Are Changes Needed to NEPA?

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Summary

This paper examines whether or not fundamental changes are needed to the National Environmental Policy Act (NEPA), its implementing regulations or Federal agency NEPA procedures. NEPA documentation/analysis has evolved since the law was originally passed in 1969 and the size and complexity of NEPA documents has expanded beyond what many originally envisioned. NEPA documents are now routinely over 1,000 pages in length, can take years to prepare and cost taxpayers millions of dollars each. Is this what was envisioned when Lynton Caldwell helped pen the original law over 35 years ago?

After carefully reviewing recent testimony and reports on possible changes to NEPA, and after evaluating factors such as litigation, cost, and other existing environmental statute processes and requirements, it is my opinion that, with one exception, the law itself should not be fundamentally changed or amended. However, several changes related to Council on Environmental Quality (CEQ) NEPA guidance and/or implementing regulations along with Federal government procedures and paradigms should be modified to reflect present day challenges.

Changes needed to improve the NEPA process include:

1. Ensuring career paths for NEPA practitioners – create a Federal job series for environmental planners
2. Providing better training and easily accessible examples for NEPA practitioners
3. Changing the way NEPA is funded and the timing of analysis
4. Changing the focus from compliance to planning
5. Eliminating the ability of citizens to sue Federal agencies and create a NEPA dispute resolution board under CEQ, EPA or some other entity

This paper summarizes recent efforts to evaluate improvements to NEPA and discusses all five of the recommendations above. Additionally, this paper touches on the possibility of eliminating the law altogether and focusing environmental review and disclosure efforts through other more substantive statutes.

Introduction

NEPA became law on the first day of 1970. The law was the culmination of years' worth of work by Congress, environmentalists and the general public to establish a basic national charter for the protection of the environment. Books such as Rachel Carson's *Silent Spring*, the Santa Barbara oil spill and the National Environmental Colloquium of 1968 were all important precursors to the establishment of the law. NEPA established a national environmental policy and provides a framework for environmental planning and decision-making by federal agencies. The purposes of the law, taken directly from the statute (**Sec. 2 [42 USC § 4321]**), are: "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to

promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." The action enforcing provision of NEPA (**Sec. 102 [42 USC § 4332]**) directed that federal agencies, when planning for projects or actions, conduct an environmental review to consider potential impacts proposals may have on the environment. This action enforcing provision, while critical to the success of the law, has always been controversial and is the primary subject of recent efforts to improve the NEPA process.

Discussion

I have been involved with NEPA for over 17 years with the Department of the Navy. During this time, I have had the opportunity to work on some very diverse NEPA efforts. From relatively small documents for projects such as land acquisitions and fence construction to large NEPA efforts for the relocation of fighter jets on the East Coast and sonar operations in the Atlantic, I have seen the undisputable benefits of NEPA and also experienced frustrations when the law has been used as a tool simply to delay contentious projects with minimal environmental impact. As an example, in recent testimony to House of Representatives members as part of a House Resources Committee Task Force on Improving/Updating [NEPA] (Dec 2005), the following was presented:

> "in an area devoid of endangered species, impacts to waterways and floodplains, or of federal funding, NEPA may be the only tool that grassroots groups have [to fight highway projects]."

Clearly this individual sees NEPA as a tool to stop projects not as something that ensures full disclosure and consideration of environmental impacts of Federal projects and actions. I believe that the law, its implementing regulations and/or Federal agency procedures and paradigms should, at a minimum, ensure better integration of environmental decision-making within Federal agencies and also ensure that NEPA is not simply used as a tool to stop/delay projects because of Not in My Backyard (or NIMBY) reasoning. There have been two recent notable efforts (one initiated by CEQ and the other by Congress) that have dealt with the issue of improving and/or modernizing NEPA. My recommendations come largely from those two reports, my own personal experience and interviews with other senior level NEPA practitioners in the Federal government.

The CEQ NEPA Task Force final report titled *Modernizing NEPA Implementation* (Sept 2003) focused its analysis on the following areas:

Technology and information management
Federal and intergovernmental collaboration
Programmatic analysis and tiering
Adaptive management and monitoring
Categorical exclusions

Environmental assessments

The report represents views and opinions of the Task Force and did not establish new requirements for NEPA analysis. In my opinion, with few exceptions, the recommendations contained in the Task Force report are superficial and would do little to improve the NEPA process. As an example, the Task Force discussion on technology and information management is riddled with recommendations that include sponsoring workshops, developing more guidance and establishing work groups. These are noble recommendations but ones that are routinely used in the Federal government to kick an issue down the road without meaningful changes. Additionally, although the term "adaptive management" has been around for years and is routinely discussed in NEPA training classes, it is seldom if ever used/discussed within the NEPA practitioner's world. In reality, although the practice of incorporating adaptive management into an agency's alternatives or mitigation discussion would, on the surface, allow an agency to better adapt to unknown circumstances and/or incomplete information, it also could be seen as a weakness in an agency's analysis (not enough information to draw conclusions) and used against an agency in litigation. Seldom does an agency want to admit it does not have enough information to conduct an adequate analysis and/or reach conclusions. The most focused and beneficial recommendations contained in the Task Force's report dealt with the use and structure of Environmental Assessments (EAs).

The recently released draft initial findings of the House of Representatives/House Resource Committee Task Force on improving and modifying NEPA (Dec 2005) (hereafter referred to the House Task Force report) present a more direct although somewhat misguided effort to improve the NEPA process. The draft findings were grouped around the following themes:

What does NEPA mean?
The impact of changing NEPA
Litigation
Federal, tribal, state and local entities and the NEPA process
NEPA's interaction with other substantive laws
Delays in the NEPA process
Cost of compliance
Public participation
Adequacy of agency resources

In general, the report reveals that there were strong beliefs that NEPA should be changed. There were equally strong beliefs that the law should remain as is. Litigation (or at least the threat of litigation) was seen as the single biggest challenge with the NEPA process and it directly affects the cost and time to do NEPA. Agencies routinely try to make their NEPA documents "bullet proof" while many times missing the essence of the law altogether – good analysis, public participation and informed decisions.

Again, with few exceptions, the draft recommendations contained in the House Task Force report are superficial and, in my opinion, would do little to improve the NEPA

process. As an example, two draft recommendations call for establishing mandatory timelines and enforcing page limits. While many Federal agencies would, not surprisingly, probably support such changes to minimize cost and delays, the recommendations themselves are arbitrary and capricious and do little to foster better analysis and decision-making. With few exceptions, my experience within the Department of Defense has shown that very few EISs could be completed with 18 months. Arbitrarily setting time and page length deadlines for NEPA documents would undoubtedly lead to cutting corners, shortchanging the "hard look" requirement of NEPA, and minimize the potential for meaningful analysis and public input. If an agency were pressured to finish an EIS to keep within the arbitrary mandatory timeline, one could easily see an agency dismissing or downplaying meaningful input from another agency or the public.

With respect to litigation, the House Task Force report recommends creating a citizen suit provision under NEPA. The intent of doing so would be to clearly define and clarify standards for a citizen's suit under NEPA. While I do not support this recommendation, it relates to one of my five recommendations discussed later in this paper: eliminating the ability of citizens/agencies to sue Federal agencies under the Administrative Procedures Act (APA) while at the same time creating a formal dispute resolution board to handle citizen/agency NEPA complaints and challenges.

The most meaningful draft recommendations contained in the House Task Force report have to do with alternatives, providing additional authority for CEQ, and initiating a study to determine the amount of duplication and overlap in the environmental evaluation process. In my experience, agencies routinely create alternatives to arbitrarily satisfy NEPA, CEQ and agency requirements, when, in fact, there are no other reasonable alternatives to an action. In this case, the Federal agency should simply be allowed to document this reality in the NEPA effort and move forward with the project once sufficient analysis under NEPA is completed (assuming the final decision is to move forward). As an example, our office prepared an EA for the demolition of an old building on Naval Station Norfolk, Virginia. The only reason an EA was required was because the building was listed as a potentially historic structure and demolishing the building constituted an "adverse affect" under Section 106 of the National Historic Preservation Act. The building was in terrible shape and represented an extreme safety hazard. Although there were truly only two decisions – to demolish or not to demolish (no action), and even "no action" was truly not reasonable, the Navy created two additional action alternatives to demolition – giving the building to HUD for the homeless and rehabbing the building. In reality, the two additional alternatives should have been discussed and eliminated up front in the EA because they simply were not reasonable. In reality, the two additional alternatives were carried through the EA even though they did not meet the need for the action (eliminate the safety hazard). Any changes to the law and/or implementing regulations to clarify NEPA alternative analysis requirements would be helpful.

With respect to granting more authority to CEQ, this recommendation also relates to my fifth recommendation to improve the NEPA process – eliminating the ability of

citizens/agencies to sue under APA and creating a dispute resolution board possibly within CEQ to arbitrate NEPA cases. Lastly, as I also touch on later in this paper, understanding the requirement of laws passed after NEPA (such as the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act (ESA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) warrants a discussion of possibly eliminating NEPA altogether.

Now that I have touched on the two recent Federal efforts to improve the NEPA process, I will discuss my recommendations to do the same.

1. Ensuring Career Paths for NEPA Practitioners – Create A Federal Job Series for Environmental Planners

While on the surface this may seem like a self-serving recommendation, it is clear that a primary reason for inadequate NEPA analysis lies with the specific person assigned to managing and/or preparing the analysis. As discussed in the House Task Force report (Dec 2005), inexperience in preparing NEPA documents is seen as an important factor in poor quality NEPA analysis. NEPA is not something that is taught in school, and, until recently, there were few college degrees that directly related to NEPA and the Environmental Planning arena. As an example, within the entire Department of Navy (Navy) environmental program (encompassing some 3,200 individuals), most environmental professionals are environmental engineers working in a compliance field such as CERCLA or the Resource Conservation and Recovery Act (RCRA). When a job becomes available to do NEPA within the Navy, it is routine to hire an environmental engineer who is losing his or her job elsewhere, is disgruntled with his or her current job and is looking for a change or is simply an under performing individual. This is not always the case but it happens. Some have said that performing NEPA is part science, part art, part engineering, and part craziness. It is not a "traditional" environmental discipline. Not unexpectedly, there is no Federal job series for an environmental planner.

Because NEPA is not well understood and the education and background requirements to do NEPA are not well defined, there is a perceived credibility gap within the Federal government. It is routine to hear that "anyone can do NEPA." Yes, anyone can certainly do NEPA. However, not many can do NEPA well. Unfortunately, when senior level positions come open within the Federal government, the perceived lack of credibility and pedigree for NEPA practitioners often prevents them from getting those senior level jobs. As a result, good NEPA practitioners often leave their jobs to pursue other more lucrative and job enhancing disciplines. This must change if we hope to keep the best and brightest in the NEPA profession.

Jobs in the Federal government are advertised with specific job series (i.e. environmental engineer (819), etc.). The biggest change that is needed is to create a Federal job series for Environmental Planners. Requirements for this job series

would have to be broad but not necessarily soft. A successful NEPA practitioner is one who typically has a good natural science or planning background but more importantly is someone who has excellent writing and oral communication skills. Preparing and managing the preparation of NEPA documents is often an exercise is debate, compromise, negotiation and relationship building. Creating a Federal job series for environmental planners to capture these attributes would be a big step towards bridging the perceived credibility gap.

2. Providing Better Training and Easily Accessible Examples for NEPA Practitioners

This recommendation relates to some of the recommendations contained in the 2003 CEQ Task Force report and the House Task Force report on improving/modernizing NEPA. This recommendation also relates to my first recommendation above. Once better, more qualified people are recruited for NEPA work by ensuring a good career path for those individuals, it is imperative that they be given the tools to do their job effectively. Currently, NEPA training is inconsistent and expensive. Additionally, many Federal agencies are severely limited in their training resources (money). All too often, new NEPA practitioners learn NEPA the hard way – by being thrown into a complex NEPA effort. This is not the way to learn the craft.

CEQ should lead the effort for better training and providing examples of good NEPA work. The CEQ's *NEPAnet* (http://ceq.eh.doe.gov/nepa/nepanet.htm) is a good first start and it currently serves as an outstanding resource for NEPA practitioners. Currently, there are many private groups such as *Shipley Associates Inc.* who perform NEPA training along with a select number of universities such as Duke. In many instances the Federal agency themselves sponsors/creates NEPA training for their practitioners. Unfortunately, the quality of the training is sometimes suspect and inconsistent. CEQ should establish a "NEPA Training Curriculum" and sponsor development of NEPA training opportunities for both Federal government employees and contractors who prepare NEPA documents. Additionally, when good examples of NEPA documents and/or sections of NEPA documents are identified (possibly through EPA's current EIS grading system), those should be posted on CEQs NEPAnet for all to emulate.

3. Changing the Way NEPA is Funded and the Timing of Analysis

A fundamental problem with the way NEPA is implemented has to do with the way Federal projects/actions are funded. Typically, to get a Federal project in the funding pipeline, planning level documentation is prepared so that the project/action can be submitted and validated by the respective agency before either going to Congress or some other approving authority. The project/action itself is usually derived from some need identified by a comprehensive plan, study or emerging requirement.

I'm going to give an example of a Navy construction project although, based on my experience and conversations with other Federal NEPA practitioners (Nashold, Knight 2006), this example is representative of the funding pre-decisional quagmire of Federal agencies. A Naval base master plan might identify the need to provide more pier space to accommodate additional ships. NEPA is not typically done for Navy master plan efforts primarily because it is argued that many of the projects/actions identified in the plan are not ripe for analysis. As a result of the Master Plan, a project is developed for a new pier along the waterfront. This project is submitted up the Navy chain of command, it is "ranked" (i.e. it competes against other projects for funding) and, if validated, is put in a long-term funding plan. Once the project is put into a funding year, the Navy would plan to conduct NEPA analysis on the pier either 1-2 years ahead of the project/action year for an Environmental Assessment or 3-5 years ahead of time for an Environmental Impact Statement.

The problem with this project and the NEPA funding/analysis scenario is that there would probably be very little real flexibility to analyze reasonable alternatives outside of what is in the funding program – a new pier. In reality, is a pier the best answer? In theory, the Master Plan would have evaluated and decided on the best option. However, this may not always be the case and one must question what environmental considerations were included in the recommendation to build a pier. What happens is that the NEPA practitioner is given a limited set of alternatives and must develop his or her purpose and need and alternatives screening criteria narrow enough to support the pier option. The NEPA practitioner is limited to looking at pier design or location options.

The solution is to start NEPA earlier in the Federal project/action planning process and to provide a separate funding stream for Federal agencies to complete NEPA. On many occasions, NEPA is started too late in the planning process and has little impact on the ultimate decision made. Prior to submitting projects to get ranked and/or approved, Federal agencies should be required to perform NEPA as part of their internal project/action identification process to meet a specified need. In fact, in concert with a recommendation put forth in the 2003 CEQ Task Force on Programmatic NEPA analysis and tiering, Federal agencies should be required to prepare programmatic environmental analysis on Master Plans, Transportation Plans, etc. to ensure NEPA fosters better analysis and decision-making early in the process. Follow-on NEPA documents should tier off the programmatic analysis as needed to look at site-specific impacts and alternatives.

Funding battles to secure NEPA funding for projects/actions can be intense in the Federal government. Often, project/actions are proposed and, for a variety of reasons, funding was not planned in advance to complete NEPA. Delays in initiating the NEPA process lead to predetermined outcomes with little meaningful analysis. Federal agencies should receive a separate pot of money based on previous NEPA expenditures that would be managed by a central entity within the agency that would distribute money based on specific proposals.

NEPA funding would not be tied to any specific project (as is the current practice). As an example, the Corps of Engineers headquarters office would get a set amount of money each year based on the past five (5) years of NEPA expenditures. This money would be managed centrally within the agency (it is typically distributed internally to lower echelon level district offices) and distributed based on a request for a specific proposal. Each Corps proposal would be evaluated against other Corps NEPA proposals and there is certainly a chance that funding could fall short or be exceeded in any given year. To ensure money is available to complete NEPA, there would be a NEPA "slush fund" managed by CEQ, EPA or some other Federal agency that could be tapped by the requesting Federal agency on an "as needed" basis. Critical to the success of this effort would be to ensure that NEPA funding levels in any given year for an agency be based on at least the last five (5) year's worth of expenditures.

4. Changing the Focus from Compliance to Planning

This recommendation goes hand in hand with the proposal #3. In many instances, NEPA documents have become a "checking the box" exercise with limited meaningful influence on project/action plans and alternatives analysis. Federal agencies typically like to see all consultations completed and permits received (and included in the NEPA document's appendix) before finalizing a NEPA document. However, in order to finish consultations and/or get permits, a project must be late in the execution stage (i.e. 35% design or later). This creates a problem in that NEPA is completed too late in the projects/action planning process to meaningfully influence planning for a proposal.

I believe the recent shift to looking at NEPA documents as compliance efforts is directly related to having too many environmental compliance-minded individuals involved in preparing NEPA documents. There is a critical need to shift the NEPA paradigm back to one where it is recognized that it is more important to complete NEPA early in the planning process than to ensure all permits and agency approvals are included in the appendix to a NEPA document. In all reality, it is more important to actually analyze projected impacts early on a project/action proposal so elements of the project/action can be modified or mitigated to minimize environmental impacts. It is entirely acceptable to only discuss the permitting or consultation process in a NEPA document – not the actual results. An open appendix can be left in the NEPA document for agency permits and approvals to be added later.

Of course, there will be times when a NEPA document is completed early and conditions change or new information provided during the consultation or permitting process that could potentially affect the agency's ultimate decision. If this is the case, supplemental NEPA analysis may be required.

5. Eliminating the Ability of Citizens to Sue Federal Agencies and Create a NEPA Dispute Resolution Board Under CEQ, EPA or Some Other Entity

This is the one change that needs to be made to the law itself. Although statistics show that the actual number of NEPA documents being litigated is low (House Task Force 2005), the threat of litigation is driving the cost and time to complete NEPA documents through the roof. Agency lawyers are more involved than ever in the preparation of NEPA documents and insist on more detail and analysis than is probably required; especially for issues that have little or no bearing on the project/action itself. In a nutshell, fear is driving us to prepare the "perfect NEPA document." Is this an irrational fear? No, considering tight Federal agency construction budget realities. The Navy's total military construction budget in 2006 was a little over $800M (significantly less than in previous years) and each construction project is scrutinized more than ever. In fact, it is now routine practice in the Navy to demand that NEPA efforts be completed a year before funding is approved for projects. The thought being if the project is controversial, no matter how important it may be to national defense, Congress does not want to risk allocating scarce construction resources to a project that may end up in litigation for years. Again, reality says the number of NEPA litigation cases is low, but the risk of failure in tight budget times for the individual agency preparing the NEPA effort drives them to go after the "perfect NEPA document."

Assuming the threat of litigation is eliminated through an amendment to NEPA, a formal dispute resolution board must be established at CEQ, EPA or through some other entity that would serve as an arbitrator to hear complaints about agency NEPA documents and analysis. The authority of this board must be absolute and have the effect of a binding court decision. The intent is to move the sometimes long and expensive NEPA cases out from the overtaxed court system to a group of people who truly understand NEPA, its requirements and limitations.

Lastly, it was stated in the House Task Force report that the NEPA process is duplicative of other Federal law requirements. The House Task Force recommends that this be studied to see if agencies can be exempted from completing NEPA if there is a requirement to comply with a more substantive environmental law with functionally equivalent analysis and disclosure requirements.

NEPA became law in 1970 after a period of "environmental awakening" in the 1960's in the United States. Until this time, there were few substantive environmental laws on the books and it was common for agencies to make poor environmental decisions. However, following NEPA, laws such as the Clean Air Act (1970), Clean Water Act (1972) and the Endangered Species Act (1973) were passed and revolutionized environmental protection in this country.

Today, it is impossible to imagine that Federal agencies could take an action or build a project that would have environmental impacts without getting approvals from a myriad of state and Federal agencies and without disclosing the proposal to the public for scrutiny. The days of dumping waste oil in the back of the motor pool are over. The

days of installing a turbine or motor that emits air emissions without going through a rigorous permitting process are over. The days of cutting down trees in the vicinity of protected species are over. In essence, because of the plethora of media-specific environmental laws that have been passed since NEPA emerged in 1970, environmental stewardship is ingrained in all levels of Federal agency decision-making.

Environmental activists would have you believe that Federal agencies at every turn are trying to figure out ways to get around environmental requirements and ramrod projects through without considering the impacts of that project. This is simply not the case. There are far too many checks and balances in media-specific laws to ensure this doesn't happen.

The House Task Force recommends that the overlap of NEPA with other environmental laws be studied to determine if there is duplication and how to eliminate or minimize this duplication. A possible result of this study, at least theoretically, could be to repeal NEPA. However, in my opinion, the benefits of complying with NEPA far outweigh the potential benefit of eliminating the broad-based and sometimes duplicative environmental analysis required under the law.

Conclusion

Although the House Task Force will ultimately issue its final recommendation on whether to change NEPA, the law itself will most likely survive in largely its current state well into the future. And, although not perfect, it is arguably the most important environmental law ever passed and it is still the cornerstone of environmental protection, analysis and disclosure in this country.

I have recommended changes that, if implemented, will truly improve the NEPA process. My first two recommendations go to the heart of what I believe is the biggest challenge facing NEPA – recruiting, keeping and training highly skilled people to conduct NEPA analysis. If we get the right people with the right skill sets, train them correctly, and commit to keeping them by providing career paths, the NEPA process and the quality of NEPA documents will improve and, ultimately, more informed environmental decisions will be made. My third and fourth recommendations go right to the heart of how Federal projects/actions are planned and executed and how NEPA is applied to those projects/actions. By changing the current NEPA paradigm from compliance to planning and by adjusting how NEPA is funded, NEPA can be used to better influence project/action design, make more informed decisions and minimize environmental impacts. My last recommendation is the only one directly tied to changing the law itself. By specifically exempting Federal agencies from NEPA litigation under APA and establishing an educated central dispute resolution board to resolve NEPA cases, the potential for long delays is minimized and better, more balanced resolutions would be expected.

Lastly, as to the possibility of repealing NEPA altogether, that is highly unlikely. The public will not stand for a repeal of the cornerstone environmental law in this country.

Changes may ultimately be made to minimize duplicative efforts with other media-specific statutes, but those changes will hopefully only streamline and not substantially change how NEPA is implemented.

References

Council on Environmental Quality NEPAnet. http://ceq.eh.doe.gov/nepa/nepanet.htm

Council on Environmental Quality NEPA Task Force final report, *Modernizing NEPA Implementation*. September 2003

House of Representatives Task Force on Improving and Modifying NEPA. U.S. House of Representatives. December 2005

Knight, Kelly K. NEPA Consultant and Former Government NEPA Project Manager. Personal communication. February 8, 2006

Nashold, Elizabeth. NEPA Program Manager, Fleet Forces Command, Norfolk, VA. Personal communication. February 23, 2006