

*Natural building blocks for quality of life*

June 3, 2005

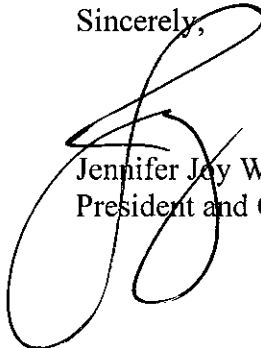
The Honorable Cathy McMorris  
Chairman, House Task Force on Improving NEPA  
1324 Longworth House Office Building  
Washington, DC 20515

Dear Madam Chairman:

The National Stone, Sand and Gravel Association ("NSSGA") appreciates the opportunity to provide comments to the Task Force on Improving the National Environmental Policy Act (NEPA). NSSGA believes that the stated goal of the Task Force – ensuring that the federal decisions are made in an appropriate, environmentally sound manner, rather than being focused by litigation – is laudable and indeed necessary. NSSGA does not dispute the intent and value of NEPA to the decision-making process. However, based on the experience of our members, it is clear that NEPA has moved away from Congress' original intent. As it now stands, the NEPA process has become a regulatory quagmire, sinking many important projects with delay and endless cycles of review. Moreover, the unfortunate reality is that delays in projects (such as permitting aggregate mining) due to lengthy NEPA reviews has a "ripple effect" on the cost of such materials – which are often purchased by public agency customers. The end result is that the taxpayers bear much of the added cost of NEPA compliance. This is surely not the process Congress envisioned.

Based upon the experience of our members in the NEPA process we provide the following suggestions for actions that can be taken to improve and modernize the NEPA process. We look forward to working with the Task Force on this much needed reform.

Sincerely,



Jennifer Joy Wilson  
President and CEO

Enclosure (s)

cc: The Honorable Tom Udall  
Ranking Member  
House Task Force on Improving NEPA

## INTRODUCTION

NSSGA, based near the nation's capital, is the world's largest mining association by product volume. Its member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. and approximately 120,000 working men and women in the aggregates industry. During 2004 a total of about 2.79 billion metric tons of crushed stone, sand and gravel, valued at approximately \$16 billion, were produced and sold in the United States.

The vast majority of these materials are utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement. The importance of aggregate in vital public works projects cannot be understated. Projects such as highways, mass transit, and water supply depend on timely delivery of aggregate in order to meet their deadlines. Hence, delays in the provision of aggregate materials can often lead to delays in the public infrastructure projects.

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f process itself is straightforward – but the "devil is in the details." NEPA requires each federal agency to "include in every recommendation or report on . . . major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. §4332. Significantly, however, NEPA does not dictate a specific outcome. Rather, it is a "process-forcing" mechanism designed to ensure that environmental considerations are factored into the decision-making process. This fact is often missed in the modern NEPA process.

NEPA documentation may be in the form of an Environmental Impact Statement (EIS). Council of Environmental Quality (CEQ) regulations allow an agency to prepare a more limited Environmental Assessment (EA) if the impacts are insignificant. 40 C.F.R. § 1501.3. An agency that decides, pursuant to an EA, that no EIS is required must issue a "finding of no significant impact" (FONSI). *Id.* § 1501.4.

The NEPA process has veered from its original intent of better environmental decisions with less paperwork. Depending on the size and scope of a project, the NEPA process can be a long and protracted component of the planning phase, taking anywhere from eight to twenty-four months to complete, and in some instances several years longer. Relatively straightforward mining permits for which only an EA will be prepared can be caught up in incredible delays and added expense. In other cases, projects with obvious environmental benefits, such as reclamation of quarries, are also dragged into the seemingly endless NEPA process. Even projects that are not drawn into litigation can become so entangled in the complexities of NEPA analysis that the increased costs and delays may be fatal to the project. Thus, rather than assisting agencies with making better decisions, NEPA has become a tool of opponents who seek not to comment on the project, but rather to stop it. NEPA is used to delay and delay and then, when the project is

finally approved, to litigate. The end result is significant economic impacts without appreciable environmental benefits.

### **RECOMMENDATIONS FOR NEPA REFORM**

1) The NEPA process must have a clear end point.

Perhaps the biggest frustration that the regulated community faces is the fact that it is nearly impossible to plan for the length of the NEPA process because the practical reality is that NEPA review often has no clear end point. This has led some to describe the typical NEPA process as "paralysis by analysis."

Defined end points in the process are essential for the planning purposes of the public and federal agencies alike. For example, there must be some end to the level of data that will be reviewed and the studies that must be undertaken. Too often, NEPA turns to a game of "gotcha" whereby the agencies complete the process only to be sued for failure to have considered some report that was not completed or available within the time period of the record being open or for failure to respond in detail to what was a minor comment on an obscure point. Data submitted at the last second or data that was not reviewed by the agencies of only tangential importance should not cause the agency to have to reopen the entire NEPA process.

Often, agencies will seek to protect their NEPA documentation from legal challenges by producing piles of paperwork that exhaustively discuss every potential impact of the proposed action in hopes of creating a "bullet-proof" document. Yet, the cost of such padding is borne by the project proponent (both in terms of preparation of documentation and in delays) and in many circumstances by the public at large (from the costs to the agencies to the increased cost of the underlying project). While the agencies may see this as a way of reducing litigation vulnerability, it has a significant impact on the process. Ironically, it is not uncommon for the time frame for decision-making to be so long that the agencies end up making decisions with outdated information. The agencies should only count what truly "counts" and should not be forced to reopen the record to respond to tangential comments.

Not only are project proponents forced to deal with the incredible delays of the NEPA process itself, but they are also at risk of committing resources in reliance on the final permit only to have it shut down while the project gets reviewed by the courts. Therefore, we recommend the adoption of a 60-day statute of limitations applicable to lawsuits filed under NEPA. Often, NEPA lawsuits are filed after project work has already begun – at that point, the permittee has already committed significant resources in reliance on the federal government's action. A lawsuit filed at this late juncture has a devastating effect on the project and forces the agencies to divert resources in defense. Reasonable statute of limitations would both preserve the rights for opponents to challenge the NEPA review while allowing the project proponents to commit resources without fear of eleventh hour litigation.<sup>1</sup>

Currently, the CEQ regulations do not specify any detailed project schedule or set any hard deadlines. Section 1501.5 provides the lead agency with discretion to develop a schedule in coordination with cooperating agencies. This causes unnecessary delay. Establishing deadlines

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<sup>1</sup> For example, the California Environmental Quality Act (a "little NEPA") has a statute of limitations that varies, depending on what is being challenged. See CA PUB RES § 21167.

and tighter schedules will provide significant benefits in terms of planning finality and avoiding delays. One way to streamline the review process and to add some level of regulatory certainty would be to have an explicit requirement that non-lead federal agencies must utilize the lead agency's NEPA document unless the non-lead agency makes a finding, within 30 days (or at most 60 days) of the lead agency circulation of the Final EIS, that the EIS or EA is not adequate. In addition, project sponsors must agree to any time extensions. The end result of these changes would be to prevent the agencies from engaging in an endless cycle of comments on revised drafts.

2) The NEPA review must always remain focused on project purpose.

Often NEPA review moves away from the project purpose. For example, analysis of alternatives to the underlying action being considered often results in unnecessarily /detailed analysis of an unreasonable number of alternatives or analysis of alternatives that are not remotely consistent with the project purpose.

The range of alternatives to be analyzed must be defined by the underlying purpose of the proposed action, and the agencies must take the permittee's objectives into account in formulating that purpose.<sup>2</sup> This means that the agencies should not be forced to analyze a myriad of alternatives that would not support that purpose merely because a third party suggests it.<sup>3</sup> We are aware of circumstances where this leads agencies to request mining companies to analyze 8 or 10 alternatives, some of which are obviously inconsistent with the underlying project purpose. If the agencies are analyzing a project that proposes expansion of a quarry on private property, it makes no sense whatsoever to force the agencies (which ends up being passed down to the permittee) to provide detailed analysis of alternative "options" such as donating the property for public use or finding alternatives to the aggregate materials that will be mined. Only those alternatives that are truly practicable, feasible and consistent with the project proponent's underlying purpose should be analyzed.

3) There needs to be more rationality in analysis of impacts

The tactics of those wishing to use NEPA to delay projects are well known. By asking for more discussion of certain issues, and then moving on to new issues each time the agency responds, project opponents constantly "move the bar" for the agencies. Under this approach, project opponents will always be able to point to some area of the record that is not discussed as much as other areas, and hence always demand more NEPA analysis or claim that the failure to properly analyze one small issue is fatal to the overall process. The Supreme Court has condemned this tactic:

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<sup>2</sup> See City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999).

<sup>3</sup> For example, if the project purpose is to operate a quarry to provide needed aggregate to the local region, the action agency would not have to analyze an alternative that a third party finds more suitable. See Louisiana Wildlife Fed'n v. York, 761 F.2d 1044 (5<sup>th</sup> Cir. 1985) (Holding "not only is it permissible for the Corps to consider the applicant's objectives, the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable").

"[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978).

There must be a rational limit to the scope of impacts that must be analyzed and the level of detail that must be utilized. NEPA should not require the agencies to independently conduct extensive scientific studies related to the subject matter of the EIS. This is an impossible expectation for agencies that issue thousands of permits a year, and it should be clarified that it is not the law. Instead, the agencies should, as was the intent of Congress, be required to gather available information and apply it to the proposed action. In addition, NEPA must allow for other studies to be incorporated by reference without the requirement that they be rehashed in the EIS. There is no reason for agencies to "reinvent the wheel" rather than to leverage existing information resources. Where studies have been performed by other federal or state agencies, such studies should be utilized in the NEPA process.

There would also be significant benefits in collaboratively sharing information resources. For example, State and local agencies often have the personnel, expertise, and experience to address local concerns and can provide a level of detail and expertise that Federal agencies cannot achieve. Establishment of collaborative relationships between Federal and local interests would reduce financial and human resource burdens of the federal agencies, while fostering better intergovernmental relationships.

Whether or not an EIS is required is dependent on whether the federal actions involved in a project are expected to result in "significant" impacts to the environment. The definition of the project is must be the key to determining significance. Thus, agencies should only have to analyze those impacts that are proximately caused by the underlying action. In U.S. Dept. of Transportation v. Public Citizen, 124 S. Ct. 2204, 2215 (2004), a unanimous Court held that an EIS need not analyze impacts unless they are proximately caused by the challenged agency action. There must be strict adherence to the requirement of proximate causation.

Finally, given the length of time that it takes to get through the process, not only should the environmental benefits of the project but also the potential environmental harm of delaying the project serve as factors that should be considered in the final NEPA documentation. Thus, the analysis of environmental benefits of a mining operation would include the environmental benefits of the reclamation phase of a mine as well as the potential impacts of delay in the public infrastructure project that will be supplied by the mine. The true benefits of a project should be fully considered and balanced and the focus should not just be on the impacts of the mining.<sup>4</sup>

4) Supplementing should only be required in limited circumstances

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<sup>4</sup> As noted in a recent case, at times the agencies seem to forget that NEPA ultimately requires consideration of the impact on the "human" environment. See Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior, 344 F.Supp.2d 108 (D.D.C. 2004).

While, generally speaking, an initial EIS completes an agency's NEPA obligations, in certain limited circumstances the EIS must be supplemented. Under NEPA, an EIS must be supplemented where there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Frequently opponents to projects seek to reopen the NEPA process by attempting to force the agencies to supplement the EIS. A Supplemental EIS should not be required where there is no pending federal action. At the point of permit issuance, the agency's NEPA duties should be terminated. The Supreme Court unanimously ruled in Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373, 2384-85 (2004), that where the "major federal action" triggering NEPA was approval of a land use plan, once that plan was approved "there is no ongoing 'major Federal action' that could require supplementation." While the Court clarified that an agency does not have an ongoing obligation to constantly revise its EIS every time a new circumstance arises, it did not define what, if any, other types of federal approval will similarly be considered a complete federal action. It should be clarified that unless there is a second, and indeed, wholly distinct federal action, or a significant change to the underlying federal approval there is no ongoing federal action subject to NEPA.

## **CONCLUSION**

NSSGA commends the Resources Committee for undertaking the NEPA reform initiative and pledges to work with the Committee to improve the NEPA process. In summary, NSSGA asks for consideration of the following points for effective NEPA reform: (1) The NEPA process must have a clear end point; (2) NEPA review must remain focused on project purpose; (3) there needs to be a more rational analysis of impacts; and (4) supplementing the NEPA record should only be required in certain circumstances. It is clear that NEPA has strayed from Congressional intent. We look forward to working with the Committee in this important effort.