA cases decided by federal district courts from January 2001-June 2004 found that the courts concluded that the government had erred in 44 percent of the cases. This high success rate (by both pro-environment and pro-development litigants) suggests that high quality cases are being brought and that there is little interest in bringing cases with low probability of success.[36]

The draft recommendation suggests constructing a new citizen suit provision, and refers to elements that might be engrafted on this provision. In many cases, these elements are unneeded or potentially introduce unnecessary complexity. Indeed, since NEPA litigation is brought under the Administrative Procedures Act (APA),[37] its rules and parameters are among the most well settled and least controversial of any litigation involving the federal government. Introducing a wholly new cause of action or citizen suit provision will necessarily also introduce new issues of interpretation, uncertain interactions with prior APA precedents, and issues for litigation.

For instance, one of the draft recommendations is that challengers be required to "demonstrate that the [NEPA] evaluation was not conducted using the best available information and science." This would convert what is now a straightforward "administrative record review" process[38] into one in which trial courts would be called on

[35] While CEQ estimated in 1993 that 50,000 environmental assessments were prepared each year by federal agencies, it is also the case that many actions are categorically excluded. It is unknown how many times categorical exclusions (CEs) are invoked each year, but it is surely in the many thousands, albeit less than the number of EAs. The Federal Highway Administration makes substantial use of CEs for its many actions subject to NEPA, for example. *See, e.g.*,23 CFR 771.117.

[36] Environmental Law Institute, *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act* (2004). This is consistent with historical data for NEPA, which found a 45.7 % success rate for plaintiffs in NEPA cases decided from 1970-84. Paul G. Kent and John A. Pendergrass, "Has NEPA Become a Dead Issue?" 5 Temple Envtl. Law & Tech J. 11, 15 (Summer 1986).

[37] 5 U.S.C. §§ 701-706.

[38] NEPA cases are generally decided on the basis of the administrative record compiled by the agency. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 (1978); *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021 (4th Cir. 1975).

to adjudicate scientific questions involving battles of the experts simply to dispose of a motion to dismiss, and apparently again on the merits. This is a solution in search of a problem.

The draft also suggests that the statute "clarify" that parties must be involved in the administrative process in order to have standing for judicial review. The courts have applied this as a matter of course to virtually all NEPA challenges under the usual requirements of the Administrative Procedures Act, making such an addition unnecessary.[39] The same concerns apply to draft proposals to construct a free-standing statutory law of "standing" under NEPA defining impact, involvement, and other standards. These are already settled by Supreme Court precedent in the APA and NEPA context, [40] but might be disturbed if expressed in new statutory language.[41] Recommendations concerning establishment of processes or policies for settlement of NEPA claims would be useful, but might best be addressed by Department of Justice or CEQ directives or policies.[42] Finally, a separate statute of limitations for bringing NEPA claims would probably not change existing practice very much.[43]

4.2. The "pre-clearance" proposal is ambiguous.

The draft recommendation appears to insert CEQ directly into agency NEPA review prior to a federal agency's development of an administrative record. Such an approach is probably beyond CEQ's limited staff and financial resources and might also result in unclear decision-making authority for the many actions subject to NEPA that are now carried out by responsible federal agencies. The draft also recommends that CEQ monitor court decisions and prepare guidance documents and interpretive advice for federal agencies on NEPA requirements, a function that CEQ currently performs.

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[39] The ABA's NEPA Litigation Handbook notes that under current law, "A party who fails to raise an issue during the public comment period on a draft EIS may be barred from raising that issue in a subsequent action for judicial review of the agency's final decision." K. Sheldon & M. Squillace (eds.), The NEPA Litigation Handbook (1999), at 122 (citing the Supreme Court's NEPA decision in *Vermont Yankee*, among other citations).

[40] *See, e.g. Lujan v. National Wildlife Fedn.*, 497 U.S. 891 (1990) (APA/NEPA standing).

[41] The draft report also discusses other litigation issues and suggestions, such as posting a bond (report at 12); but this too is covered by existing law covering civil litigation and already applicable to NEPA, subject to court oversight. *See* F.R.C.P 65(c) (posting of bond for preliminary injunction, as determined by court); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (upholding bond amount for preliminary injunction).

[42] The approach expressed in the draft (statutorily constraining the Department of Justice from some types of settlements with "severe" effects on non-party "businesses") could have the inadvertent effect of requiring plaintiffs to join as party defendants interested businesses, which could unnecessarily proliferate litigation against parties who might or might not have chosen to intervene, causing them to incur expenses. Also, developing a statutory protection only for "businesses" may raise significant equal protection and statutory interpretation issues that could be avoided by addressing settlement issues non-statutorily.

[43] While NEPA claims are technically covered by the general six-year statute of limitations for claims against the United States, in practice, courts require rapid action if they are to consider a NEPA claim. *E.g. Save Our Wetlands v. U.S. Army Corps of Engineers*, 549 F.2d 1021(5th Cir. 1977) cert. den. 434 U.S. 836 (1977) (laches); *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75 (4th Cir. 1989) (balance of harms). Plaintiffs also act expeditiously because doing so makes it possible to seek injunctive relief that would otherwise be lost. ELI is aware of no studies that suggest NEPA lawsuits are often, or even infrequently, filed long after decisions have been made.

5.1. New statutory thresholds for alternatives analysis could impair the influence of states, local governments, tribes, businesses and the public.

The draft recommendation would apparently supplant the existing requirement in the regulations that NEPA documents consider "reasonable alternatives" and briefly discuss why other potential alternatives were eliminated from detailed study,[44] and instead require that alternatives be analyzed only if they are "supported by feasibility and engineering studies" and have certain economic effects if implemented. This approach puts the cart before the horse, in that it prohibits analysis of alternatives that are not already fully analyzed. Such an approach is not only unworkable, but it neglects the well-developed approach of the CEQ regulations that allows agencies to define reasonable alternatives based on a rule of reason. Moreover, allowing agencies to exclude alternatives merely on the grounds that they have not already prepared a feasibility study and technical analysis in advance of the NEPA process would convert NEPA review from a process that genuinely takes into account comments and information from the public, local governments, businesses, and tribes into one wholly dictated by the federal agency.[45] The feasibility and engineering studies must follow, not precede, identification of alternatives.

5.2. Current "no action" review standards are sufficient and appropriate.

Under the NEPA regulations, federal agencies are required to consider the environmental impact of not taking action on a proposed project. The draft recommendation apparently overlooks 40 CFR 1502.16, which (together with 1502.14, cited in the draft) already requires what it proposes – consideration of the impacts of the no action alternative.

The draft recommendation would add a new requirement that an agency must reject the "no action" alternative if impacts "outweigh" on balance the impacts of the proposed action or decision. This would for the first time introduce a substantive outcome requirement into NEPA – a law that has been held consistently by the courts not to dictate a specific outcome, but rather to inform an outcome that is primarily controlled by an agency's authorizing legislation and discretion. Such a provision could generate conflict with the substantive law that the agency is primarily responsible for administering, and would also create a new set of litigable issues that the Supreme Court long ago eliminated – *viz.* review of whether the agency *correctly* evaluated the impacts and the benefits of competing alternatives.[46]

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[44] 40 CFR 1502.14(a).

[45] In numerous cases, NEPA alternatives proposed by towns, tribes, individuals and others have been selected by federal agencies in preference to those the agency started with, after completion of the NEPA review. *See* Center for the Rocky Mountain West, Reclaiming NEPA's Potential: Can Collaborative Processes Improve Environmental Decisionmaking? (2000), and CEQ, The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years (1997). *See also*, "The Role of NEPA Alternatives" 35 Envtl. L. Rep. 10911 (Dec. 2005) (list of citizen and non-federally proposed alternatives that produced superior outcomes).

[46] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.").

5.3. Regulations to require mandatory mitigation proposals could improve environmental performance.

In general, the NEPA process, whether through an EIS or EA/FONSI, results in the identification of mitigation measures and alternatives with mitigation that produce improved environmental outcomes. There is, however, a serious gap in current practice – *viz.* that mitigation, once proposed in a NEPA document, is not necessarily implemented or monitored. Adding such a requirement to link implementation obligations to the continued validity of a NEPA document could improve performance under the regulations.

6.1. Regulations to encourage more consultation with stakeholders would be appropriate, but such purposes can also be achieved by ongoing CEQ initiatives with sufficient financial support.

Consultation and collaboration are both key to sound NEPA performance and effectiveness, but CEQ has already found that the obstacles (and opportunities) lie with commitment of resources and staff rather than with defects or obstacles in the regulations. Financial support for these functions would improve NEPA's consultative effectiveness.[47]

6.2. Supporting lead agencies' coordination and development of integrated administrative records is sound.

The draft recommendation would duplicate existing regulations.[48]

7.1. A NEPA ombudsman could assist the process if done transparently.

To some extent, CEQ staff already serve an ombudsman-like function in controversial or complex NEPA issues among the federal agencies, and have been very effective in mediating and resolving problems. Establishment of a NEPA ombudsman at CEQ or in the agencies could be useful if sufficient funding were provided, and provided further that the process were conducted with full transparency to assure the public and stakeholders that all interactions with analysts and decision makers were consistent with publicly available information. In addition, activities by an ombudsman would need to become part of the administrative record of any NEPA process and decision in order to forestall any issues that might lead to disputes or litigation over record review. Giving an ombudsman "decision making authority" may not be necessary, but would, if adopted, need to be carefully bounded in order to prevent transferring substantive agency authority to CEQ.

7.2. A CEQ study of ways to control NEPA costs would be beneficial.

The recommended study could be combined with the suite of studies recommended in draft recs. 9.1-9.3.

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[47] NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (2003).

[48] 40 CFR 1501.5. Indeed, the proposed "additional concepts," such as consolidated documentation, are already present in the regulations. *See* 40 CFR 1500.4(o), 1505.1, 1506.4.

8.1. Clarifying how agencies measure the effect of past actions on cumulative impacts would be better addressed by rulemaking.

The report identifies an issue and proposes an outcome that would benefit from detailed scrutiny by all interested parties, including CEQ and the affected federal agencies, in a notice-and-comment rulemaking. In contrast, the draft recommendation would apparently freeze in place whatever approach an agency currently uses for assessing current environmental conditions, whether or not this approach were methodologically sound or adequate to the evaluation task at hand. Legislating a single approach to the complex problem of projecting future impacts of previous actions and commitments of resources might engender substantial confusion and could lead to litigation over whether the method used in an evaluation is really the agency's current one or some other method. The cumulative impact issue deserves more attention by agencies and stakeholders that deal with it on a day-to-day basis before a single approach is locked in place by statute – particularly because agencies' current assessment methods may be the source of difficulty rather than the solution.[49]

8.2. New regulations focusing analysis of cumulative impacts of future actions on "concrete proposed actions" may unduly limit the analysis and hence its value to federal decision makers.

Current regulations specify that analysis of cumulative impacts includes "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions."[50] Limiting the analysis to "concrete proposed actions," might, for example, lead a water resources or wildlife agency to ignore the fact that population in a watershed is expected to increase by 50 percent over the next 25 years, even though no subdivision plats have yet been filed. Such an approach might also violate the standards embodied in NEPA §102(2)(C)(ii), (iv), and current NEPA case law.

9.1, 9.2, 9.3. The recommended CEQ studies would be very useful in improving practice under NEPA.

The Task Force draft recommends that CEQ undertake several studies. These include studies of NEPA's interaction with other federal environmental laws, studies of current federal agency NEPA staffing issues, and studies of NEPA's interaction with state "little NEPA" laws. Other Task Force recommendations, such as Rec. 7.2 for evaluation of ways to control NEPA costs, also suggest important studies that can improve NEPA performance. ELI also notes that several additional areas covered in the Task Force draft recommendations would benefit from CEQ study prior to any new legislation or rulemaking (*e.g.* cumulative impacts, data on reasons for exceeding time limits, Recs. 8.1, 1.2). The recommended studies would help determine where reforms could be targeted and where efficiencies can be gained, particularly if they are done rigorously using a clear methodology. This approach would enable CEQ and the Congress to

[49] CEQ has done important background work in the area of cumulative impacts, including issuing a major and highly useful guidance document. Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act (1997). However, substantial additional work is needed.
[50] 40 CFR 1508.7. Cumulative impacts can result from "individually minor but collectively significant actions taking place over a period of time." *Id.*

address the issues of uncertainty; exclusion of state, local and tribal governments; costs; and delays, identified as core concerns in the Task Force's report.[51]

It will be necessary to provide adequate funding for such studies, as undertaking them without dedicated funding is likely to burden a CEQ staff which remains correctly focused on facilitating the functioning of the NEPA process across dozens of federal agencies.

Conclusion

While this Task Force took on a substantial review task and an ambitious schedule including numerous hearings, it should not feel obliged to offer statutory changes to justify either its appointment or the very substantial expenditure of effort by its members and staff. By analogy, a thorough health check-up and battery of tests is not wasted if it results in recommendations for changes in diet or exercise (or a clean bill of health) rather than surgery.

The Task Force's final recommendations would especially benefit from consideration of the advice of the expert entity in the Executive Office of the President with jurisdiction over NEPA. The Council on Environmental Quality's Chairman testified before this Task Force, in testimony cleared by the Office of Management and Budget, that while NEPA "practices" can be improved, the statute and regulations have both demonstrated their continuing vitality and "stood the test of time."[52]

[51] Task Force Initial Report and Draft Recommendations (Dec. 21, 2005), at 10.
[52] Statement of James L. Connaughton, Hearing of Task Force on Improving the National Environmental Policy Act, House Committee on Resources, Nov. 17, 2005, at 10.

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