

The Environmental Law and Policy Center of the Midwest ("ELPC") and the Center for Neighborhood Technology ("CNT") are submitting these comments in response to the Council on Environmental Quality's National Environmental Policy Act Task Force's ("Task Force") notice and request for recommendations to improve NEPA implementation. 67 Fed. Reg. 45510 (July 9, 2002). ELPC is a Midwest public interest environmental quality and economic development organization, which works to promote innovative and efficient approaches to transportation and land use issues, conserve natural resources, and encourage the use of clean energy sources. CNT is a Chicago-based public interest organization that promotes policies that will help create livable urban communities throughout the country.

Congress passed NEPA in 1969 to serve as the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA is designed to achieve this goal through a series of procedural requirements that promote fully informed agency decisionmaking and meaningful public participation. The environment will be better protected so long as federal agencies are required to fully study and consider the environmental impacts of their actions, and there is an open decisionmaking process in which public participation is allowed and, indeed, encouraged.

Over the past three decades, when agencies follow the NEPA process as it is designed, better results for both the environment and society are more often achieved. Difficulties arise, however, when agencies take a top-down approach to NEPA compliance that seeks to simply justify a pre-determined result. If an agency simply goes through the motions and has little concern for whether informed decisionmaking and meaningful public participation occurs, the process does not work well – projects are proposed that may unnecessarily harm the environment, more public opposition may be encountered, and time-consuming legal challenges more often result.

ELPC and CNT encourage the Task Force to ensure that any recommended changes to NEPA implementation work to increase the likelihood that agencies will fulfill the informed decisionmaking and meaningful public participation goals of NEPA. In Part III of these comments, ELPC and CNT recommend the following improvements to the NEPA implementation process:

- **Do Not Game The Timing:** NEPA review of an agency proposal should be timed early enough to influence the agency's plans, but close enough to when a project is viable, rather than years in advance, so that the information relied on is timely and accurate.
- **Early Substantive Involvement:** Once the NEPA process begins, both the public and regulatory agencies should have early and substantive involvement, so that the NEPA process is truly an open exchange of ideas designed to achieve the best result, rather than simply a top-down way for an agency to justify its own preferred project.
- **Internet Access to Information:** To facilitate public participation, the Task Force should recommend the development of a system through which the public would be able to access via the Internet all information relevant to a project being reviewed under NEPA.

- **Fully Fund Agency Implementation:** Agencies should have sufficient resources dedicated to NEPA implementation to carry out its goals in a thorough and timely manner.

Unfortunately, there are a number of proposals circulating in Congress to “streamline” and weaken the NEPA process. The Task Force should reject changes to the NEPA implementation process that serve to undermine the goals of better environmental protection and more engaged and meaningful public participation.

## **I. NEPA ISSUES – BACKGROUND**

NEPA provides for agencies’ careful consideration of environmental impacts of major federal actions. In effect, NEPA calls for federal agencies to pause, consider the environmental impacts and the public’s view of a proposed federal action, and then make a determination based on full information and public input. Ideally, an agency enters the NEPA process with an open mind, so that the information and public comment are gathered and used to ensure that the best action is taken. Given widespread public support for protecting the environment – public opinion polls show 80% or more of Americans support environmental values – and the importance of public participation in government decisionmaking processes, NEPA represents an appropriate and popular method for ensuring that major federal actions do not unnecessarily damage the environment.

Some critics contend that the NEPA processes should nonetheless be “streamlined” because of alleged burdensome environmental reviews for proposed new airport, highway, and energy projects. The reality is that there is not a big problem that must be fixed. Rather, there are particular private interests and particular legislators supporting particular projects who would like to avoid NEPA review or anything else that might get in their way. The facts do not support the “streamlining” argument because, in many cases, NEPA poses little burden on federal agency actions.

First, the full environmental review procedure required under NEPA applies to only a relatively small proportion of federal agency actions. An agency is required to complete an Environmental Impact Statement (“EIS”), of course, only for projects that “significantly affect the human environment.” For example, this EIS requirement is triggered for only 5% of all highway projects. David Bearden, *Environmental Streamlining Provisions in the Transportation Equity Act for the 21st Century*, CRS Report for Congress, at 2 (March 5, 2002). The other 95% of highway projects avoid substantial NEPA review because they are either categorically excluded or the initial assessments lead to a Finding of No Significant Impact. *Id.* Therefore, the reality is that EISs are only needed for the small minority of truly major projects that are likely to significantly impact the environment. Due to the significant impacts created by these projects, it is not unreasonable to spend a significant amount of time studying these projects and taking public input before proceeding.

Second, even where full NEPA review is conducted, it often does not substantially delay projects. For example, a Federal Highway Administration study of 100 highway projects from

the 1970s, 1980s, and 1990s revealed that the average time for project development was 13.1 years, with only 3.6 years, or 28% of that time, being taken up preparing EISs. *Id.* at 3. This data shows, not surprisingly, that major federal actions take a long time to carry out for a wide variety of reasons – including project development, funding issues, and public opposition – and that constricting or eliminating the environmental review process would have only a minimal impact on the amount of time it takes to deliver a project.

Third, NEPA is a procedural, not a substantive, statute. NEPA itself does not stop any project; if a project is laudable and supported by the public, it may proceed regardless of the environmental impacts. NEPA simply establishes procedural requirements for the agency to ensure that the purpose and need of the project are explained, all reasonable alternatives are considered, the environmental impacts are fully analyzed, and the views of the public are addressed before the project commences. Rather than stopping projects, NEPA is designed to ensure that the agency and the public fully consider and understand the environmental ramifications of major actions that are to be taken.

**II. OUR EXPERIENCES WITH NEPA IN THE MIDWEST**

The value of active NEPA compliance is shown in two recent cases in Illinois where the procedural requirements have been at issue. The first involves the City of Marion’s (Illinois) proposal to build a dam and reservoir to provide water to both Marion and the nearby Lake of Egypt Water District. Marion’s proposal would have had numerous significant environmental impacts, including the damming of one of the last free-flowing streams in Illinois; flooding of one-and-a-half square miles of wetlands, woods, fields, and farms; and the destruction of habitat for bald eagles and two federally protected bats. Furthermore, the goal of providing more water to Marion and the Water District could have been achieved by the less environmentally destructive alternative of obtaining water from two different existing sources, rather than from a single new lake.

Despite these environmental impacts, the U.S. Army Corps of Engineers, from which the City of Marion would have to obtain a permit before the project proceeds, refused to carry out the analysis required by NEPA. First, the Corps declared that the project would have no significant environmental impacts. A federal judge in the U.S. District Court for the Southern District of Illinois rejected this contention and, in 1992, ordered the Corps to prepare a full EIS for the project. The Corps did so in 1996, but, once again, the Corps failed to comply with NEPA. On review, the U.S. Court of Appeals for the Seventh Circuit found that the Corps completely failed to consider the reasonable alternatives, including obtaining the water from two other viable sources. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7<sup>th</sup> Cir. 1997).

As the Seventh Circuit noted in its opinion, the Marion case “provides a textbook vindication of the wisdom of Congress in insisting that agencies follow [the procedural requirements of NEPA] in the first place.” *Id.* at 666. Without active enforcement of NEPA, there would have been no consideration of the less environmentally destructive alternatives. Moreover, if the Corps had fully followed the requirements of NEPA in the first instance, it could have either settled on the two other water sources as viable alternatives or, instead, sought

to justify why these alternatives were not reasonable. By seeking to limit the NEPA review process, the Corps has delayed the ability of the City of Marion and the Water District to obtain new water while also posing dangers to the environment.

A second example involves the Illinois State Toll Highway Authority's ("ISTHA") and the Illinois Department of Transportation's ("IDOT") proposal to build a very expensive (\$700 million) 12.5 mile extension of the I-355 tollway into Will County, Illinois, the far-south suburban area in the Chicago region. The proposed tollway would: harm numerous natural and historical sites; destroy a significant amount of wetlands, wildlife habitat, and forests; and bring additional sprawl to this region of the state. In addition, there are alternatives involving local road improvements and better public transportation and planning that would achieve the traffic reduction goals of the I-355 proposal more effectively and for less money.

In 1996, the IDOT issued an EIS that did not seriously explore alternatives to the proposed expensive new tollway and, thus, failed to comply with this core requirement of NEPA. On review, the federal judge for the United States District Court for the Northern District of Illinois held that IDOT acted arbitrarily and capriciously by failing to fully consider and seriously explore alternatives. *Sierra Club v. U.S. Department of Transportation*, 962 F.Supp. 1037 (N.D. Ill. 1997). In addition, the Court held that IDOT's EIS failed to adequately consider the air pollution impacts of the proposed new tollway. *Id.*

Once again, the I-355 example demonstrates that it is only through careful compliance with the requirements of NEPA that the environmental protection goals of NEPA can be achieved. Without NEPA, the environmentally destructive I-355 project would have been built without an adequate consideration of less destructive alternatives that would achieve better results at a lower cost. ISTHA's and IDOT's failure to fully comply with NEPA has unnecessarily delayed the creation and implementation of such alternatives.

### **III. WAYS TO IMPROVE NEPA IMPLEMENTATION**

Given the importance of active NEPA compliance, ELPC and CNT believe that the Task Force should consider ways to improve NEPA implementation that would increase the ability of agencies to fully comply with NEPA. In particular, any recommendations should work to strengthen both the informed decisionmaking and public participation goals of NEPA. With these goals in mind, ELPC and CNT encourage the Task Force to make the following recommendations.

- **Do Not Game The Timing:** The Task Force should recommend that agencies carry out the NEPA process close to the time when a proposed project would be implemented, as opposed to long in advance. One frequent problem with agency implementation of NEPA is that agencies will game the timing of the review process by completing the NEPA process long before the agency has any intention of actually building the project being reviewed. For example, the Illinois State Toll Highway Authority (ISTHA) recently released a Draft EIS for its proposal to build a 25-mile extension of Route 53 into Lake County, Illinois, the far northern suburban area of Chicago. ISTHA, however, acknowledges that it does not have the

money necessary to build this \$1 billion project, and that any potential construction would not begin for at least 10 years.

This approach undermines the goals of NEPA by forcing the NEPA analysis to be based on largely hypothetical information. A present-day decision on a project that ISTHA does not plan to even consider building for over a decade cannot be fully informed because the information relevant to that decision will certainly change. Such changes undermine the ability of the agency to accurately determine what the environmental impacts of the project would be, whether the need for the project will change, and the appropriateness of reasonable alternatives. In addition, ISTHA's approach serves to diminish the likelihood of active and meaningful public participation. Citizens will be less likely to comment on a project that the agency claims will not be built until long in the future, and those who do comment will be working with the same hypothetical information that the agency has.

The better approach is for the NEPA review to occur close in time to when the agency plans to implement a project. That way both the agency and the public will be able to judge the project on the basis of more accurate and timely information. Only through such a timely approach to NEPA can the informed decisionmaking and public participation goals of NEPA be achieved.

- **Early Substantive Involvement:** The Task Force should recommend that, once an agency begins the NEPA review process for a project, early and substantive involvement of both other regulatory agencies and the public occurs. One of the major causes of NEPA-related delays is that agencies take a top-down approach in which they use the Draft and Final EISs merely to justify a particular preferred project to the public and regulatory agencies. This approach creates delay because the agency has often overlooked environmental impacts and public opposition in designing its project, and therefore drawn out battles ensue over the proposal.

A more effective approach to NEPA implementation would seek to replace this top-down approach with an approach that involves early and substantive involvement of both regulatory agencies and the public in the NEPA process. This would enable the regulatory agencies and public to steer agencies away from environmental and other problems earlier in the process, and help craft a proposal that is much less likely to engender significant opposition or be mired in substantial debates over environmental impacts. By creating an approach that encourages the development of better proposals to begin with, such changes to NEPA implementation could reduce delay without sacrificing thorough environmental review. This recommendation is relevant to Study Area B, in that the Task Force could recommend substantive inter-governmental collaboration on NEPA issues early in the process. It is also relevant to Study Area F, as the Task Force could recommend that agencies develop other NEPA implementation procedures that provide for substantive public involvement at the planning stage.

- **Internet Access to Information:** The Task Force should recommend that all agencies make information relevant to projects under NEPA review available on the Internet, and accept public comments on those projects via the Internet. Public participation can be effective

only if the public has accurate and complete information about a proposed project and adequate opportunities to comment on the project. The Internet offers a powerful tool to facilitate such information gathering and public comment by providing a single place where information can be accessed and shared at any time. Therefore, ELCP and CNT encourage the Task Force to recommend either that each agency post all information relevant to a project on its webpage, or the development of a single webpage dedicated solely to providing information on NEPA reviews being carried out by all agencies. This proposal is relevant to Study Area A.

- **Fully Fund Agency Implementation:** The Task Force should recommend that all agencies receive sufficient resources to properly carry out the requirements of NEPA. Often, deficiencies in NEPA review are the result of a lack of the monetary and personnel resources necessary to implement NEPA. Such lack of resources creates an incentive for an agency to cut corners in carrying out project reviews under NEPA, and hinders the ability of an agency to complete its NEPA duties in a timely manner. Therefore, full agency funding will improve NEPA implementation and help achieve the goals of NEPA.

#### IV. NEPA "STREAMLINING" PROPOSALS THAT SHOULD BE AVOIDED

In contrast to the proposals for improving the NEPA process described above, there are a number of NEPA "streamlining" proposals that are circulating in Congress that would actually undermine the goals of NEPA. Despite the fact that NEPA applies to only a small portion of agency actions and is effective only when thoroughly complied with, critics claim that steps are needed to reduce redundancies, inefficiencies, and delay in the NEPA process. In reality, however, the proposals pushed by these critics would merely gut the environmental protection value of NEPA. Furthermore, by leading to projects that are opposed by the public, NEPA "streamlining" could actually create further delay in project delivery. We address some of these proposals below because they may be proposed in response to the Task Force's call for comments, especially regarding Study Areas B and F.

Examples of the type of "streamlining" proposals that ELPC and CNT oppose because they would weaken the NEPA process and do little to actually improve NEPA implementation include:

- **Coordinated Review:** Most projects subject to NEPA will actually have to undergo a number of different environmental reviews under state and federal law. Coordinated review calls for requiring that these various reviews take place concurrently, rather than consecutively. In most cases, however, environmental reviews cannot occur concurrently because it is only through the NEPA process that sufficient information can be gathered to make decisions regarding wetlands, endangered species, etc. Therefore, coordinated review would require agencies to make uninformed decisions, contrary to a key goal of NEPA.
- **Consolidation in a Single Agency:** Most projects subject to NEPA will also have to be reviewed by a number of different federal and state agencies. Streamlining advocates propose consolidating environmental review authority for a particular project in a single

federal agency, with other agencies reduced to the role of simply commenting on the project. Such consolidation, however, takes authority away from agencies that have expertise, and a legislative mandate for environmental protection, regarding a particular issue. Furthermore, consolidation in a single federal agency takes power away from local and state agencies that may be more responsive to local concerns.

- **Limits on Purposes, Objectives, and Alternatives:** At the heart of NEPA are requirements that an agency explain the purpose and objectives of a project and consider all reasonable alternatives to such project. Streamlining advocates have proposed to limit the ability of agencies to carefully analyze the purpose and need of a project or to fully consider reasonable alternatives. However, it is only through the careful analysis of purpose, need, and alternatives that an agency can ensure that it is making the correct decision for the environment and society, and therefore these proposals undermine the goals of NEPA.
- **Time Limits for Environmental Reviews:** In order to further streamline the process, critics have recommended setting strict time limits in which an agency must complete an environmental review. Time limits, however, do nothing to solve one of the underlying causes of delay in agency action – namely that agencies tend to be under-funded and overworked. Given this reality, time limits will simply force agencies to cut corners on their environmental reviews in order to meet arbitrary deadlines and will limit the ability of the public to participate in the review process.

These streamlining proposals would significantly weaken environmental reviews, would restrict the ability of the public and local governments to be involved in the review process, and are unjustified by the facts regarding NEPA. The Task Force, therefore, should reject these proposals and instead focus on recommendations that would encourage informed decisionmaking and public participation.

## V. CONCLUSION

As discussed above, effective and efficient NEPA implementation occurs only where agencies actively pursue the fully informed agency decisionmaking and meaningful public participation components of NEPA. Therefore, we encourage the Task Force to recommend changes to the NEPA implementation process that would strengthen NEPA review, as described above. We further urge the Task Force to reject any proposals that would weaken the requirements of NEPA under the guise of "streamlining." Thank you for CEQ's consideration of these comments.



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NOTICE AND REQUEST FOR COMMENTS ON NEPA IMPLEMENTATION**

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**August 23, 2002**