
Chapter 7

Additional Areas of Consideration

Several issues were raised in public comment and during interviews with Federal agencies concerning procedural aspects of the NEPA process that were not directly related to the focus areas⁹⁶ evaluated by the task force. Suggestions included a proposal that the Environmental Protection Agency oversee the NEPA process, strict enforcement of page limits for EAs and EISs, and a requirement that agencies submit annual progress reports about their ability to achieve NEPA-process improvements.⁹⁷

7.1. Additional Topics Raised

Several observations and additional topics were presented to the task force warrant recognition and are discussed below.

7.1.1. Public Opinion

Diverse and strongly held opinions about possible revisions to NEPA or the CEQ regulations or guidance exist. Views varied from suggestions to eliminate NEPA and the CEQ implementing regulations to leaving the law and CEQ regulations and guidance intact.

The broad and often conflicting range of views made the task force's work challenging. We concluded that few universally held descriptions of problems or solutions exist, and that periodic review of discreet NEPA implementation issues would be beneficial.

⁹⁶ Technology and information management and security; Federal and intergovernmental collaboration; programmatic analyses and tiered documents; adaptive management and monitoring; categorical exclusions; and environmental assessments.

⁹⁷ Content Analysis Team, Forest Service, "Summary of Public Comment—NEPA Task Force" (Dec. 20, 2002), *available at* <http://ceq.eh.doe.gov/ntf/comments/comments.html>.

7.1.2. Agency Critiques

Concerns were raised in comments and discussions with Federal agencies regarding a specific agency or activity. Some critiques explained a comment or supported a recommendation, however, many attempted to secure task force intervention to address an issue on a specific project or redress an agency's conduct in implementing NEPA procedures.

The task force was not designed to intercede in individual cases and each situation involves unique circumstances that the task force did not address beyond their applicability to broad recommendations. We invite Federal agencies to review the public comments and consider agency-specific comments posted on the task force Website at <<http://ceq.eh.doe.gov/ntf/comments/comments.html>>.

7.1.3. Agency Trust and Credibility

Besides individual agency critiques, many comments addressed agency credibility in implementing NEPA. Some respondents believe that agencies pre-decide projects, misinterpret or misrepresent environmental effects information, and do not conduct quality analyses. Agencies expressed frustration with one another and the public about insensitivity to agency goals and responsibilities, lack of responsiveness or late participation in the NEPA process, and emphasis on short-term impacts rather than long-term goals.

The perspectives suggest the need to continue efforts to strengthen trust and credibility. Trust and credibility are discussed in other chapters of this report, and several task force recommendations are designed to improve participation in the NEPA process.

7.1.4. Resource Allocation

The public and agencies are concerned about the availability of dollars and skills to prepare quality environmental analyses and documents.⁹⁸ Comments suggested that CEQ should investigate the time and dollars being used to conduct NEPA processes. It was also suggested that CEQ support agency-specific requests for greater funding of environmental analyses, and encourage agencies to institute performance-based rewards systems for NEPA work.

The task force recognizes that each agency has budget protocols and management systems that establish priorities to fund environmental needs. Additionally, CEQ is available to consult on fiscal and personnel matters and might need to take a more active role if the increasing number of experienced NEPA practitioners and environmental and natural resource specialists that are retiring are not replaced.

7.1.5. Definitions

CEQ regulations implementing NEPA contain many terms that the courts have helped to interpret. The definitions of terms such as "human environment," "major federal

⁹⁸ For further discussion of resource needs, see Smythe, Robert and Isber, Caroline, "NEPA in the Agencies—2002, A Report to the Natural Resources Council of America" (Oct. 2002), available at <http://www.naturalresourcescouncil.org>.

action,” and “significantly” have been debated for years, and forums have been convened to discuss and propose changes.⁹⁹ Some have argued that the current definitions are too inclusive, while others believe that they are too narrow.

Considering the length of time that the terms have been used in the NEPA process, defined through case law, and debated, the task force felt that a consensus for new definitions would probably not be reached. CEQ counsel should convene periodic meetings with agency counsel to discuss current case law regarding NEPA practices and terminology, as discussed later in this chapter.

7.1.6. Legal Standards of Review

Several respondents commented that adjusting the legal standards of NEPA review, setting bond requirements before litigation, and amending statutes that govern legal actions under NEPA could increase the efficiency of the NEPA process. Specifically, recommendations were offered to adjust the legal standards of review, limit reviews to administrative forums under the Act of September 6, 1966, commonly called the Administrative Procedure Act¹⁰⁰, or modify payment requirements under the Equal Access to Justice Act.¹⁰¹

The task force believes that these laws relate to broad legal and administrative requirements that have applicability beyond NEPA. It may be advantageous for CEQ to organize workshops and meetings among agency counsel to discuss judicial review standards under the Administrative Procedures Act and issues associated with the Equal Access to Justice Act, as discussed later in this chapter.

7.1.7. Process Management

A generic term, “analysis paralysis,” was used to express frustration with what are perceived by some as inordinate and excessive procedural requirements imposed under NEPA. Respondents also thought that using NEPA as the vehicle to integrate the many laws that affect agency decisionmaking is difficult. The term “analysis paralysis” is used to address a broad range of concerns about inefficiencies such as agency specific procedural requirements, project priority setting, project management, and Federal consultation and coordination requirements. Many respondents are concerned that the development of these analyses and documents takes too long and results in documentation that is excessive in light of the significance of the actions evaluated.

Although there is not agreement on the causes of lengthy and excessive analyses and documentation, there is a consensus that various aspects of the NEPA process could be improved. The NEPA process needs to be done well and done efficiently, and that is the goal of the recommendations made by the task force.

⁹⁹ For example, in 1996 the Senate Energy and Natural Resources Committee explored changes to NEPA and CEQ implementing regulations.

¹⁰⁰ 5 U.S.C. § 551 *et seq.*

¹⁰¹ 5 U.S.C. § 504 *et seq.*

7.1.8. Effects Analysis

Many comments concerned the depth and breadth of environmental effects analysis; direct, indirect, and cumulative. Some issues were due to confusion about the scope of the analysis associated with programmatic-level documents. Other comments were project specific and require attention that cannot be easily translated into CEQ guidance. Agencies also expressed concern about the level of specificity required for project analyses. CEQ has issued a handbook on cumulative effects analysis,¹⁰² and several training courses are available to Federal agencies on cumulative effects analysis.

The task force believes that many problems associated with effects analyses are project specific and thus, can be addressed through additional training and consultations with CEQ. An exception would be when CEQ has not provided guidance, specifically concerning social, cultural, and economic analyses, as discussed later in this chapter.

7.1.9. Supplemental Reviews

Several agencies expressed dissatisfaction with the need to evaluate new information or changed circumstances for ongoing actions after the NEPA analysis and decision are completed.¹⁰³ This requirement is especially relevant for programmatic analyses that support multiple projects that will be approved during a period of years or for projects that require years to complete. Question 32 of the Forty Most Asked Questions¹⁰⁴ reiterates the obligation of agencies to evaluate ongoing or incomplete projects and suggests a 5-year period for such evaluations. Agencies are finding that new information and changed circumstances can occur relatively quickly, and that analyses are required to determine if the information or changed circumstance is pertinent to the NEPA analysis or could result in changes to the proposal.

The process, thresholds, and documentation requirements for new information and changed circumstances, especially for programmatic documents, are often specific to the proposed action and agencies should continue to informally consult with CEQ on these issues. Efforts to make the NEPA process more efficient should help alleviate this problem by allowing agencies to make more timely decisions and also by providing opportunities for more flexibility to respond to emerging issues (see the Adaptive Management and Monitoring chapter of this report).

7.1.10 Delegation of NEPA Responsibilities

In a number of situations, State agencies develop NEPA analyses and documentation for Federal agencies. Additionally, several States have environmental analysis statutes similar to NEPA.¹⁰⁵ When an action is subject to both NEPA and State environmental analysis requirements, the Federal and State processes are often integrated and one document is produced. Such an approach can satisfy both Federal and State

¹⁰² Council on Environmental Quality, "Considering Cumulative Effects Under the National Environmental Policy" (Jan. 1997), available at <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm>.

¹⁰³ 40 C.F.R. § 1502.9(c)(ii).

¹⁰⁴ Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026 (Mar. 23, 1981), available at <http://ceq.eh.doe.gov/nepa/regs/40/40P1.htm>.

¹⁰⁵ Currently, at least 17 states have statutes that are similar to NEPA. For more information visit <http://ceq.eh.doe.gov/nepa/states.html>.

requirements; however, it is not always efficient because Federal and State requirements for disclosure, public involvement, and analysis might be different. A number of State agencies and individuals commented that to avoid duplication of analysis and documentation, CEQ should specify that State environmental statutes should satisfy NEPA when they are similar to NEPA. A second, but related issue involves the delegation of NEPA responsibilities to State and local agencies and Tribes. Some State agencies have suggested that States be delegated the responsibilities for Federal NEPA analyses and documentation, especially where the Federal agency role is limited to approving funding.

The task force notes that State laws vary considerably and are not identical to NEPA. Delegation of the NEPA process to State and local agencies and Tribes would not alter the existing decisionmaking responsibilities of Federal agencies, which are derived from other statutes. NEPA responsibilities have been delegated by statute when a local or tribal government is the decisionmaker such as the release of Community Development Block Grant and Home funds under Title I of the Housing and Community Development Act of 1974¹⁰⁶ and the release of funds under the Native American Housing Assistance and Self-Determination Act of 1996.¹⁰⁷ State or local agencies cannot be delegated the responsibility for Federal decisions without changes in Federal and, possibly, State law.

CEQ should continue to support efforts to merge or synchronize Federal, State, local, and Tribal NEPA processes (see the Federal and Intergovernmental Collaboration chapter of this report). When legal issues arise they might be project- or agency-specific and should be addressed in the context in which they arise. Establishing legal forums, as discussed later in this chapter, provides a mechanism to identify issues that merit broad attention.

7.2. Four Additional Issues and Recommendations

Based on comments and input received, the task force developed specific recommendations for four additional areas that were considered: coordinating compliance with other laws; alternatives; social, cultural and economic effects analyses; and disputes and post-decisional reviews. The discussion and recommendations are provided in the following four sections.

7.2.1. Coordinating Compliance with Other Laws

Public comment and agency interviews identified several laws that are closely associated with environmental analysis under NEPA and, therefore, obligate agencies to comply with them as an integral part of the NEPA process. The need to synchronize the analyses is important for the NEPA process to be an effective tool. The most common laws cited were the Endangered Species Act¹⁰⁸, the National Historic Preservation Act,¹⁰⁹ the Federal Water Pollution Control Act commonly called the

¹⁰⁶ 42 U.S.C. § 5301 *et seq.*

¹⁰⁷ 25 U.S.C. § 4101 *et seq.*

¹⁰⁸ 16 U.S.C. § 1531 *et seq.*

¹⁰⁹ 16 U.S.C. § 470 *et seq.*

Clean Water Act¹¹⁰, and the Clean Air Act.¹¹¹ Agencies attempt to conduct compliance analyses concurrently, but they often perform them sequentially.

For example, integrating the NEPA process with Section 7 of the Endangered Species Act, which requires consultation with the U.S. Fish and Wildlife Service and/or The National Marine Fisheries Service (NOAA Fisheries), is a long-standing concern. CEQ and various agencies have worked with the Fish and Wildlife Service and NOAA Fisheries to better integrate the requirements of Section 7 consultation into NEPA requirements. The efforts focus on addressing Endangered Species Act requirements earlier in the NEPA process, which can expedite informal and formal consultation which typically occurs toward the end of the NEPA process.

Despite these laudable efforts, Federal agencies still perceive the Section 7 consultation as a major challenge for efficient analyses. Respondents suggested two specific and very different approaches. One suggestion was that CEQ should work with the Fish and Wildlife Service and NOAA Fisheries to change the Section 7 consultation process and allow agencies greater flexibility in deciding when formal consultation is required. The other approach was to address Section 7 requirements separately from the NEPA process as a part of project implementation. Agencies that routinely accomplish Section 7 consultation understand how and when to efficiently align it with the NEPA process, however, limited resources and changing priorities often preclude efficient integration. Implementing solutions for greater efficiency in consultation will continue to be challenging and continue to be addressed by the regulatory agencies.

Consultation with State Historic Preservation Officers under Section 106 of the National Historic Preservation Act has received more attention from the Federal agencies because of recent changes in the Section 106 procedures. The new procedures allow Federal agencies to comply with the Section 106 requirements through the NEPA process¹¹² CEQ should work with the Advisory Council on Historic Preservation and Federal agencies to develop guidance on how to implement such a consolidated process.

Addressing conformity requirements in the Clean Air Act and total maximum daily loads and 404 permitting requirements in the Clear Water Act during the NEPA process usually present project-specific challenges and change from State-to-State and area-to-area because of the varied and complex issues that can arise. The task force believes that to coordinate these laws with the NEPA process, Federal, State, local, and tribal regulatory agencies should develop specific memoranda of agreement. These agreements would be tailored to agency mission, project scope, and the potential impacts to air and water resources.

Many agencies could benefit from CEQ guidance that outlines efficient measures and timing for integrating various environmental requirements with all NEPA processes,

¹¹⁰ 33 U.S.C. § 1251 *et seq.*

¹¹¹ 42 U.S.C. § 7401 *et seq.*

¹¹² Advisory Council on Historic Preservation, "Coordination with the National Environmental Policy Act," 36 C.F.R. § 800.8 (2003).

including programmatic analyses and documents. The guidance should address the requirements for aligning the requirements for: Section 7 of the Endangered Species Act; Section 106 of the National Historic Preservation Act; conformity analyses under the Clean Air Act; and the total maximum daily load and Section 404 requirements of the Clean Water Act. A template for such guidance could be the Department of Transportation's Red Book, *Applying the Section 404 Permit Process to Federal-aid Highway Projects* (FHWA 1988),¹¹³ which was developed by the Federal Highway Administration, U.S. Army Corps of Engineers, EPA, Fish and Wildlife Service, and National Marine Fisheries Service. Whenever possible, CEQ should coordinate its efforts with existing initiatives addressing the integration of environmental requirements.

The task force recommends that CEQ, in consultation with the Environmental Protection Agency, Advisory Council on Historic Preservation, Fish and Wildlife Service, NOAA Fisheries and other agencies with experience in complying with ESA, NHPA, CAA and CWA, develop a CEQ handbook on effectively integrating ESA Section 7 consultation, NHPA Section 106 coordination, CAA conformity requirements, and CWA total maximum daily loads and Section 404 requirements with the NEPA process.

7.2.2. Alternatives

Comments submitted to the task force identified several issues connected with alternatives. Concerns exist over the definition of the no-action alternative, criteria and methods for identifying alternatives, and how collaborative planning influences the range of alternatives.

Interviews with agencies elicited issues concerning the definition of the no-action alternative as it relates to environmental assessments. CEQ defined the no-action alternative,¹¹⁴ and the task force believes further clarification is unnecessary. Most agencies indicated that they did not have problems associated with generating alternatives. Concerns were expressed about how to decide which alternatives to consider in detail and which to eliminate from detailed evaluation. The task force believes that this is determination best left to individual agencies to address on a project-by-project basis.

As agencies gain success using collaborative planning and decisionmaking models, the agencies suggest focusing on a few good alternatives rather than a large number of alternatives. Agencies believe that collaborative efforts will likely result in a narrow set of refined, agreed upon alternatives, while other alternatives will be

¹¹³ Federal Highway Administration, "Applying the Section 404 Permit Process to Federal-Aid Highway Projects" (Sept. 1998), available at <http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/aa5aec9f63be385c852568cc0055ea16/6f708d283ad7a7c485256d63000b6ce5?OpenDocument>.

¹¹⁴ The no action alternative is interpreted to accommodate proposals for projects where no action means the proposed activity does not take place and to accommodate proposals that involve ongoing programs, such as updating a land management plan where no action means no change from the current management plan. Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026 (Mar. 23, 1981), Question 3, available at <http://ceq.eh.doe.gov/nepa/regs/40/40P1.htm>.

eliminated early in the analysis process. A challenge to the success of this approach is to include potentially interested parties early to ensure that relevant alternatives are not prematurely eliminated. However, the task force believes that it would be reasonable for CEQ to explore this approach.

The task force recommends that CEQ explore the use of collaboration to develop and refine alternatives by working with a facilitator, such as the US Institute for Environmental Conflict Resolution, and then provide guidance that outlines how agencies can document the process of refining a proposal and conform to the regulations requiring the rigorous and objective evaluation of reasonable alternatives.¹¹⁵

7.2.3. Social, Cultural, and Economic Analyses

Concerns continue to be voiced that agencies do not adequately address social, cultural, and economic effects, nor do they consider the whole of the “human environment”¹¹⁶ Section 102(2)(B) of NEPA requires that unquantified environmental amenities and values be considered along with economic and technical considerations. Additionally, CEQ regulations include historic, cultural, economic, and social impacts in the definition of effects¹¹⁷ Although social and economic effects alone might not require an agency to develop an EIS, the effects must be addressed as part of the NEPA process.

CEQ has not provided guidance to Federal agencies about how to develop and integrate social, cultural, and economic analyses into the NEPA process. The responsibility for developing and implementing such technical procedures has remained with individual agencies. CEQ has provided guidance for environmental justice as a special case of social analysis.¹¹⁸

When CEQ recognized that cumulative effects analysis was problematic for many agencies, a cumulative effects publication was developed (CEQ 1997b). The task force believes that CEQ guidance on social, cultural, and economic analyses would also be beneficial as agencies respond to greater inquiries regarding such analyses. Agencies commented that the existing guidance on environmental justice has been helpful in addressing this specific aspect of social and economic analysis. The task force reasons that similar guidance on social, cultural and economic analyses would improve the quality and efficiency of this aspect of the NEPA process.

The task force recommends that CEQ develop a handbook on social, cultural, and economic analysis similar to the cumulative effects publication.

¹¹⁵ 40 C.F.R. § 1502.14.

¹¹⁶ Content Analysis Team, Forest Service, “Summary of Public Comment—NEPA Task Force” (Dec. 20, 2002), *available at* <http://ceq.eh.doe.gov/ntf/comments/comments.html>.

¹¹⁷ 40 C.F.R. § 1508.8 (2003).

¹¹⁸ Council on Environmental Quality, “Environmental Justice—Guidance Under the National Environmental Policy Act” (Dec. 1997), *available at* <http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf>.

7.2.4. Disputes and Post-decisional Reviews

The topic of post-decisional administrative reviews received many comments both in favor of and opposed to these administrative processes¹¹⁹ Concerns centered on whether agencies were implementing the project and mitigation measures either as described in the NEPA documents or in the most efficient manner possible. NEPA and the CEQ regulations focus on the pre-decisional aspects of integrating environmental considerations into decisionmaking and do not address post-decisional administrative processes for appeal by the public regarding decisions subject to NEPA. In certain cases, Congress has imposed post-decisional requirements on agencies.¹²⁰

The task force is not suggesting that CEQ prescribe post-decisional processes. Rather, the task force recommends that CEQ study the effectiveness of alternatives for resolving disputes, including those over environmental mitigation and the most efficient implementation methods, both during and after the NEPA process. Such a study could be done through the US Institute for Environmental Conflict Resolution or another organization that specializes in conflict resolution. Results of such studies could be used to further improve the efficiency and effectiveness of the NEPA process.

The task force recommends that CEQ study the effectiveness of alternatives for resolving disputes, including those concerning environmental mitigation and improving project implementation, both during and after the NEPA process.

7.3. Three General Recommendations

The task force developed three recommendations for CEQ action that will facilitate efforts to address any and all of the issues and specific recommendations made throughout this report, and they should be implemented as soon as possible. These recommendations will provide tools to CEQ and NEPA practitioners that will improve the NEPA process.

7.3.1. Increase Staff

CEQ provides advice and counsel to agencies on priority projects and situations important to the Administration, and on projects that could establish a NEPA precedent. These consultations were considered valuable to the agencies involved. The task force recognizes that CEQ is not sufficiently staffed to provide all the services and consultation demanded. Especially lacking is the capacity to provide hands-on consultation with agencies to improve NEPA implementation and environmental analysis. Additional staff would also enhance CEQ's ability to implement task force recommendations.

The task force recommends that CEQ establish an additional professional position, or positions, to provide technical NEPA process consultation and better coordinate advice and guidance to agencies about improving NEPA implementation and environmental analysis.

¹¹⁹ Content Analysis Team, Forest Service, "Summary of Public Comment—NEPA Task Force" (Dec. 20, 2002), *available at* <http://ceq.eh.doe.gov/ntf/comments/comments.html>.

¹²⁰ The Forest Service's administrative appeal process was mandated by Congress in 1992 (P.L. 102-381) and is codified at 36 C.F.R. Pt. 215 (1993).

7.3.2. Annual Legal Forums

The discussion of definitions and legal standards of review further highlighted the need raised during several discussions of the focus areas, to more actively engage agency counsel with NEPA practitioners to discuss issues that are raised in litigation. CEQ should conduct annual NEPA Legal Forums to discuss important NEPA legal developments. Legal conferences held by agencies and other organizations could identify issues in areas of interest to practitioners that could benefit from CEQ guidance or clarification. An annual NEPA Legal Forum could provide a NEPA-legal-lessons-learned mechanism, identify the need for new CEQ guidance, and facilitate a consensus on NEPA legal issues. The proceedings of the forum should be prepared and made available to all NEPA practitioners.

The Task Force recommends CEQ hold annual NEPA Legal Forums to discuss important NEPA legal developments; discuss and recommend any CEQ guidance that might need to be clarified as a result of this case law; discuss NEPA issues of interest to the NEPA community; and facilitate consensus on addressing legal issues whenever possible.

7.3.3. Develop Handbook

As the task force discussed various issues, it became clear that the lack of a central repository of guidance organized by specific topics often results in unintentional neglect of existing guidance. Although NEPA practitioners are familiar with the Forty Most Asked Questions Concerning CEQ's NEPA Regulations, they are less familiar with other valuable CEQ guidance. Existing reference and guidance materials should be compiled and available by topic headings to facilitate access by all members of the NEPA community.

The task force recommends that CEQ develop a handbook that provides existing guidance identified by topic areas and is supplemented as new guidance is issued. The guidebook should be published on the Web, with updates published periodically in hardcopy to ensure accessibility.

7.4. Summary of Additional Recommendations

The task force developed additional specific recommendations described above. Four of those address several additional issues of concern. The last three facilitate efforts to address all areas of consideration and should be implemented as soon as possible. The task force recommends that CEQ:

- ❖ Develop a handbook to effectively integrate the NEPA process with Endangered Species Act Section 7 consultation, National Historic Preservation Act Section 106 coordination, Clean Air Act conformity requirements, and Clean Water Act total maximum daily load and Section 404 requirements in consultation with the Environmental Protection Agency, Advisory Council on Historic Preservation, Fish and Wildlife Service, NOAA Fisheries and other agencies, as appropriate.

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- ❖ Explore the use of collaboration to develop and refine alternatives by working with a facilitator, and then provide guidance that outlines how agencies can document the process of refining a proposal and conforming to the CEQ regulations requiring the rigorous and objective evaluation of all reasonable alternatives.
 - ❖ Develop a handbook on social, cultural and economic analysis similar to the cumulative effects and environmental justice publications.
 - ❖ Study the effectiveness of alternatives for resolving disputes, including those about environmental mitigation and project implementation, both during and after the NEPA process.
 - ❖ Establish a professional position, or positions, to provide technical NEPA process consultation and better coordinate advice and guidance to agencies about improving NEPA implementation and environmental analysis.
 - ❖ Convene an annual NEPA legal forum to discuss important NEPA case law from that year, recommend any CEQ guidance needing clarification as a result of the case law, discuss other NEPA issues of interest, and facilitate a consensus on addressing legal issues.
 - ❖ Develop a handbook that provides existing guidance identified by topic areas, is supplemented as new guidance is issued, and is published on the NEPAnet Website and in hardcopy.