

TULANE LAW SCHOOL

Statement of Oliver A Houck, Professor of Law, at CEQ Southern Roundtable, Memphis,  
Tennessee, December 11, 12 2003

My name is Oliver Houck. I direct the environmental law program at Tulane University, and I have been involved in rulemakings, litigation, agency instruction, research, publication and teaching of National Environmental Policy Act issues since 1971. I appreciate the opportunity to present this statement, and the inclusive fashion in which CEQ appears to be conducting the current review of its interagency report on NEPA. Nevertheless, had the report itself been prepared in a collaborative fashion with citizen and user groups from the outset, its identification of needs, underlying information and recommendations would look very different. The federal establishment's view of NEPA is only part of the picture, and often part of the problem.

I would like to make two general observations about NEPA, and several specific comments and recommendations.

The first general observation is the purpose of NEPA. Congress intended to change federal agency decisions towards greater environmental protection. It made this intention very clear in the Conference Report and the statute itself. The EIS process was simply a means for achieving this change. With this fact in mind, then, any amendments to the NEPA process, regulatory or legislative, that move federal decision-making towards greater environmental protection are within the spirit and the language of the statute. Those that do not, are not. The proper litmus test is not whether an amendment will produce better EISs; it is whether it will produce more environmentally protective decisions.

The second general observation is that NEPA and its CEQ regulations have functioned rather well for the past 33 years. Congress has only touched it with one small amendment. CEQ has only touched it with one small amendment. A program that has been this visible -- and yes, even complained of -- for 33 years does not necessarily show decrepitude, dry rot or disharmony with the needs of the time. The US Constitution and Bill of Rights have been around for more than 200 years, with very few amendments, and several of them regrettable. NEPA is not broke. It has proven to be incredibly resilient. If it makes enemies, that is primarily because agencies and their constituencies do not, even now, want to change. And would like to opt out of the drill. Far from evidence that NEPA needs "fixing", this is the best possible evidence that NEPA is working.

This said, NEPA is not achieving its Congressional goals. The resistance to it remains strong and widespread, and will remain so forever, because it is not in human nature to like to have to change the way one does business. Because of this resistance, many loopholes have emerged in agency compliance, of which I will identify four of importance:

1. Removal of NEPA from strategic and planning decisions. On the administrative front, from Regional Development Planning approvals under the federal highway program; from Forest Management Plans of the US Forest Service. On the legislative front, see the pending energy bill and transportation bill, without a shred of environmental impact consideration, indeed of public disclosure. The largest and most important federal decisions evade the requirements of the statute.

2. Piecemealing and segmentation of federal actions, often under the guise of "logical terminae". E.g. an EA on the access road now, on the timber sale later; on the pier now, and the condominium development behind the pier later; on Interstate 10 from Carrollton Ave to the Airport now, from the Airport to Baton Rouge later. Coupled with the refusal to consider their interrelated and cumulative effects.

3. Diminution of alternatives ... to those desired by the applicant or agency. Defeating Congress' intention to change those very agency and applicant decisions.

4. Delegation of the process to the parties most at interest ... to state agencies who are bidding for hundreds of millions of dollars for their transportation projects; to consultants for private applicants who will go on to large contracts for building the project, and others, once this one is approved.

In sum, the EISs come late, piecemealed, limited in their most important scope (alternatives) and delegated to parties most biased towards a preconceived, and often environmentally harmful, decision. It is a wonder, then, that the process produces positive change at all, but it does. NEPA-made positive changes are legion. Largely thanks to the active participation by other agencies, primarily environmental agencies, and above all by active citizen groups. The great strength of the current regulations has been to capacitate these groups to make the process work.

Recommendations:

1. Revitalization and meaningful implementation of the legislative impact statement process. If proposed legislation primarily affects a given agency (e.g. Transportation, Energy), that agency should prepare the statement even though it is not technically proposing the legislation.

2. Re-coupling of NEPA to strategic planning decisions, even if they are not imminent "actions". These plans are more important than implementing actions.

3. Re-assertion of federal authority over all phases of the process, to the selection of the EIS preparer to scoping, alternatives consideration, inter-agency and public consultation, and the resolution of issues arising in the process. No EIS process should be directed nor an EIS prepared by a state or private party with financial interest in the outcome of the decision.

4. Re-emphasis of the alternatives requirement to make explicit that the least environmentally harmful alternative be identified and, if not recommended, the reasons for not recommending it clearly stated. Were this a legislative proposal, then the least environmentally harmful alternative should be required unless there are no feasible and prudent alternatives; while it is arguable whether the current statute permits this requirement, the statute clearly permits the identification and reasons proposed.

Thank you for the opportunity to submit these views.