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Recommendations to Improve and Update the National Environmental Policy Act  
Presented to  
Representative Cathy McMorris, Chairwoman  
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\*

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

## Executive Summary

This paper presents a comprehensive set of recommendations to improve and update the National Environmental Policy Act (NEPA). These recommendations clarify and expand on the recommendations and findings presented in the Initial Findings and Recommendations report issued on December 21, 2005 (“Initial Report”). The recommendations in this paper are produced following review and analysis of the public comments submitted on the Initial report.

Summary of Comments on Initial Recommendations – The primary point raised by reviewers of the Initial Report is that the initial recommendations needed additional clarification or explanation. Indeed, that was one of the principle points of seeking public input on the initial set of recommendations. That is, the Task Force is relying in part upon those who work with NEPA to provide input that provides needed clarity. Much like the testimony and comments received through the Task Force NEPA review process; there are two distinct views of the current state of the NEPA process. The first is that the status quo is adequate and must be maintained. Obviously, this viewpoint lends itself to a skeptical opinion on any recommended changes to NEPA. The other perspective is that some improvements will have benefits to all stakeholders. Those who expressed the viewpoint appreciated the possibilities of change, but still urged the Task Force to understand that any changes cannot undermine the underpinnings of the statute. It was this latter category of comments that yielded the most constructive comments.

Recommendations – This report sets out 20 recommendations (some with sub-parts) that are based in large measure on input received on the recommendations presented in the initial report.<sup>1</sup> The recommendations were also developed through analysis of additional research and study of events that transpired subsequent to the release of the Initial Report. These final recommendations represent refinements to the initial recommendations. The process of refinement in some cases resulted in an initial recommendation being dropped. In developing these final recommendations it is important to note that the number of comments in support or opposition was not the primary factor. The main reason for the presentation of a particular final recommendation is the net effect the Task Force believes it will have on improving NEPA and its directives. For the sake of consistency with the Initial Report, the final recommendations are presented in the same categories as draft recommendations:

- 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

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<sup>1</sup> Some comments presented the Task Force with recommendations beyond those in the Initial Report. This was encouraged and the recommendations received were in some cases quite valuable. It is important that all of the recommendations received be reviewed and analyzed going forward.

The final recommendations within these groups are legislative as well as administrative actions. Implementing these recommendations – whether changes to NEPA or directions to CEQ – will require legislative action.

### **Summary of Comments on Initial Recommendations**

The following is a brief discussion of the comments received on the Initial Report. The Initial Report was released on December 21, 2005. The comment period was open for 45 days, ending February 6, 2006.<sup>2</sup> Approximately 250 substantive comments were received. Those providing comments fell into the following groups:

- Individuals
- NEPA practitioners
- Interest groups
- Business and industry
- NEPA lawyers
- State/local governments

Comments were received via e-mail, fax and standard mail. Copies of the comments are available on the Committee on Resources website at:

<http://resourcescommittee.house.gov/nepataskforce.htm>. It is important to point out that improving NEPA is an evolving process and all comments received on the initial recommendations will be kept for use in the continuing debate on improving NEPA.

Many of the comments were easy to characterize as “pro” or “con” with respect to modernizing NEPA. However, this characterization is not easily attached to the type of author. In addition, the bulk of the comments expressed the desire for more information from the Task Force. Further, many comments offered additional suggestions that would strengthen the recommendation. Of course, there were several comments that advocated the deletion of a recommendation.

Almost without exception, comments that wished to see the current process remain unchanged suggested that any of the recommendations would automatically result in a weakened NEPA. This vehement defense of the status quo was not, in the majority of cases, persuasive. One refrain was the notion that “streamlining” the statute equates to “gutting” it. Unfortunately, those with this perspective believed there is no middle ground. This view was more than offset with a number of comments that noted NEPA is a valuable tool for government decision-making that should not be abandoned because of its benefits yet it could be strengthened by the recommendations.

There were also some comments that suggested that the recommendations presented in the Initial Report would allow the NEPA process to be inappropriately influenced by interest groups. In commenting on addressing delays in the process and litigation, some commenters suggested that there is “business-government” collusion. This was unsubstantiated but indicative of the skeptical view of the recommendation from interest group authors. Another

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<sup>2</sup> The 45<sup>th</sup> day fell on a weekend, thus the period was extended until Monday the 6<sup>th</sup> of February.

example, was the suggestion that some of the recommendations having to do with creation of a citizen suit would “tip the balance in favor of business interests.” This myopic response missed the clear intent of the recommendation, which is to create a framework for bringing up a NEPA lawsuit. It is not obvious how setting out the process in which a suit would be brought would favor any potential litigant.

Finally, there was some suggestion that some of the recommendations were not “warranted.” This position was most often expressed by those who did not want their particular role in the NEPA process to change. Obviously, all of the recommendations are defensible based on the record compiled through the Task Force hearing process and are therefore “warranted.” Therefore it is evident that the argument that a particular recommendation is “warranted” or not is actually rooted in what one commenter “wants” or not.

The majority of the comments focused less on trying to divine the motives of the Task Force and more on proving input to make the NEPA process better. These comments discussed how the recommendations would ensure NEPA remains a valid and functional law. These comments ran the gamut from minor alterations to the initial recommendations to suggesting wholesale changes. The comments supporting the basis for the initial recommendations noted many weaknesses in the current NEPA process that are in fact undermining the law’s effectiveness. For example, in arguing the need for reforms in the use of supplemental NEPA documents it was noted that the existing mechanisms created a near-endless NEPA process. The result is incomplete or initiated federal projects. In sum, the constant thread running through the supportive comments was while there is much good about the NEPA process, there are elements causing enough uncertainty to warrant modest improvements and modifications to both the statute and its regulations.

This initial report represents the next step in developing a set of measures that will update the statute 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. To do nothing would be a disservice to all stakeholders who participate in the NEPA process and against its initial intent.

A final note, the path to modernizing NEPA through Congressional action is a lengthy one. There have been a number of positive and important efforts to address particular NEPA issues. It is critical that these other specifically tailored attempts to streamline NEPA and address distinct inefficiencies should not be abandoned as the debate on comprehensive improvement progresses.

## **Analysis of and responses to the comments received on Initial Report**

### Group 1 – Addressing delays in the process

Opinions are split on both whether delay exists and if it does, what should be done about it. It appears from some comments that there are no delays, just “complex projects” that take years to analyze. Yet others, including government agency personnel, expressed frustration with the length of the NEPA process. This debate lies at the heart of what qualifies as a “major federal action” (Recommendation 1.1). The current “definition” is largely a product of case law.<sup>3</sup> It was mentioned that the 30-plus years of case law has created “uniform guideposts” though it is not clear what these “guideposts” are or specifically what would be the detrimental effect of changing them. Some commentors suggested that a clear “go/no go” type of definition is needed. Contrast this with those who suggested that any definition, if too rigid “could exclude large but insignificant projects as well as those which are small but significant.” Other commentors suggested that the proper focus should be on whether a decision is “major” or not. Rather the importance should be focused on the overall “significance” relative to the environmental impact. This idea has merit. Clear criteria from CEQ for what constitutes a “significant” action would provide useful clarity to support a statutory definition.

In terms of the creation of timelines (Recommendation 1.2), those in opposition suggest that the proposed 18 month timeline for the preparation of an Environmental Impact Statement (EIS) and 9 month timeline for Environmental Assessments (EA) are “arbitrary.” This statement makes little sense. There are no timelines in current law or regulations, thus any proposed timeframes could be considered “arbitrary.” However, it was proposed in direct testimony that timeframes are the “single most important potential reform in eliminating delay from the process.” In fact, one commentor suggested it must be clear that the 18 and nine-month timeframes should be outside limits because NEPA compliance “can take place more expeditiously” than the time limits” presented in the initial report. Several other comments noted the value of timelines pointing out that in their absence the result is “unfinished” or “uninitiated” projects. Therefore, it stands to reason that the timeframes presented in the Initial Report are fair, appropriate and necessary.

On the subject of the unambiguous criteria for the use of Categorical Exclusions (CE), EA and EIS (Recommendation 1.3), it was stated by multiple commentors that the current CEQ regulations aim to provide the clarity sought by this recommendation. There were differences of opinion if that goal is being achieved. For example, some commentors believe the current process is effective and efficient. However, evidence suggests that agencies are defaulting to Easy and EIS and struggling to utilize the CE. It should be noted that the difference between an EA and EIS can mean years. One need only look to the repeated comments that suggested that federal agencies are attempting to “bulletproof” their NEPA documents. This reality translates into Easy that are as detailed as an EIS and then lead to a “mitigated FONSI.” Without question, clear and reliable criteria are definitely needed. Those comments that supported the creation of unambiguous criteria disagreed as to whether the criteria should be legislative or regulatory. It seems sensible that this could be a

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<sup>3</sup> To be fair, there is a definition of “major federal action” in 40 CFR 1508.18. However, like many regulatory provisions it has questionable value in terms of providing clarity.

regulatory exercise. As stated above there already have been efforts to do this through CEQ. Further, a regulatory pass allows for the needed public participation.

The final recommendation in this group addresses the use of supplemental NEPA documents, namely how and when the supplemental EIS should be used (Recommendation 1.4). The purpose of examining this specific component of the NEPA process is most certainly to reduce the occurrence of supplemental NEPA documents. If the NEPA process were working as it was intended, the need for supplemental NEPA documents would be limited. Evidently, the process is defective in some respect as supplemental EISs are becoming standard. Some commentors properly acknowledged that there is existing regulatory language that speaks to this issue. However, it was also correctly pointed out that the current regulatory framework allows project opponents to reopen the NEPA process through the use of supplemental documents without a showing of a wholly distinct federal action. This exposes a weakness in the process whereby an agency believes it has an “obligation” to reopen the process for any type of new circumstance. Some comment suggested that this “obligation” is appropriate. A number of examples provided in support of this appeared to cite very specific examples rather than providing an explanation of why the systemic use of the supplemental NEPA documents is proper. Given the potential for delays if an agency chooses to reopen the NEPA process, the need to reform this practice remains important.

#### Group 2 – Enhancing public participation

The first recommendation in this group proposed to give federal decision makers the ability to assign value to the comments from the stakeholders most directly impacted by a particular action (Recommendation 2.1). It was evident that many commentors misunderstood the recommendation. There is no logical reason to deduce that this recommendation would curtail public comment. All the comments that would be reviewed presently would still be reviewed if this recommendation were in place. The basis for this recommendation is the fact that those closest in proximity to a federal action are in the best position to understand its impacts – especially the significance – to the environment and economy.

There were many comments that expressed concern about what was meant by “local” comments. Questions were raised about projects that are “regional” in scope (i.e., covering more than one geographic element such as a city, county or state). The term “local” was not intended to create an artificial limitation on the type or source of comments. Rather than focusing on whether or not comment is from a “local” entity, the principle is to focus on comments from entities that will experience the most significant effects of the federal decision. It was interesting to find from the comments that no group spoke of an obvious benefit of this recommendation which is the empowerment of local groups. It is a clear benefit to local citizen and business groups if their comments are given greater consideration. Finally, it was clear from reviewers of this recommendation that there would be a greater number and higher quality of comments.

With respect to what “weight” should be given and how to do it, there was similar confusion. At the outset, it must be reiterated that the proposed recommendation states that CEQ would be charged with creating a system whereby all agencies would develop their own criteria. This is not a statutory change. While it is clear the agencies currently have methods to sort through and evaluate comments, it is evident that comments from those who will experience

the greatest impact are given the same consideration as those who comment as a matter of principle. NEPA's requirement for public participation is an attempt to solicit comments that are as specific as possible on the adequacy of the proposed action, including any appropriate alternatives. Therefore, generalized comments are not consistent with NEPA's stated goals. Agencies must be instructed to give greater consideration to comments that are generated from those that will feel the most significant impact. The arguments that these are too inflexible for agencies to implement or that commentors will be somehow "disenfranchised" are not persuasive. Placing emphasis on comments from those facing the greatest significance does not in any way denigrate other comments.

The next recommendation in this group would amend NEPA to codify page limits currently set forth in CEQ regulation (Recommendation 2.2). Surprisingly, despite the existence of page limits in regulation, some commentors suggested the page limits are "arbitrary." This comment on one of the more straightforward and less controversial recommendations suggests two things about the state of the NEPA process. First, it acknowledges the lack of force suffered by the CEQ regulations. Second, it shows that for the ardent defenders of the status quo, any type of refinement of NEPA to improve the process, even the simple codification of existing regulatory language, will meet with resistance.

In support of this recommendation many comments noted that current NEPA documents are "massive" and create situations that make it difficult for the general public to develop "meaningful comments." This idea was articulated for a wide range of projects and not confined to one time of federal decision. Further, it was stated that enforcing the page limits currently set forth in CEQ regulations would assist in making NEPA documents "more user-friendly for both agency decision makers and the general public." In addition, other commentors noted that having statutory page limits would complement the time frames as set forth in Recommendation 1.2 as methods to reduce the delays associated with preparing NEPA documents. One comment suggested that any page limits be applied to EAs as well.

Those opposed to page limits proffered the argument that NEPA documents should "be as long as [necessary]" and that page limits would unfairly truncate the analysis that goes into them. This is, of course, at odds with CEQ regulation directed at reducing paperwork in the NEPA process. Moreover, it was stated that inadequate resources are the "root cause" of lengthy delays. Interestingly, government comments suggested the opposite challenge – that the length of the documents is unnecessarily taxing current resources. Finally, one comment noted that shortening the length of NEPA documents by statute is inappropriate given "pervasive public sentiment" that agencies are already treating the NEPA process in a "perfunctory manner." This contention is without merit. It contradicts the widely held (although admittedly contradictory) beliefs that: a) agencies don't need a change in the NEPA process because the status quo is adequate or b) that agencies are spending too much time on the NEPA process. Either way, there is nothing to suggest that the NEPA process has become a "perfunctory" exercise.

### Group 3 - Better involvement for state, local and Tribal stakeholders

While there are existing regulations providing for "cooperating agency status," the Task Force heard from a number of state and local governmental entities that they are unable to have their voices effectively heard at critical points in the NEPA process. The intent behind

Recommendation 3.1 is to address this issue and ensure that governmental entities are given the appropriate seat at the table. The result of this dialogue will be a greater investment by these entities early in the process while reducing conflicts.

Reactions to this recommendation were mixed. A tribal commentator noted that there may be an adverse effect on “the federal duties and responsibilities to tribes” if the Federal government is required to accept conditions from state and local governments. However one NEPA practitioner suggested that tribes should be granted cooperating agency status because they are sovereign. Other commentators believed that the recommendation has merit but needed to be adjusted to ensure that non-governmental entities are not mistakenly included and to avoid instances where states could inadvertently “trump” the rights of other states.

A number of comments, obviously in opposition, strongly believe that this recommendation will cause “dysfunction” within the NEPA process. For example, even if narrowly defined, it is possible in practice that the number of cooperating agencies could be “unlimited.” This is a valid point and given the potential for disruption of the NEPA process, it certainly merits further consideration before inclusion as part of the statute.

The other recommendation in this group will eliminate duplicative environmental analysis where state law and NEPA present equivalent requirements (Recommendation 3.2). This recommendation introduced the concept of “functional equivalence” for satisfying NEPA’s requirements. This recommendation directs CEQ to craft regulations that would allow agencies to judge the NEPA process satisfied if the state environmental requirements contain equivalent features such as a detailed statement, public participation and scoping. At present, as one commentator noted, there are eight states that would qualify as having “functionally equivalent” state NEPA processes based on the ability to best overlay their requirements on NEPA’s requirements. It is assumed that in the regulations CEQ would contemplate situations where a project would cross state lines or involve one state with a “mini-NEPA” and one that does not.

Supporters of this recommendation noted the unnecessary expenditures of time and money on duplicative analyses. As one comment stated:

“as long as the environmental impacts of a proposed project are considered it should not matter whether the analysis is completed under the state review process or NEPA’s requirements.”

Indeed, it was suggested that the current practice is to require NEPA review and state review in “series rather than in parallel.” To the extent that the equivalent requirements are being met, this makes little sense.

The primary argument advanced by several groups in opposition to this provision that federal projects located in one state “may affect all Americans” is misplaced. The basis for this assertion seems to be rooted in the notion that federal projects affect lands “owned by all the taxpayers” and therefore state “mini-NEPA” statutes are inappropriate for federal projects. Of course NEPA is not limited to “public lands” decisions nor does it involve projects that are “national” in scope.

It makes perfect sense that a project that requires state and federal analysis in the state of Washington could utilize the State Environmental Policy Act process as appropriate and avoid a redundant review under NEPA just for the sake of an additional review. Further, state NEPA equivalent statutes are not “project specific” and make the attempt to mirror NEPA. Finally, for this recommendation to be effective, the CEQ regulation must ensure that the state NEPA’s are more than “facially” similar. The state statutes must provide at least NEPA’s requirements of public participation, cumulative effects and alternatives analysis.

#### Group 4 – Addressing litigation issues

The initial recommendation in this group is the creation of a citizen suit provision within NEPA (Recommendation 4.1). This recommendation creates a framework for judicial review procedures under NEPA. One commentor summed up the value of this recommendation by stating that the “greatest reduction in ... delays” would be the reduction of litigation. A number of reviewers provided alternative means to manage NEPA litigation. However beneficial these proposals appear, the fact remains that they would allow judicial review of NEPA decisions to be governed solely by the Administrative Procedure Act (APA). The APA-based structure leaves little or no room for improvements.

As pointed out by several commentors, NEPA litigation, of course, has its benefits. It does add accountability for government decisions under NEPA. However, the aggregate effect of litigation on the federal government’s ability to initiate or complete projects remains an issue. Moreover, many comments seemed to be putting forth the notion that litigation was “essential” perhaps as some way to “protect the commons.” This is a typical defense of environmental litigation and one that is blind to the overall negative effects on federal government decision-making. In light of these arguments, this provision was crafted with the aim of reducing needless litigation brought only to delay or derail projects while providing guidance for any stakeholder wishing to exercise their right to pursue legitimate grievances.

There was strong reaction to this recommendation. The comments ranged from the notion that it would “close the courthouse door” to “it does not go far enough” to reduce NEPA litigation. It was noted that a citizen suit provision would “disrupt massive body of [NEPA] case law.” This is a curious assertion. There is nothing in the recommendation that would retroactively change any decision or process for bringing suit. Therefore, it is difficult to understand how the provision would be disruptive. Also, it should not be forgotten that NEPA is a “national policy” to be applied without regard for the borders of a particular judicial circuit. Therefore any modification to the statute that would apply nationally is far superior to defining the statute through a patchwork of case law. Further, there is little sense to the declaration that this recommendation will “place significant restrictions” on the ability to sue for NEPA violations. It seems logical that if a NEPA related lawsuit is truly valid, there should be little difficulty asserting in the complaint that the disputed government action is in contravention of the best information available to it at the time of the decision. Moreover, it also seems to maintain the status quo with respect to deference to agency decision-making and prevents them from having to conduct “fishing expeditions” to explore all potential impacts – no matter how remote or irrelevant they may be. Frankly, having a best information and science standard will reduce the incentive to bury a federal decision

maker with useless information that has as its primary basis, the creation of reasons to file lawsuits.

With respect to the standing component of Recommendation 4.1 it was characterized by some as having the potential of erecting “barriers” to prevent citizens from bringing legitimate suits. Quite the opposite, the recommendation was correctly viewed by others as an effective means for bringing issues to the forefront before litigation becomes the only option. It is consistent with NEPA’s core principles to air issues at the earliest possible point in the process rather than introducing new ones after the main period of public participation has concluded. Although the fact that some courts have suggested that issues be fully raised during the NEPA process, there is no downside to providing additional certainty.

Distinct from the requirement requiring an appellant advance arguments during the NEPA process before they are able to raise them during litigation, is the proposal to create clear guidelines for standing to challenge NEPA actions. As commentators properly point out, courts are already adept at “policing” standing in most cases – including NEPA. Further, it is true that current case law concerning Article III standing obviates the need for additional standing requirements.

Another component of this recommendation is to include stakeholders that will be affected in settlement discussions. Clearly, most NEPA disputes are between interest groups on one side and the government on the other. Many times, there are groups, companies, and individuals with a pecuniary interest in a project. Despite this fact, these groups often play no role in settlement discussions. A number of commentators referenced the need to access the legal system when their interests would be impacted. These commentators believe the recommendation will provide that needed avenue without disrupting the NEPA process.

The other recommendation in this group is a mechanism for curbing needless litigation through early CEQ involvement. The phrase “pre clear” gave rise to some confusion. Understanding that CEQ currently provides general guidance to federal agencies, the goal of this recommendation was for CEQ to provide specific legal guidance to agencies to ensure that they understand the current landscape of NEPA case law. It seems reasonable to modify this recommendation instructing that CEQ (with the acknowledgement that additional resources may be necessary) provide ongoing analysis of NEPA cases and provide that information to agencies on a proactive and as requested basis.

#### Group 5- Clarifying Alternatives Analysis

The initial recommendation in this group seeks to refine the number of alternatives that must be reviewed by a federal decision maker (Recommendation 5.1). The purpose is not, as many commentators suggested, an attempt to restrict the number of viable alternatives (i.e., ones that are truly feasible in light of the project’s purpose and need) that must be considered to meet NEPA’s mandate. As one comment put it agencies receive many alternatives “far outside the scope of the proposal” and feel compelled to respond to each one, lest they face litigation. Indeed, several comments noted that agencies, per a multitude of court decisions, have “flexibility” to exercise a “rule of reason” when reviewing alternatives. If this authority is appropriate and legally sufficient, it does not seem to reconcile the fact that an agencies “failure” to examine “reasonable” alternatives continues to be the most litigated issue in

NEPA related cases. It makes perfect sense to provide federal agencies with sideboards to enhance their existing abilities.

In response to the argument that the requirement that an alternative be supported by feasibility or engineering studies it should be noted that this is a requirement for the agency, not the public. Those alternatives provided to the agency by way of public comments would not have to have an accompanying economic or technical analysis. The practical effect of this recommendation's requirement would be that the agency will conduct these analyses before the NEPA document is released for public consumption. Thus, the alternatives presented to the public will have a solid foundation. All interested parties will be allowed to present whatever alternatives they wish, but the agency will be free to discount those that are not supported by the purpose and need and are inconsistent with the agency's feasibility analyses.

The second recommendation deals with how to treat the "no action alternative" and its variations (Recommendation 5.2). It is unclear if agencies are giving the "no action alternative" the same consideration as other alternatives presented in a NEPA document. For example, it does appear that agencies believe that doing "something" will have some degree of impact while doing nothing just maintains the status quo. While this is true in some limited cases, it has to be the case that the status quo is not as good as alternatives proposed in the NEPA document – or what is the real value of the project at all? Therefore, if "no action" is going to make matters worse or not improve them, then the agency should feel compelled to discuss that fact and it would stand to reason that it would be rejected. Again, while commentors opposed to this recommendation asserted that agencies are treating the no action alternative adequately at present, evidence presented to the Task Forces proves otherwise.

The third and final recommendation in this group is focused on enforceable mitigation (Recommendation 5.3). Comments on this recommendation were generally positive. The concern with the current state of affairs with respect to mitigation is that "promises" are being made but not kept. This is not to say, however, that federal agencies are intentionally disregarding their mitigation proposals. Comments noted there is a definite need to build in some criteria that will hold agencies responsible for the mitigation proposals they themselves present to the public. It was also pointed out that this requirement is already present in the California "mini NEPA." The net benefit, as the commentors saw it, is that having enforceable mitigation will strengthen the "mitigated FONSI" that sometimes follows an EA. This process is certainly shorter than the preparation of an EIS and if complemented by enforceable mitigation, then it will be less subject to challenge. Those in opposition offered that it is "unclear if CEQ has the authority" to promulgate this regulation. Clearly, this recommendation would grant CEQ this authority if it does not presently exist. Further, CEQ is the proper entity to work with agencies to develop the enforcement measures that are the most workable and effective.

#### Group 6 – Better Federal agency coordination

The group starts out with a recommendation to increase the current consultation with stakeholders (Recommendation 6.1). This recommendation was met with widespread support – with some suggested enhancements. It was agreed that "increased and early"

communication and consultation can only help to further NEPA's goals. It was also pointed out that, at present, stakeholders are not "brought to the table" until decisions are already made by the agency. Thus it is important to begin consultation "prior [to conducting] a full environmental analysis. Some commentors expressed uncertainty with the meaning of the periodic consultation referenced in the recommendation. There is no specific requirement of how the consultation should work. Rather, CEQ is instructed to encourage more consultation with interested parties; how they do that is largely up to CEQ. Other comments raise valid points about who should qualify for consultation. Some commentors noted there should be "stratification" of stakeholders – those with greater responsibilities should be allowed greater consultation. This seems reasonable and would not appear to disenfranchise any state, local or national interested party.

The other recommendation in this group codifies the current regulation on lead agencies (Recommendation 6.2). As stated in the language accompanying the recommendation, clarifying the role of lead agencies has been done in legislation. Comments on this recommendation ranged from "worthwhile" to "unnecessary." In reviewing the comments, it appears that while there is existing regulation on the role of lead agencies, its directives are not "carried out due to conflicts between agencies." This is problematic and justifies the solution set out in the recommendation. The lead agency is responsible for core NEPA decision such as purpose and need and alternatives. Given its critical role, lead agencies must have clear guidelines for the "across the board." However, some comments noted that codifying the existing regulation with the additional concepts presented in the regulation may create a situation where agency flexibility is unduly restricted. In other words, it is important that "particularized attention" must be paid to the mission and "undertakings" of an agency. This is an important point and the recommendation is modified accordingly.

#### Group 7 – Additional authority for the Council on Environmental Quality

The recommendations in this group will give CEQ additional authorities to reduce inefficiencies in the NEPA process. The first recommendation creates a "NEPA ombudsman" within CEQ to resolve conflicts between agencies and among stakeholders (Recommendation 7.1). There was little support for this recommendation. Some considered it "radical" in that it would now involve CEQ in a dispute resolution role down to the "project level." Moreover, several commentors suggested that the recommendation is "unnecessary" given the existing authorities. These comments pointed out that the current mediation process includes "informal" dispute resolution that works rather well. Further, some thought the addition of "another decision maker" would add more delays to the NEPA process. In light of these comments, a NEPA ombudsman within CEQ is not appropriate at this time.

The other recommendation in this group addressed the increasing costs of NEPA compliance (Recommendation 7.2). There is little to dispute that the cost of NEPA compliance has risen significantly over the years. However, as one would imagine, there was much dispute as to the causes of the costs and any potential "benefits." Reaction to this cost containment recommendation was mixed. Several comments found the recommendation worthwhile and beneficial. Those opposed to it suggest that it is "unnecessary" because "CEQ already has the authority" to conduct such an analysis. This response reflects a common misconception with current NEPA practice. Indeed, CEQ may have existing authority to execute the tasks

laid out in the recommendation. In many instances, however, CEQ is not doing these things and needs to be directed to do so. Other comments indicate that “comprehensive [NEPA reviews] may require expenditure[s] of time, capital and resources.” In other words, a “comprehensive” analysis may be too costly to undertake. This is not a logical conclusion. CEQ, by virtue of its statutory role within the NEPA process, is in the perfect position to evaluate ways in which agencies should pursue comprehensive NEPA documents without having to spend vast (and seemingly unlimited) sums. Other comments noted that CEQ should “monitor” compliance costs on an ongoing basis and periodically report the findings to Congress. This would be appropriate as a way to support a comprehensive study. Finally, one comment pointed out that if other recommendations in the initial report were to take effect, cost would decrease as a result thus obviating the need for this particular recommendation. This notion could be verified through the use of ongoing cost monitoring.

#### Group 8 – Clarifying the meaning of “cumulative impacts”

The recommendations in this group will clarify the two most contentious components of cumulative impacts – past and future actions. The first recommendation clarifies the baseline that agencies can use to assess the effects of past actions within NEPA’s directives on “cumulative impacts” (Recommendation 8.1). As was the case with comments on delays in the NEPA process, the comments on this recommendation focused on both whether there is a problem with past actions and if so how can it be dealt with. A number of comments stated that this recommendation as “essential” to NEPA modernization. Not surprisingly, some commentors who are supportive of the status quo felt this recommendation was “unnecessary.”

In support of this recommendation it was said that it would provide a “common point of reference” for agencies to judge the impact of a proposed action. It was also pointed out that the current treatment of past actions is a “prime example” of how court-created NEPA policy is problematic. The recommendation was viewed as an appropriate “side board” for cumulative impact analysis. It was noted, correctly, that cumulative impact analysis would not disappear or otherwise be degraded under this recommendation.

The opposition to this recommendation pointed to the fact that a statutory amendment is unworkable and has been overtaken by events such as the “detailed guidance” issued by CEQ in the wake of *Lands Council v. Powell*. It was mentioned that assessing cumulative impacts is “quite complex” and that legislating criteria is a “bad idea.” While noting that legislation is not preferable, it was stated that regulations on this subject is “strongly supported.” Moreover, some commentors sensed that this recommendation is susceptible to various “interpretations” that could cause even more confusion and controversy than exists at present. One interpretation that was advanced was that agencies could “ignore the impacts of past actions.” This assertion misses the point. The recommendation allows agencies to focus on past actions in the proper context of the proposed action, rather than an exhaustive and improper examination of all past actions.

The other recommendation in this group directs CEQ to promulgate regulations to establish the parameters of the future actions component of cumulative impacts analysis (Recommendation 8.2). The importance of these potential regulations was summed up by the comment that noted that it is “hard to predict” future actions. Also, it was stated that the

current “inconsistency” on future actions have led courts to be “particularly active” on this issue. The opposition to this recommendation focused on potential issues with the phrase “concrete proposed actions.” Several commentors provided examples how restricting future impacts to “concrete proposed actions” could detrimentally “limit [a legitimate] scope of analysis” with little benefit. It was suggested that elimination of “speculative scenarios” would be a useful criterion. Guidance on this issue will aid federal decision makers by allowing them to focus on the scope of future impact analysis is “actually needed” rather than guessing what might be needed depending on litigation. The focus of the regulation should be “proximate causation.” In other words, the regulation should limit study of future actions to those impacts that will immediately or very closely follow from the proposed action.

### Group 9 - Studies

The final group of recommendations contained three proposed studies that will yield more information about ways to improve the NEPA process. CEQ would be charged with administering the studies. It is the intent that CEQ would be given the appropriate resources to conduct these studies. The first recommendation is a comprehensive examination of how NEPA interacts with other federal laws (Recommendation 9.1). The reaction to undertaking this study was generally positive. Commentors that supported this recommendation stated – and provided examples to highlight – that while NEPA is not a substantive statute it is often the “trigger that brings to bear the full weight of [other major] environmental laws.” Laws cited as appropriate for review include the Clean Air Act, Clean Water Act and Endangered Species Act. It is obvious that these laws do not have identical requirements and that NEPA’s purpose is to serve as an “umbrella” statute. What is not so evident is the degree that these laws require overlapping environmental evaluation. For example, it was stated that taken together the major environmental laws “ensure full and thorough consideration” of environmental impacts. The question then is where does NEPA fit in? Clearly, NEPA ought not to be removed as a tool for environmental impact analysis but cannot be used as just another layer of analysis. Finally, this study is not intended to prevent or impact existing or proposed legislative proposals that include NEPA components. Obviously, these provisions will have their own dialogue and will go through their own set of analyses.

The second study is an assessment of current NEPA staffing in the federal agencies (Recommendation 9.2). The intent is to conduct a quantitative analysis of how many skilled NEPA practitioners exist with the federal government, how many are needed and how will the agencies get the necessary qualified staff to fill any gaps. Contrary to the notion that “it is well documented” that there are inadequate resources, all that is known is that there is generally a lack of personnel. What remains is understanding exactly what is needed given an agencies NEPA workload and sophistication in dealing with the NEPA process and where the personnel can be found (e.g., within the public or private sector) that can help agencies efficiently manage the NEPA process.

The final study is the interaction between NEPA and state “mini-NEPAs” (Recommendation 9.3). It was pointed out by one commentor that having this study after a recommendation to allow state NEPAs to satisfy appropriate NEPA requirements (Recommendation 3.2) seems to “put the cart before the horse.” This is a valid point with one caveat. Although it was noted in the Initial Report that the recommendations should be considered “in concert,” there are instances where the recommendations are somewhat independent. Thus, it is possible

that Recommendation 3.2 may go forward if conducting a “full blown” study as proposed in Recommendation 9.3 is not possible nor warranted. Many reviewers noted that this type of study is “worthy” or “absolutely essential.” These commentators believe that the state mini NEPA’s have “grown tremendously” adding to the overall complexity of the NEPA process. Other opinions mentioned that rather than doing this study, it would be “more prudent” for CEQ to focus on getting states and other non-federal stakeholders better involved in the NEPA process.

## **Recommendations**

After reviewing the over 250 substantive comments, the following recommendations are offered to the Chairwoman of the Task Force. As stated above, these recommendations are based upon those presented in the initial report and in many cases have been modified or eliminated to reflect ideas and concepts presented in the written comments. However, it should not be surprising that the text of some recommendations remain very similar to the text offered in the initial report. This is not a result of disregarding any particular comment. Rather, it is a result of the comments, on balance, suggesting that there should be no change. If executed, these recommendations will have a profound impact on improving both the NEPA statute and the manner in which it is implemented.

The recommendations include statutory changes as well as directions for new regulation from CEQ. To mitigate concerns that new CEQ guidance and regulations will suffer the same problems as existing ones, the recommendations for new regulations are supported by accompanying policy statements that will be placed into the statute. It is important to note that the existing NEPA regulations, given their general nature, must be read in conjunction with an array of court cases. It is the intent that the regulations set out in the recommendations would stand alone and not need additional court interpretation.

Although these recommendations are the final product of the Task Forces, further discussion is needed as the NEPA landscape is continually changing. However, this conversation should not delay moving forward on starting the necessary legislative or administrative procedures.

### **Group 1 - Addressing Delays in the process**

Recommendation 1.1: Amend NEPA to change “major federal action” to “significant federal action.” The current determination of “major federal action” – which triggers the use of an EIS – is undefined in statute and has been left in large measure to the courts. To determine a “major federal action”, courts engage in a two-step process of reviewing a federal government action against two CEQ regulations that, when combined, attempt to define “major federal action” (40 CFR 1508.18 and .27). However, within the regulations the term “major” has no meaning independent of “significantly.” The term “significantly” is the true trigger for the use of an EIS. Clearly the undefined term “major” leads to some inconsistent application of the EIS requirement of section 102(2) (C). To ameliorate this confusing, multi-step process, the statute that changes the trigger for the detailed statement required by section 102(2)(C) from “major federal action” with “significant federal action” and a definition should be added to the statute that clearly defines a “significant federal action.” Regulation 40 CFR 1508.8 would also need to be amended to reflect this change.

Recommendation 1.2: CEQ will promulgate regulations to set mandatory timelines for the completion of NEPA documents; Amend NEPA to add a policy expressing the need for timely completion of NEPA documents. NEPA regulation 1500.5(e) states that agencies shall reduce delay “by establishing appropriate time limits for the [EIS] process.” This regulation has not been applied as intended. That is, there are no time

limits for any component of the NEPA process. Therefore, CEQ should craft a regulation 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 nine months. As a backstop to ensure agencies adhere to the letter and spirit of the regulations, NEPA documents that are not concluded by these timeframes will be considered completed. It is incumbent for the agency to acquire and use the resources necessary to complete NEPA documents in a timely manner. Sensible timeframes will make for better federal decisions. This statement will form the basis for a new statutory policy on reducing delay.

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 six and three months respectively. If CEQ cannot or will not issue this new guidance within a timely fashion, an amendment to NEPA with the above time limitations is appropriate.

Recommendation 1.3: CEQ should issue new regulations to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS); Amend NEPA to craft a policy that federal officials must use the NEPA documents that address the environmental impacts. A number of comments suggested that if the agencies used the “proper” process, there would be fewer controversies and delays. Therefore, in order to encourage the “proper” use of CEs and EAs, CEQ will promulgate a set of regulations to establish clear criteria to differentiate between the requirements for EA’s and EIS’s. These new regulations should utilize the current definitions in 40 CFR 1508.7, .9 and .11. The criteria should focus on the “significance” of an action – to be consistent with existing regulation and case law. Utilizing the regulatory approach will provide flexibility. Further using the regulatory process is preferred for agency-wide implementation and the encouragement public participation. The accompanying policy statement will direct agencies to focus their choice of NEPA document based on impact, rather than on which one will reduce the potential for litigation.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA section 102 to codify criteria for the use of supplemental NEPA documentation. This provision would not allow an agency to require supplemental NEPA 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). Subsection (2) of the current regulation would not be included in this statutory change. Including this language would run counter to the goal of incidents of supplemental NEPA documents. Note that the “significant new circumstances” requirement can include a violation of the mandatory mitigation requirement in recommendation 5.3.

## **Group 2 - Enhancing Public Participation**

Recommendation 2.1: Direct CEQ to prepare regulations instructing agencies to evaluate comments based on impact; Amend NEPA section 101 to recognize the significance of a federal undertaking must be measured by its impact on the environment. CEQ should instruct agencies to assess comments according to the impact on the entity submitting them. This will give an agency the true “effect” of an action on a scale from greatest to least impact. Agencies would be required to create a scoring mechanism consistent with their mission. All comments submitted would be subject to this type of evaluation. Therefore, there would be no diminution on the ability of any stakeholder to comment. To the extent federal agencies already have this type of evaluation process, CEQ will document it and publish it for the benefit of all those wishing to comment. A regulation in section 1500 would be appropriate and consistent regulatory policy statements such as “reducing paperwork” and “reducing delay.”

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to section 102(2) of NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects. Consistent with 40 CFR 1502.7, this page limitation would only apply to:

1. The purpose and need
2. Alternatives
3. Affected environment
4. Environmental consequences

The language would allow agencies to petition CEQ for a waiver of the page limits on if there is a compelling need.

## **Group 3 – Better Involvement for State, Local and Tribal Stakeholders**

Recommendation 3.1: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements; Amend NEPA to articulate a policy that federal agencies should utilize equivalent state environmental analysis statutes and procedures to the extent they further NEPA’s goals. 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. NEPA would be enhanced by speaking directly to the value of state “mini-NEPAs.” A new policy statement would encourage federal agencies to make the most of these statutes.

## **Group 4 - Addressing Litigation Issues**

Recommendation 4.1: Amend NEPA to create a policy declaration on litigating under the statute; Direct CEQ to prepare regulations clarifying legal procedures for bringing suit under NEPA; A new section under Title I of NEPA should be created that expresses a policy position recognizing the role of litigation as an enforcement

tool, but pointing out that it should be used only in limited cases and where the following elements are present:

- A clear demonstration that an agency made a decision without using the best available information and science.
- An aggrieved party has been involved throughout the process in order to have standing in an appeal.
- Challenges should have been filed within 180 days of notice of a final decision on the federal action

To complement this policy declaration and to make it simple to understand the criteria for bringing a NEPA-related suit, CEQ would provide regulations on specific procedures.

Recommendation 4.2: Amend NEPA to add a requirement that CEQ provide litigation guidance to agencies. With an additional requirement placed under section 204, CEQ would become a clearinghouse for monitoring court decisions that affect the 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 issuing proactive guidance advising appropriate federal agencies of its applicability.

### **Group 5- Clarifying Alternatives Analysis**

Recommendation 5.1: Amend NEPA to require analysis of only “reasonable alternatives”; CEQ to issue regulations to define “reasonable alternatives” as those that are economically and technically feasible. Current statutory language would be amended to add “reasonable” to references to alternatives – for example in 102(c)(iii). In addition, CEQ would be directed to issue regulations that state that “reasonable alternatives” are those 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 requires 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. For example whereas the statute talks about the “adverse environmental effects” of a proposed action, similar statutory treatment should be given to any “adverse environmental effects” if the proposed action is not realized at all. 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 guidance to make mitigation proposals mandatory; Amend NEPA to recognize that mitigation proposals that a utilized as part of the decision-making process must be implemented. CEQ would be directed to craft guidance that requires agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. To be valid the mitigation to be used in must be articulated in NEPA documents such as an EIS or a “mitigated FONSI.” This mitigation guarantee would have to include the following features: (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. If the mitigation commitment is not adhered to, the agencies will be forced to prepare an EIS (in the event that an EIS includes a commitment and there is a violation, the result will be the preparation of a supplemental EIS). 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. CEQ will draft regulations that direct agencies to periodically consult in a formal sense with interested parties throughout the NEPA process, with an emphasis on bringing parties to the table before decisions are finalized. Utilizing the regulatory process will allow CEQ to create a workable mechanism that will make the consultative role commensurate with responsibility. Further, CEQ’s regulations will focus on creating a mechanism that includes all appropriate stakeholders with particular emphasis on not including “fringe” elements that would only seek to delay the decision-making process.

Recommendation 6.2: Amend NEPA to clarify responsibility of lead agencies. The statute should be amended to add to duties of the “responsible federal official,” additional concepts such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. When carrying out its duties as presented in this recommendation, the lead agency would be charged with recognizing the mission and operations of cooperating agencies.

#### **Group 7 - Additional Authority for the Council on Environmental Quality**

Recommendation 7.1: Amend NEPA to direct CEQ to control NEPA related costs and to ensure statutory authority to conduct this exercise. A provision would be added to Title II specifically charging CEQ with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies. A provision would be added to Title II of NEPA granting CEQ the authority to control NEPA-related costs.

## **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 is the appropriate methodology to account for past actions. This enhancement means that agencies will still have to account for the effect of past actions. However it would become policy that the methods that agencies use (and take the care to develop) to evaluate the current state of the environment will serve as the basis for evaluating the actual effect of 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; Amend NEPA to instruct federal agencies to employ practical considerations to assess the practicality of a future action’s impact on the environment. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to clarify what actions are “reasonably foreseeable.” The amended regulation should make certain that speculative actions are not “reasonable” within the context of cumulative impacts.

## **Group 9 - Studies**

Recommendation 9.1: CEQ study of NEPA’s interaction with other Federal environmental laws. Within one 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:

1. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts;
2. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication; and
3. If there are necessary overlaps among federal laws, determines methods to streamline any interactions (including mandatory timelines for the completion of consultations).

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within one 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 one 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 interact; 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 and Next Steps**

The recommendations in this document form the best foundation for modernizing NEPA. The recommendations provide a point from which the Committee on Resources can achieve tangible success in improving NEPA for the benefit of all stakeholders. As stated above, the process for modernizing NEPA is not a short one. The near-term next steps include:

- A hearing before the full Committee on Resources on these recommendations
- Additional dialogue with the Council on Environmental Quality to understand how the recommendations would be implemented
- Additional consultations with all affected stakeholders to provide an ongoing impact assessment of the recommendations

Ultimately, legislation should be prepared and introduced that will facilitate implementation of the recommendations presented in this report. Taking concrete actions are necessary to ensure NEPA continues to be a viable tool for informed federal decisionmaking.