

Judith Lee's Comments for CEQ NEPA Task Force (Memphis Round Table)

Environmental Planning Strategies, Inc.

I have put my comments and recommendations in my recommended order of priority, and tied them to the Task Force Recommendations as appropriate.

A. Overall programmatic comments:

1. NEPA and its implementing regulations, as they currently exist, provide a powerful foundation, consistent with proven planning paradigms and processes, for:
 - Systematic, interdisciplinary efficient, and effective planning and informed and collaborative decisionmaking, (Section 102),
 - Environmental protection, conservation, management, and stewardship (Section 101), and
 - Authority for Federal agencies to effectively exercise inherently governmental responsibilities while thoughtfully seeking out, considering, and integrating the responsibilities of other Federal, state, and local agencies and authorities and the information, concerns, and expertise of interested/affected persons, agencies, organizations, Tribes, and educational institutions.

Don't tinker with what isn't inherently broken, especially if it opens the law and/or regulations to direct attack in Congress.

2. The Executive and Legislative branches are effectively weakening NEPA, as well as other environmental laws (Clean Water Act, Clean Air Act, National Forest Management Act, The Endangered Species Act, Marine Mammal Protection Act, and others) indirectly, through industry-friendly legislation that "streamlines" or partially/completely exempts compliance with NEPA and these other legal substantive and procedural environmental procedures, as Horst clearly stated in Memphis. This approach requires CEQ's constant surveillance and affirmation action within both branches. Much damage has already been done. I am especially concerned with Mr. Connaughton's apparent support of the Administration's efforts to legally support removing isolated wetlands from Clean Water Act Section 404 jurisdiction. I have read both the majority and dissenting conclusions of the Supreme Court (5-4 decision) on this matter, and the dissenting argument in support of the "Migratory Bird Regulation" for ecologically crucial and highly threatened isolated wetlands is significantly more compelling, reasonable, and logical— and legally and environmentally responsible. CEQ, as a formal advisory council to the Executive Branch, must openly take firm stands against these "back door" attacks on NEPA and environmental protection and stewardship, or the rest of your efforts to "modernize" NEPA will be simply tinkering with what remains of what was once a powerful, dynamic, and effective law.

3. The Executive and Legislative Branches must become informed of the adverse environmental ramifications of the laws and amendments to laws that it passes. As I work with agency decisionmakers and their environmental planning staff across the country, I repeatedly hear how frustrated, often angry, and usually professionally and even personally embarrassed they are at having to prepare NEPA documents for the sole purpose of justifying decisions already made by Congress and forced upon them through the political process. Dr.

Houck brought out the excellent example of tax breaks for second homes; another example is the tax break for gas-guzzling business vehicles over 6000 pounds. Innumerable examples exist of legislative amendments with more direct obvious environmental ramifications, such as the amendments to the Marine Mammal Protection Act and Endangered Species Act for military readiness, the recent Forest Management Act, NAFTA and Kyoto treaties, the energy bill, transportation legislation, and “pork” funding of specific projects nationwide. NEPA regulations state repeatedly that it is not to be used to “justify or rationalize decisions already made,” yet many agencies are regularly and continually expected to do just that: Federal Highway Administration, Federal Transit Authority, Federal Aviation Administration, General Services Administration, branches of DoD, and the US Forest Service, among others. CEQ, as the formal environmental advisory council to the Executive Branch and therefore, indirectly, to the Legislative Branch, must find an appropriate vehicle for ensuring that Legislators are appropriately informed of the environmental ramifications of their daily votes in a timely manner. NEPA and its implementing regulations already provide for Legislative EISs with their truncated procedures. Perhaps the Office of Management and Budget (OMB) or the General Accounting Office (GAO), since environmental costs often translate into monetary costs, could also be effective means of meeting this crucial need. In the real world, NEPA and Federal politics are necessarily in the same “bed,” and some objective body/processes must step up to implement the Federal environmental policy stated in Section 101 that the Federal government is “a trustee of the environment for present and future generations of Americans.” The American government includes the Executive and Legislative Branches themselves, not just the individual agencies within the Executive Branch that respond to direction from the Legislative Branch.

4. As I work with agencies, I find that the primary cause of high costs, delay, and conflict (interagency, intra-agency, and with the public) involves need(s) for action and objectives that are poorly defined, not defined, biased to support decisions already made, or defined or changed in the middle of the process. Agencies and contractors have little expertise and experience in appropriately initiating NEPA planning processes to focus the issues, alternatives, and impact analyses. The CEQ Task Force did not address this critical issue at all. The CEQ regulations very effectively define the requirements for identifying the proposal (40 CFR 1508.23), yet agencies tend to begin their planning with the proposed action, rather than the underlying need for action. I strongly recommend that CEQ put out guidance emphasizing the importance of initiating NEPA processes with the need for action, objectives, and scope of decisions to be made; this would minimize or eliminate many of the “painful” aspects of NEPA experienced by agencies and the public. The lack of a clearly defined need for action and objective also causes confusion and inability to create effective alternative means of meeting the needs. Many agencies develop “theme” alternatives (timber, elk, watershed, etc) in which all the actions to mitigate impacts on resources are typically incorporated only in their “theme” alternative, rather than creating an array of alternatives, each one of which meets the need for action and addresses the resource issues differently. To address the lack of real alternatives, decisionmakers typically select components of different alternatives and create a new one, which has not been analyzed in detail in the EA or EIS, and select it for implementation (what I call the “cafeteria approach”). This is inconsistent with the intent of NEPA, which is informed decisionmaking. This problem was described under Section VII (Recommendations for Additional Consideration).

5. I find an extraordinary, increasing, and disturbing trend of illegal and inappropriate delegation of inherently governmental authority to for-profit contractors throughout the

NEPA planning, decisionmaking, and public involvement processes and documentation. Through inappropriately worded and structured statements of work, agencies request contractors to identify and define the agency/applicant need(s) for action, agency objectives, scope of agency decisions to be made, the arrays of issues and alternatives to be considered in detail, issues and alternatives eliminated from detailed analysis, and even the evaluation of significance of impacts and the selection of the alternative to be implemented. This can result in inappropriate planning directions and decisions that may even be in conflict with agency mission, higher costs as agencies find themselves in conflict with contractor recommendations/decisions and redoing work, and potential conflict-of-interest. I have even found agency NEPA managers who are unaware of their inherently governmental responsibilities, and contractors who resist recognizing agency authority.

B. Task Force Recommendation I (Recommendation of Federal and Intergovernmental Collaboration), II (Recommendations for Environmental Assessments), III (Recommendations for Categorical Exclusions), and VII (Recommendations for Additional Considerations)

I believe that many of the “Additional Considerations” are a higher priority than the specific recommendations, especially the recommendations for Technology and Information Management and Security (Recommendation III). Also, several of the recommendations under Section VII are related to recommendations for EAs and Categorical Exclusions and have been integrated here.

1. Many of the task forces, FACA committees, and training recommended by the NEPA Task Force will be reinventing existing successful processes, excellent practices, and quality training that already exist within the public and private NEPA arena.

A. I find excellent, innovative, effective, and collaborative work being done or attempted to be done (when management support exists) by the agency NEPA “soldiers” (GS-5 through GS-14 levels) that get little to no recognition from CEQ, Federal agency higher-level management, environmental professional organizations, Federal agencies with environmental oversight responsibilities, or the Executive or Legislative branches (I have seen “Golden Fleece” awards for what actually are wonderful and needed environmental programs, such as control and eradication of the brown tree snake in Guam and Hawaii). Based on my observations, awards for excellence in NEPA are presented only to large-scale, extremely expensive efforts that tend to involve massive collaborative efforts, often benefiting some industry sector (such as the Galveston Bay initiative). As was often stated during the Memphis Round Table, the agency NEPA practitioners with whom I come in contact all want to work well and happily together professionally, and conduct efficient and effective planning efforts that support environmentally responsible agency decisions. Many of the proposed task forces will involve legal practitioners, higher level managers, and contractors who are often not aware of the quality, smaller-scale, less expensive successes occurring on a day-to-day basis within agencies. I recommend that the CEQ redouble and complete the efforts started during the CEQ Task Force to find and publish “stories” and examples of these routine and cost-effective/affordable examples of excellence and make them readily available to those who need them. The folks doing the day-to-day environmental planning, compliance, and NEPA processes and documents need not only guidance – they need practices and experiences that work, management and lawyers who support their affirmative, inclusive, and innovative efforts, and recognition for a job well done. In December, sent Horst (and, previously, the CEQ Task Force)

examples of the effective use of the facilitated approach and agency points of contact, as well as published papers documenting and describing this approach, including applying this approach using adaptive management, programmatic decisions, and integrated with Environmental Management Systems.

B. Quality training opportunities for NEPA, environmental planning, public involvement, collaborative problem solving, alternative dispute resolution, and compliance with related environmental laws and impact analysis (Endangered Species Act, National Historic Preservation Act, Environmental Justice, Magnuson-Stevens Act, etc.) already exist within the educational, governmental, and private sector. I am pleased to see that CEQ is beginning to endorse for-profit training with its formal endorsement of the programs at the Nicholas School of the Environment at Duke University. I recommend that CEQ continue and expand the program of identifying, recognizing and endorsing existing quality training programs and workshops related to quality NEPA compliance and associated regulatory and procedural requirements, rather than creating new training. Since CEQ has begun the process of endorsing governmental, educational, and for-profit training and educational programs, then I recommend an on-going CEQ-sponsored certification program involving evaluation of documented:

- Effectiveness of well-organized, performance-based educational curricula and opportunities for interactive methodologies
- Opportunities for tailoring to agency missions, needs, and planning and decisionmaking processes
- Background and extent of experience of instructors in the implementation of quality NEPA processes, understanding the various agency missions, planning and decisionmaking processes, and regional and national issues and challenges, and effective adult-based learning techniques
- Quality of materials and content, including consistency with CEQ regulations and written guidance, interpretation and application of legal precedence, incorporation of agency-specific NEPA guidance and regulations, use of interactive learning techniques regarding effective interdisciplinary environmental planning and decisionmaking processes, and using actual NEPA-related case studies reflecting the complexities and flexibilities involved in the practical application of NEPA and other environmental laws, collaborative planning processes, and the interdisciplinary approach.
- Evaluations, ratings, and comments of participants and government points of contact
- Value to the government

This CEQ certification approach would ensure that:

- The Federal Government receives the highest quality training with CEQ oversight at the best value to the government,
- Appropriate recognition is provided to excellent training and educational workshops and programs,
- The various concerns of the CEQ Task Force are addressed at no additional and long-term cost to the government

2. Using NEPA processes and documents as the overarching processes and documentation for compliance with other laws and Executive Orders, as well as economic analyses and project/program design, is extremely effective, lowers costs, minimizes delay, and facilitates effective public involvement and agency decisionmaking by providing what I call “one-stop shopping.” This approach, however, necessarily means that:

- EAs will be longer than the 15 to 30 pages recommended to briefly document lack of significant impacts, especially if alternatives are also evaluated (Section 102(2)(e)), and
- Categorical exclusions will require some level of documentation to provide evidence that no extraordinary circumstances exist for the proposed action and compliance with the pertinent laws and executive orders.

The length of the document is not evidence of significant impacts requiring an EIS; all analyses, including those in compliance with other laws and Executive Orders must be concise and consistent with 40 CFR 1502.8 (Writing), with sufficient analyses for the agency decisionmaker to evaluate significance of the documented impacts and select the alternative for implementation. A concise, complete, and therefore longer document may still support a FONSI, while a shorter document may actually be an EIS. Even programmatic documents and those integrating Environmental Management Systems may be short or longer EAs. The emphasis should be on documentation that is concise, complete, logically structured, focused on the truly significant issues, and that logically integrates compliance with other requirements, as a basis for efficient public and agency review and informed decisionmaking. Again, I recommend that CEQ seek out and make available examples in addition to putting out any guidance the Council believes is necessary.

3. I definitely support development of a citizen’s guide to NEPA. US EPA personnel frequently refer citizens interested in effectively working with or ensuring that they are heard by Federal agencies to me. Citizens and non-governmental organizations need correct and appropriate information to make them more effective players in the NEPA arena. Any guidance should include procedures for effectively participating in collaborative planning processes.