

# THE ROLE OF NEPA IN THE SOUTHWESTERN STATES

---

---

## OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

---

Saturday, June 18, 2005, in Lakeside, Arizona

---

**Serial No. 109-21**

---

Printed for the use of the Committee on Resources



Available via the World Wide Web: <http://www.gpoaccess.gov/congress/index.html>

or

Committee address: <http://resourcescommittee.house.gov>

---

U.S. GOVERNMENT PRINTING OFFICE

21-884 PS

WASHINGTON : 2005

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

## COMMITTEE ON RESOURCES

RICHARD W. POMBO, California, *Chairman*  
NICK J. RAHALL II, West Virginia, *Ranking Democrat Member*

Don Young, Alaska	Dale E. Kildee, Michigan
Jim Saxton, New Jersey	Eni F.H. Faleomavaega, American Samoa
Elton Gallegly, California	Neil Abercrombie, Hawaii
John J. Duncan, Jr., Tennessee	Solomon P. Ortiz, Texas
Wayne T. Gilchrest, Maryland	Frank Pallone, Jr., New Jersey
Ken Calvert, California	Donna M. Christensen, Virgin Islands
Barbara Cubin, Wyoming	Ron Kind, Wisconsin
<i>Vice Chair</i>	Grace F. Napolitano, California
George P. Radanovich, California	Tom Udall, New Mexico
Walter B. Jones, Jr., North Carolina	Raúl M. Grijalva, Arizona
Chris Cannon, Utah	Madeleine Z. Bordallo, Guam
John E. Peterson, Pennsylvania	Jim Costa, California
Jim Gibbons, Nevada	Charlie Melancon, Louisiana
Greg Walden, Oregon	Dan Boren, Oklahoma
Thomas G. Tancredo, Colorado	George Miller, California
J.D. Hayworth, Arizona	Edward J. Markey, Massachusetts
Jeff Flake, Arizona	Peter A. DeFazio, Oregon
Rick Renzi, Arizona	Jay Inslee, Washington
Stevan Pearce, New Mexico	Mark Udall, Colorado
Henry Brown, Jr., South Carolina	Dennis Cardoza, California
Thelma Drake, Virginia	Stephanie Herseth, South Dakota
Luis G. Fortuño, Puerto Rico	
Cathy McMorris, Washington	
Bobby Jindal, Louisiana	
Louie Gohmert, Texas	
Marilyn N. Musgrave, Colorado	
Vacancy	

Steven J. Ding, *Chief of Staff*  
Lisa Pittman, *Chief Counsel*  
James H. Zoia, *Democrat Staff Director*  
Jeffrey P. Petrich, *Democrat Chief Counsel*

---

## TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT

CATHY McMORRIS, Washington, *Chairwoman*  
TOM UDALL, New Mexico, *Ranking Democrat Member*

Ken Calvert, California	George Miller, California
George P. Radanovich, California	Edward J. Markey, Massachusetts
Chris Cannon, Utah	Frank Pallone, Jr., New Jersey
Jim Gibbons, Nevada	Grace F. Napolitano, California
Greg Walden, Oregon	Jay Inslee, Washington
Rick Renzi, Arizona	Mark Udall, Colorado
Stevan Pearce, New Mexico	Raúl M. Grijalva, Arizona
Henry Brown, Jr., South Carolina	Jim Costa, California
Thelma Drake, Virginia	Nick J. Rahall II, West Virginia, <i>ex officio</i>
Louie Gohmert, Texas	
Richard W. Pombo, California, <i>ex officio</i>	

## C O N T E N T S

---

	Page
Hearing held on Saturday, June 18, 2005 .....	1
Statement of Members:	
Drake, Hon. Thelma, a Representative in Congress from the State of Virginia .....	5
Pearce, Hon. Stevan, a Representative in Congress from the State of New Mexico .....	4
Renzi, Hon. Rick, a Representative in Congress from the State of Arizona .....	1
Statement of Witnesses:	
Beck, Edmond A., Superintendent, Planning and Contracts, Tucson Electric Power Company, Tucson, Arizona .....	65
Prepared statement of .....	67
Response to questions submitted for the record .....	74
Craft, Kathleen, Executive Assistant, Frehner Construction Company, Inc., Las Vegas, Nevada, on behalf of the American Road & Transportation Builders Association .....	36
Prepared statement of .....	38
Response to questions submitted for the record .....	44
Hutchinson, Howard, Executive Director, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, Glenwood, New Mexico ...	24
Prepared statement of .....	25
Response to questions submitted for the record .....	31
Lynch, Robert S., Attorney at Law, Robert S. Lynch & Associates, Phoenix, Arizona .....	9
Prepared statement of .....	11
Response to questions submitted for the record .....	15
Mackey, Bill, Granite Construction, Inc., Tucson, Arizona .....	75
Matson, Jim, Four Corners Representative, American Forest Resource Council, Kanab, Utah .....	18
Prepared statement of .....	21
Poppie, Marinel, D.V.M., on behalf of the New Mexico Cattle Growers' Association, Glenwood, New Mexico .....	46
Prepared statement of .....	48
Letter submitted for the record .....	51
Struhsacker, Debra W., Women's Mining Coalition, Reno, Nevada .....	52
Prepared statement of .....	54
Response to questions submitted for the record .....	62
Additional materials supplied:	
Dugan, Robert, Legislative and Public Affairs Manager, Granite Construction Incorporated, Letter submitted for the record .....	100
Langton, Dr. Kenneth, Chair, Sierra Club—Grand Canyon Chapter, Letter submitted for the record .....	102
McCarthy, Jim, Chapter Director, Sierra Club, Grand Canyon Chapter, Invitation letter submitted for the record by Chairwoman McMorris .....	7
Nowicki, Brian, Conservation Biologist, Center for Biological Diversity, Letter submitted for the record .....	103
Suckling, Kieran, Policy Director, Center for Biological Diversity, Invitation letter submitted for the record by Chairwoman McMorris .....	8
Information submitted for the record which has been retained in the Committee's official files .....	103



## **OVERSIGHT FIELD HEARING ON THE ROLE OF NEPA IN THE SOUTHWESTERN STATES**

---

**Saturday, June 18, 2005  
U.S. House of Representatives  
NEPA Task Force  
Committee on Resources  
Lakeside, Arizona**

---

The Task Force met, pursuant to call, at 10:00 a.m., at the Blue Ridge High School, 1200 W. White Mountain Boulevard, Lakeside, Arizona, Hon. Rick Renzi presiding.

Present: Representatives Renzi, Pearce, and Drake.

### **STATEMENT OF THE HON. RICK RENZI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA**

Mr. RENZI. Before we get started with the hearing, I want to make a couple comments. Is Police Chief Brant here?

Is the Police Chief here? How are you doing, Chief? On behalf of the U.S. Congress, Congressman Pearce, Congresswoman Drake, this flag was flown over the United States Capitol in honor of the service of you and your men. Thank you so much.

Is Commander Marty Jarvey here of the Squadron? Marty, on behalf of the U.S. Congress, Congressman Pearce, Congresswoman Drake, this flag was flown over the United States Capitol in honor of your service to your country and those of your men and women for the security you bring to our nation. God bless you for your work. Thank you very much.

And last, but not least, would Superintendent Mike Aylstock with the school come up. I am looking forward to this hearing and am most grateful for your kindness and generosity, you all from Blue Ridge High School. This flag was flown in honor of Blue Ridge High School. Thank you for your participation and assistance to the Resources Committee for our field hearing held on June 18th. This flag was flown on February 12th, 2004, over the United States Capitol.

I want to thank the community for coming out. I really do appreciate this. You all have suffered through some fires, and you've got issues with cattle, mining, the roads, and construction. We've got some great people here today. This is our country and those of you who participate in this great day, each and every one of you who are taking time from your families, away from your businesses today, are truly great patriots. We couldn't do this without you. It's

your Government of the People, so I'm grateful for the number of you that turned out today.

With that, let me say good morning, and I want to begin by welcoming the members of the Show Low Composite Squadron 210, U.S. Air Force Auxiliary, Civil Air Patrol, who will now Present the Colors. If everyone would please stand.

[Colors presentation, Pledge of Allegiance, and prayer presented.]

Mr. RENZI. Again, let me again thank the community for turning out, particularly those that have traveled so far to be with us today. I want to first thank my colleagues for giving up their weekend so we could be here together in the Arizona White Mountains to discuss this important issue. I believe the attendance today shows the importance of the National Environmental Policy Act. In the interest of the work that this Task Force is engaged in, I'm grateful that so many of our Task Force Members are here, that you will have the opportunity to learn our views and thoughts on NEPA.

This is the second in a series of meetings of the Task Force on Improving the National Environmental Policy Act, NEPA Task Force. Thus far, the NEPA Task Force has heard from a large number of individuals on the ways that NEPA can be improved. These ideas range from encouraging the agencies to increase public participation, to enacting legislation that would cut the process time and ease the threat of litigation, and this hearing will expand on those ideas heard thus far, and explore the issues that arise from the activities important to this part of the country.

This hearing is for the Southwestern States which include Arizona, Nevada and New Mexico. The invited witnesses are from and work with NEPA throughout this region, including mining, grazing, forestry, transportation, and electric utilities.

Members of the environmental community were also invited to testify. The NEPA Task Force will hear from the witnesses about their specific interactions with the NEPA process and any solutions which would ease the amount of litigation and ineffectual paperwork.

As one of our nation's first environmental laws, NEPA was visionary in its purpose to ensure the Federal decisionmakers were guided by a national environmental policy. Today, 80 Federal agencies have their own different NEPA guidelines.

The National Environmental Policy Act was intended to assure that Federal decisions are made in an environmentally sound manner, not to stifle communities' regional and economic development.

But what started out as visionary to apply environmentally sound decisions to Federal policy, has turned into thousands of court cases and hundreds of pending lawsuits. The need to reform and streamline the NEPA process is not new. In fact, in 1997, the White House Council on Environmental Quality reviewed NEPA and concluded that the process takes too long and is too technical for any reasonable use.

By the year 2000, the average cost of an environmental impact statement was between a half a million and two million dollars, and took more than two years. Today, those figures are even higher. Now, while the process has yielded many positive effects and

results, including the increase of environmental awareness and public participation, the process itself still needs to be improved.

The goal of this Task Force and the hearing today is to review the policies that oversee the use of our precious national resources and find out how the NEPA process can be improved. The Task Force on Improving the National Environment Policy Act, NEPA Task Force, is a select and bipartisan group of Resources Committee members selected by Chairman Richard Pombo of California, and the Ranking Democrat, Nick Rahall, of West Virginia. The Task Force is charged with reviewing and making recommendations on improving the National Environmental Policy Act, NEPA. The goal is to ensure the original intent of NEPA, that Federal decisions are made in an appropriate environmentally sound manner, rather than being focused on litigation.

We are hoping that this hearing today will go a long way to meeting that goal. NEPA has not been reviewed by the Resources Committee since 1995. A comprehensive examination of NEPA has never been conducted. On the 35th anniversary of NEPA, it is time to investigate whether the original intent of NEPA is being fulfilled. It is also vital that we gain a better understanding of the economic impacts that NEPA has imposed on communities like Show Low and throughout the Southwest.

We have invited a number of experts from many different fields to testify on how the NEPA process affects their industry today. Our witnesses will share some of the decisions and actions that have severely limited our region's ability to grow, and those are the decisions that hinder our economic development in several of our vital industries.

Arizona's timber industry gave life to many of the rural towns that I now represent. The families of loggers and mill workers built these countless communities, and yet NEPA regulations have become so cumbersome, that the Forest Service is no longer able to conduct the most necessary forest maintenance to protect our western communities from catastrophic wild fires.

This morning on their flight from Phoenix, my colleagues passed over the Rodeo-Chediski burn zone. In the summer of 2002, Arizona lost more than 460,000 acres to that fire, and the cost to suppress that fire has been estimated to be somewhere near \$153 million.

Years of drought and handcuffed forest managers who are unable to conduct necessary forest maintenance, has left our communities vulnerable. In 2002, that fire was halted within a few miles of where we sit today. I don't need to tell the residents of the White Mountain region how important it is that we make every effort to decrease the possibility of similar destruction. We must balance environmental protection and the implementation of NEPA with the Arizona growing economy, but at the same time we must be able to take back our forests and make them healthy and strong and protect ourselves.

Mr. RENZI. With that, ladies and gentlemen, I'd like to introduce to you two of my colleagues. From the Second District of New Mexico, my neighbor, and seated on the Resources Committee of Washington, D.C., Congressman Steve Pearce. He is the Chairman on the Subcommittee on National Parks. He is a great friend of

mine, a good colleague. We are working together on these important issues we face in regard to the National Environmental Policy Act.

And, Steve, do you have any comments?

**STATEMENT OF THE HON. STEVAN PEARCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO**

Mr. PEARCE. Well, I'm a politician, Rick. That goes without saying. I can talk until dark without taking a breath. Thank you for coming out. I appreciate coming into Mr. Renzi's District. I will tell you that you should be proud of the service that he does. The best compliment for Rick is that neither Democrats or Republicans can take him for granted. He is independent in his thinking and he stands up for his District no matter what, and I appreciate those principle stands that I've seen him make.

I believe that we are one nation under God. I believe, though, that we're fighting three simultaneous battles right now. First of all, we're fighting the war on terror, and we're all familiar with the sacrifices that the young men and women are making right now, standing there so we can have the freedom to meet and carry out our democracy here.

So, Rick, it's no challenge to me to give up a weekend. I think we're here doing the work of the people. I think it's important.

The second large struggle that is going on right now is there is a cultural war going on. We're trying to decide who we are as Americans and what our values will be, and it's appropriate that we have discussion on that, and this discussion today begins to dove-tail into that broader discussion and into the final battle that I see us fighting right now, this economic war.

Right now, China, India, the European Union, and many countries around the globe are trying to take our jobs. What I see with NEPA is it is a function and a goal that no one of us disagree with. No one wants to leave contaminated soil or water to our kids, but when it's used as a tool to slow down the ranching or to stop ranching altogether, or to drive the logging completely out to where we don't have an infrastructure now to process the timber and the lumber that comes out of our national forest, then we are working against our own jobs. We're helping to lower the job capability in this nation, helping other nations to take our jobs, and I will tell you that we will make a decision in the next 10 years what sort of a future we want for our children and grandchildren.

For me, I've heard constant reports in Washington about the way the NEPA process is used, not only positively, but also negatively, and that's what these field hearings are for. We're taking the conversation out to six different regions of the country and listening to what people are saying about the NEPA process and the effects to their community, both on the environment and on jobs.

So as I consider the things that I've heard in the past, that NEPA was used to take away grazing permits from ranchers, it is used as an excuse not to cut dead trees after a forest fire, it is used to obstruct progress on building new highways, safer highways, these are the things that we're here to listen to and we hear frequently in Washington. We're going around the Nation listening



again to the people around the country, and that's the way it should be.

Rick, thanks for having us in your District. This is a fascinating opportunity. I've read some of the discussions that the panel is going to give, and I would like to personally welcome Marinel Poppie from the Southern District of New Mexico, and also Howard Hutchinson, both good friends of mine, and both who are committed year after year after year to bringing common sense and balance into this whole discussion about do we want the economy, or do we want to protect the environment. I think we can do both. I think we have od people on both sides of the issue. I see constantly Government servants in Forest Service, Fish and Wildlife, the other agencies, who are willing to do the right thing. I think we as a nation are beginning to get engaged and involved in giving the support to the agencies that they need. Thank you two for coming over from New Mexico. I look forward to the testimony.

And, Mr. Chairman, I hand it back to you.

Mr. RENZI. Thank you, Congressman.

Mr. RENZI. I also want to introduce you all to Congresswoman Thelma Drake from the Second District of Virginia. Her District includes the world's largest naval base in Southern Virginia. The Congresswoman serves some of our greatest patriots, the military servicemen and women who have been shipped overseas and deployed.

She also has sensitive areas that include a tidal basin, tidal waterways, as well as ocean, and that is what we're going to talk about. There's going to be six of these hearings around the country, and they will focus on different parts or regions of America and, of course, the issues that affect her are so much different than what we're affected by out here in the Southwest, but she's traveled all that way to be with us here today.

Congresswoman Drake.

**STATEMENT OF THE HON. THELMA D. DRAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA**

Mrs. DRAKE. Thank you, Congressman Renzi. Good morning, everyone. I am really honored to be invited to serve on the Task Force and be able to come out and be with all of you this morning. As you've been told, the District that I represent is completely different. It is completely surrounded by water, either the Atlantic Ocean or the Chesapeake Bay. So to come out and see just your vast expanse of land, to see—this morning we flew over the fire. That was just something that is hard for me to even comprehend, with coming from the Commonwealth of Virginia.

One thing that I truly believe is that everyone in this room shares the same kind of goal, and that's that we truly protect our environment and that we leave our children and our grandchildren as good or better a world than we have had for ourselves, but where we all disagree is how we get to that end result, and this for me is an incredible learning experience to be able to see the different issues and the different perspectives.

And the question in my mind after having read over NEPA, I think it truly is a very visionary law, but the question is, is it

really being applied properly, or through some of the applications, is it actually doing more harm than good.

So I applaud Chairman Pombo for putting this Task Force together and really being willing to take a hard look. This is my first year at Congress, and I think probably every freshman comes with the perspective that this is the most exciting time to serve in Congress. I think our class feels that even more importantly because the leadership is not willing to just say keep doing things as we've always done.

Across the board, they are saying what are we doing, is this the best way to do it, and how do we make sure that we are creating a proper balance. We all know that the big reason for jobs not being in our country isn't labor like we might be told. It's the regulations that we put into place. There is not a meeting that I'm in that the issue of China doesn't come up. You've already heard Congressman Pearce referencing things going on in our world, and I think if we fail to do—to look at all of those issues, and make sure that we're making the right decisions, that we will deprive our children the greatest sense of wealth and actually our democracy. So thank you for being here on this Saturday morning.

Mr. RENZI. Congresswoman Drake, thank you very much.

Mr. RENZI. At this time I also would like to recognize the fact that we have with us today the Arizona Cattle Growers who are in attendance, the Arizona Farm Bureau, the New Mexico Cattle Growers, Mayor Larry Vicario from Pinetop-Lakeside, Ginny Mindorf from the Pinetop Council, Rick Fernau, Mayor of Show Low, Dave Tenney, County Supervisor, Ed Collins, local forest ranger—good to see you—Elaine Zieroth, our Forest Supervisor. Barbara Teague is with us on the Pinetop-Lakeside, and our Show Low Vice Mayor Gene Kelly is also here in attendance.

I want to thank you, again—all of you who came out and participated in this. By allowing us to bring a full official Congressional hearing to your community, think of the young people in civic classes or high school community classes or government classes who are now able to observe a full-blown Congressional hearing for the first time. You young people are so key to the future of our country, and I ask for you to please become involved as a public servant.

With that, I would like to call up our panel. To give us a bit of history and context would be Mr. Robert Lynch. He is an Attorney and has a long history with NEPA in both the public and private practice.

Here to talk about NEPA and its impact on forest management is Jim Matson of the American Forest Resource Council. Jim joins us from Kanab, Utah.

Next is Howard Hutchinson, who will discuss NEPA's impact on Arizona and New Mexico Counties. Howard comes to us from Glenwood, New Mexico.

Also with us here is Kathy Craft from Frehner Construction. Kathy is here to talk about NEPA and transportation. Kathy comes all the way from Las Vegas, Nevada. Thank you for coming all the way up.

Marinel Poppie is here representing the New Mexico Cattle Growers' Association. Ms. Poppie is a rancher in her own right, and is also from Glenwood, New Mexico.

Here to talk about NEPA and its role in mining is Debra Struhsacker. She is a founding member of the Women's Mining Coalition. Debbie came all the way from Reno, Nevada. Thank you very much.

Also with us is Ed Beck with the Tucson Electric Power Company. Ed will talk to us about NEPA's impact on a project to bring additional electricity transmission to Southern Arizona.

Last but not least, is Bill Mackey of Granite Construction in Tucson. Bill is with us to talk about NEPA and its effects on construction.

I want to thank you all for traveling as far as you did and taking the time, again, away from your own time and businesses to help your country.

Before we hear from our witnesses today, you will also note there are two chairs that are empty. I want to state for the record that representatives from the environmental community—Mr. Suckling of the Center for Biological Diversity and Mr. Jim McCarthy of the Sierra Club's Grand Canyon Chapter—were invited to testify, but chose not to attend. I ask for unanimous consent that the invitation letters for these two witnesses be entered into the record. Without objection.

[The invitation letters follow:]

JUNE 13, 2005

Mr. Jim McCarthy  
Chapter Director  
Sierra Club, Grand Canyon Chapter  
202 E. McDowell Rd, Suite 277  
Phoenix, AZ 85004

Dear Mr. McCarthy:

The Task Force on Improving the National Environmental Policy Act will hold a field hearing on The Role of NEPA in the Southwestern States, on Saturday, June 18, 2005, at 10:00 am at the Blue Ridge High School at 1200 W White Mountain Boulevard, Lakeside, AZ 85929. I cordially invite you or your designee to testify at this hearing.

Please read this letter carefully to ensure that you comply with all hearing requirements and that you understand your rights as a witness.

Under Committee Rule 4(b), each witness who is to appear before a Task Force of the Committee on Resources must file with the clerk of the Task Force a written statement of proposed testimony. This must be filed at least two working days before your appearance. Failure to comply with this requirement may result in the exclusion of your written testimony from the hearing record and/or the barring of your oral presentation of the testimony. Your oral testimony should not exceed five minutes and should summarize your written remarks. You may introduce into the record any other supporting documentation you wish to present in accordance with the enclosed guidelines.

Pursuant to Rule 4(b) of the Committee on Resources and clause g(4) of Rule XI of the House of Representatives, a witness appearing before the Task Force must to the greatest extent practicable include with his written testimony a current resume summarizing education, experience and affiliations pertinent to the subject matter of the hearing. In addition, to the extent practicable, each nongovernmental witness must disclose the amount and source of federal grants or contracts received within the current and prior two fiscal years. If a witness represents an organization, he must provide the same information with regard to the organization. The information disclosed must be relevant to the subject matter of the hearing and a witness' representational capacity at the hearing. Witnesses are not required to disclose federal entitlement payments such as Social Security, Medicare, or other

income support payments (such as crop or commodity support payments). To assist you in complying with these rules, I have enclosed a form which you may complete and attach to your testimony. You can also fulfill the disclosure requirement by submitting the information in some other form or format.

Under clause 2(k) of Rule XI, witnesses at hearings may be accompanied by their own counsel to advising them concerning their constitutional rights. I reserve the right to place any witness under oath. Finally, a witness may obtain a copy of his testimony once a hearing has been printed. (This process usually takes 8-10 weeks.)

The Committee on Resources Rules are available on its website at <http://resourcescommittee.house.gov/> and the Rules of the House of Representatives, including clause 2(k) of Rule XI, are available at the House of Representatives' website at <http://www.house.gov/rules/109rules.pdf> Copies can also be sent to you on request.

To fully prepare for this hearing, 40 copies of your testimony must be submitted to Joanna MacKay at the office of Congressman Rick Renzi, 1151 East Deuce of Clubs, Suite A, Show Low, Arizona, 85901, no later than the close of business on Thursday, June 16. **An electronic copy of all testimony and attachments must also be submitted no later than the close of business on Wednesday, June 15 to Joanna.MacKay@mail.house.gov.**

Accommodations for individuals with disabilities, including assistive listening systems, interpreters and materials in alternate formats, may be arranged by contacting Joanna MacKay in advance of the hearing (four business days notice is recommended) at 1320 LHOB, Washington, DC 20515 or at (202) 225-7800.

Should you have any questions or need additional information, please contact Joanna MacKay at 202-225-7800.

BEST REGARDS,

CATHY MCMORRIS

CHAIRWOMAN

TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT

COMMITTEE ON RESOURCES

Enclosures

---

JUNE 13, 2005

Mr. Kierán Suckling  
Policy Director  
Center for Biological Diversity  
P.O. Box 710  
Tucson, AZ 85702

Dear Mr. Suckling:

The Task Force on Improving the National Environmental Policy Act will hold a field hearing on The Role of NEPA in the Southwestern States, on Saturday, June 18, 2005, at 10:00 am at the Blue Ridge High School at 1200 W White Mountain Boulevard, Lakeside, AZ 85929. I cordially invite you or your designee to testify at this hearing.

Please read this letter carefully to ensure that you comply with all hearing requirements and that you understand your rights as a witness.

Under Committee Rule 4(b), each witness who is to appear before a Task Force of the Committee on Resources must file with the clerk of the Task Force a written statement of proposed testimony. This must be filed at least two working days before your appearance. Failure to comply with this requirement may result in the exclusion of your written testimony from the hearing record and/or the barring of your oral presentation of the testimony. Your oral testimony should not exceed five minutes and should summarize your written remarks. You may introduce into the record any other supporting documentation you wish to present in accordance with the enclosed guidelines.

Pursuant to Rule 4(b) of the Committee on Resources and clause g(4) of Rule XI of the House of Representatives, a witness appearing before the Task Force must to the greatest extent practicable include with his written testimony a current resume summarizing education, experience and affiliations pertinent to the subject matter of the hearing. In addition, to the extent practicable, each nongovernmental witness must disclose the amount and source of federal grants or contracts received within the current and prior two fiscal years. If a witness represents an organiza-

tion, he must provide the same information with regard to the organization. The information disclosed must be relevant to the subject matter of the hearing and a witness' representational capacity at the hearing. Witnesses are not required to disclose federal entitlement payments such as Social Security, Medicare, or other income support payments (such as crop or commodity support payments). To assist you in complying with these rules, I have enclosed a form which you may complete and attach to your testimony. You can also fulfill the disclosure requirement by submitting the information in some other form or format.

Under clause 2(k) of Rule XI, witnesses at hearings may be accompanied by their own counsel to advising them concerning their constitutional rights. I reserve the right to place any witness under oath. Finally, a witness may obtain a copy of his testimony once a hearing has been printed. (This process usually takes 8-10 weeks.)

The Committee on Resources Rules are available on its website at <http://resourcescommittee.house.gov/> and the Rules of the House of Representatives, including clause 2(k) of Rule XI, are available at the House of Representatives' website at <http://www.house.gov/rules/109rules.pdf> Copies can also be sent to you on request.

To fully prepare for this hearing, 40 copies of your testimony must be submitted to Joanna MacKay at the office of Congressman Rick Renzi, 1151 East Deuce of Clubs, Suite A, Show Low, Arizona, 85901, no later than the close of business on Thursday, June 16. **An electronic copy of all testimony and attachments must also be submitted no later than the close of business on Wednesday, June 15 to [Joanna.MacKay@mail.house.gov](mailto:Joanna.MacKay@mail.house.gov).**

Accommodations for individuals with disabilities, including assistive listening systems, interpreters and materials in alternate formats, may be arranged by contacting Joanna MacKay in advance of the hearing (four business days notice is recommended) at 1320 LHOB, Washington, DC 20515 or at (202) 225-7800.

Should you have any questions or need additional information, please contact Joanna MacKay at 202-225-7800.

BEST REGARDS,

CATHY MCMORRIS

CHAIRWOMAN

TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT

COMMITTEE ON RESOURCES

Enclosures

Mr. RENZI. It is the policy of the Resources Committee to swear in our witnesses, so I ask that you please stand and raise your right hand. Do you solemnly swear or affirm under the penalty of perjury, that the responses given and the statements made will be the whole truth and nothing but the truth.

[Witnesses sworn.]

Mr. RENZI. Let the record reflect that the witnesses answered in the affirmative. Please be seated. Ladies and gentlemen, before we get started, I want to point out to you that there are lights here. Each witness has five minutes, and when the light turns yellow, that brings you down to a one-minute warning. When the light turns red, I ask you to please wrap up so we can get through everybody's presentation and testimony, and then we will begin with a round—several rounds possibly of questions.

And, again, Robert Lynch, thank you so much for coming up. You may begin.

**STATEMENT OF ROBERT S. LYNCH, ATTORNEY,  
PHOENIX, ARIZONA**

Mr. LYNCH. Good morning, Mr. Renzi and Members of the Task Force. I am Bob Lynch. I'm an Attorney from Phoenix.

It is a pleasure to testify before you on this important program, and I thank you for the opportunity. I would ask that my written

testimony be submitted for the record. I will not attempt to read it. Instead, I would like to give you a short summary of my background with NEPA, outline some misconceptions or perhaps disturbing trends, and point out some examples in the Southwest that support the suggestions I have made in my written testimony.

My involvement with NEPA started shortly after President Nixon signed the bill on January 1, 1970. I was at the Justice Department, and by February in the Ninth Circuit with the first case to reach the appellate level. It involved a Corps of Engineers flood control project in the Safford Valley in Arizona along the Gila River. Ultimately, the delay NEPA created in going forward with this project caused it not to be built. I also handled a number of other NEPA cases and wrote my L.L.M. Thesis on NEPA before returning to Arizona in 1972. I came back to Arizona to work on the EIS's for the Central Arizona Project.

In many respects, not much has changed since 1972. Delay is still a major factor of NEPA implementation. Costs are still escalating. Cost accountability is still nonexistent. And projects and permit applications still get piecemealed by environmental laws just as I experienced with the Trans-Alaskan Pipeline in the early 1970s.

Some of the changes that are occurring aren't very good. Various reports are suggesting that an EIS is a good decision document. It is not. NEPA is an advisory law, not a decision tree. An EIS is a study, not an agency program. Public involvement is good, but decisionmaking is not group therapy. For better or worse, we have a top-down, command and control executive branch.

Adaptive Management may be a good way to deal with information gaps, but its explosive growth as a NEPA post-EIS management tool is scary. But I shouldn't be surprised. It's like throwing a lifeline to every biologist in the country.

It can create a perpetual feeding trough for agency budgets Government-wide. All the more reason for Congress to get a handle on NEPA costs.

And the Federal agencies need to play by the same rules we do. It is fine for the Bureau of Reclamation to do an EA for buying 700 acres on the Gila River for the Southwestern Willow Flycatcher, but the Fish and Wildlife Service wants to do the same, that is only an EA for its designation of 376,095 acres of Flycatcher critical habitat. That's almost 588 square miles. That's more than half the State of Rhode Island. The proposed designation include 1,556 miles of rivers and streams in six states. By contrast, the Colorado River is only around 1,120 miles long.

Congress also needs to take a hard look at the breadth of NEPA's application. For instance, just recently two environmental groups sued HUD, the VA and the SBA alleging that their mortgage insurance, loan guarantee and financial assistance programs applied around Fort Huachuca and Sierra Vista are causing impacts in violation of NEPA reporting requirements. Growth has impacts, everywhere, on everything. If the Plaintiffs' theory is correct, where will it end?

Isn't it curious that someone with purely economic interests has no standing to sue under NEPA, like the recipients of the HUD, VA or SBA assistance, but these Plaintiffs do.

Finally, NEPA needs to recognize when its necessary timeframes just don't fit. Biology won't wait for bureaucracy. If there is a disaster that qualifies for Stafford Act assistance, NEPA Shouldn't stand in the way. If a national disaster requires intervention, NEPA should cooperate. We lost nearly half a million acres of forest in Arizona in the Rodeo-Chediski fire and over a million acres to the bark beetle. Nature's vegetation management program isn't scientific or managed. Our response needs to be both, and swift.

The Healthy Forests Act attempts to respond to this particular problem, but the jury is still out on whether it will. NEPA needs to respond to true emergencies also and in ways that are far more effective than CEQ's terse regulation on the subject.

Thank you for the opportunity to appear here and share my thoughts on NEPA. I would be happy to try to answer any questions you might have.

Mr. RENZI. Thank you very much for your testifying.

[The prepared statement of Mr. Lynch follows:]

**Statement of Robert S. Lynch, Attorney at Law,  
Robert S. Lynch & Associates**

Thank you for the opportunity to appear before the Task Force and share my thoughts on ways that the National Environmental Policy Act (NEPA) and its administration might be improved.

You already have received a number of suggestions and I know you will receive more today and in later field hearings on changing various mechanisms and concepts that are part of compliance with the National Environmental Policy Act. I will attempt to address only a few of these here.

This current inquiry into NEPA provisions and practices is not without precedent. Indeed, Congress has a long history of concerning itself with issues that have arisen because of NEPA. As early as 1972, Congress reacted to the impacts on the power industry by authorizing the issuance of temporary operating licenses to nuclear power electrical generating plants in certain power-short areas.<sup>1</sup> A year later, Congress declared that the environmental impact statement for the Trans-Alaska Pipeline was sufficient not only for the Bureau of Land Management permit for which it had been written, but the fifteen or so other permits that were necessary in order that the project be constructed. In the same provision, Congress also severely limited the judicial review opportunities.<sup>2</sup>

More recently, Congress has also shaped NEPA compliance with regard to specific programs. For instance, the Century of Aviation Reauthorization Act, Pub.L. 108-176, December 12, 2003, provided the Secretary of Transportation with the opportunity to specify the time period for completing environmental reviews.<sup>3</sup> The Federal Aviation Agency is designated lead agency for environmental review processes, given authority to designate scope and content of environmental impact statements, and these decisions are to be given substantial deference by other federal and state agencies.<sup>4</sup> The Secretary of Transportation is also authorized to designate reasonable alternatives for airport capacity enhancement projects and other agencies are limited to those alternatives designated by the Secretary.<sup>5</sup> Clearly Congress was concerned that fights over the scope of a proposal and therefore its reasonable alternatives, the amount of time necessary to complete the process, and the possible fight among agencies over which one should be lead agency, depending on the nature of the project, were not in the best interests of moving this program forward.

Likewise, Congress has reacted to the emergency in our national forests caused by extensive wildfires and disease by passing the Healthy Forests Restoration Act

<sup>1</sup> Act of June 2, 1972, Pub.L. 92-307, 86 Stat. 191, 42 U.S.C. § 2242.

<sup>2</sup> Trans-Alaska Pipeline Authorization Act, § 202(D), Pub.L. 93-153, 87 Stat. 576, 43 U.S.C. § 1652(d).

<sup>3</sup> 49 U.S.C. § 47171(a).

<sup>4</sup> 49 U.S.C. § 47171(h).

<sup>5</sup> 49 U.S.C. § 47171(k).

of 2003.<sup>6</sup> In this act, Congress did a number of things to restrict the impact of NEPA on forest restoration activities. Federal agency involvement in developing community wildfire protection plans or recommendations about them are not federal agency action under NEPA.<sup>7</sup> In considering hazardous fuel reduction projects, the number of alternatives that have to be considered are limited.<sup>8</sup> Land treatment and research related to land treatment of less than one thousand acres is a categorical exclusion.<sup>9</sup> And there are a number of other restrictions as well. All of these restrictions react to what has been and continues to be a major feature of the National Environmental Policy Act—delay. So it is perfectly appropriate to enlarge the focus to consider the Act itself and ways it can be modernized so it is seen as less an obstructive device and more a positive contribution to decision-making.

#### **CAN WE SPEED UP NEPA COMPLIANCE?**

Delay has been a major byproduct of NEPA since it was signed into law.<sup>10</sup> Initially, delays were attributed to agency recalcitrance in implementing NEPA for projects that have already been authorized.<sup>11</sup> As agencies shifted from denial or avoidance to compliance, delays were also encountered as agencies reacted to and worked with the Interim Guidelines for compliance with NEPA issued by the Council on Environmental Quality, which were followed by Final Guidelines and then in turn New Final Guidelines, all in the space of two and a half years.<sup>12</sup> Delay was such an overarching problem that when the CEQ Guidelines morphed into regulations in 1978, a specific regulation addressed ways agencies should reduce delays.<sup>13</sup> That apparently didn't do the trick. By 1981, when CEQ came out with its memorandum "40 Most Asked Questions Concerning CEQ's NEPA Regulations", it inserted specific suggested timeframes.<sup>14</sup> For an EIS, CEQ suggested the process should take no more than a year. For an Environmental Assessment leading to a Finding of No Significant Impact, no more than 3 months. Obviously, the suggestions didn't work. Congress has mandated timeframes for many environmental laws. Perhaps it is time to take the CEQ suggestion found in the 1981 Federal Register notice and give it some teeth. There will obviously be situations where the timeframes suggested by CEQ cannot be met, but those should be the exception and not the rule and someone should be in charge of deciding whether the agency is dragging its feet, fumbling the ball, or actually needs more time.

#### **WHO IS (SHOULD BE) IN CHARGE?**

Figuring out who would screen agency compliance for timeframes is an interesting subject. CEQ issued its Guidelines only after being spurred to do so by Executive Order.<sup>15</sup> A later Executive Order "bootstrapped" Presidential authority into granting CEQ "regulatory authority".<sup>16</sup> Nevertheless, the Supreme Court was not convinced that CEQ was the final word on this subject.<sup>17</sup> Some appellate courts have since established the concept that CEQ regulations are entitled to great deference but most writers acknowledge that CEQ has no authority over agency regulations.<sup>18</sup> Indeed, a district court decision just last month confirmed that, effectively, no one is in charge. The court said that it didn't owe any deference to the Bureau of Land Management's interpretation of NEPA or the CEQ regulations "because NEPA is addressed to all federal agencies and Congress did not entrust administration to the [BLM] alone."<sup>19</sup> Certainly Section 309 of the Clean Air Act doesn't put the Environmental Protection Agency in charge, even though it gives that agency a commenting role on the environmental impact statements of others.<sup>20</sup> Since EPA still has NEPA responsibilities for some of its activities, in spite of exemptions granted in the Clean

<sup>6</sup>Pub.L. 108-148, 16 U.S.C. § 6501, et seq.

<sup>7</sup>16 U.S.C. § 6513.

<sup>8</sup>16 U.S.C. § 6514.

<sup>9</sup>16 U.S.C. § 6554.

<sup>10</sup>Robert S. Lynch, *Complying With NEPA: The Tortuous Path to an Adequate Environmental Impact Statement*, 14 *Ariz. L. Rev.* 717 (1972).

<sup>11</sup>*Id.*, pp. 719-725.

<sup>12</sup>Robert S. Lynch, *The 1973 CEQ Guidelines: Cautious Updating of the Environmental Impact Statement Process*, 11 *Cal. West. L.R.* 297, et seq. (1975).

<sup>13</sup>40 C.F.R. § 1500.5 (1978).

<sup>14</sup>Response no. 35, 46 *Fed.Reg.* 18026, et seq. (1981).

<sup>15</sup>Robert S. Lynch, *Complying With NEPA: The Tortuous Path to an Adequate Environmental Impact Statement*, *supra*.

<sup>16</sup>Executive Order No. 11,990, 42 *Fed.Reg.* 26967 (1977).

<sup>17</sup>*Andrus v. Sierra Club*, 422 U.S. 347, 358 (1979).

<sup>18</sup>Mandelker, *NEPA Law and Litigation* (2nd Edition 2004), pp. 2-19 to 2-21.

<sup>19</sup>*Hammond v. Norton*, 2005 W.L. 1125775 (D.D.C., May 13, 2005), citing *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

<sup>20</sup>42 U.S.C. § 7609.



Air Act and the Clean Water Act, EPA is hardly the appropriate control mechanism for the environmental impact statement process. The original intent of Section 309 was to give other federal agencies access to EPA's environmental expertise.<sup>21</sup> I doubt you would get general concurrence among federal agencies, let alone non-government applicants, that that is currently the way Section 309 works. It may be that CEQ is the best "keeper of the keys" on this issue. If that is the judgment of Congress, it will have to give that role specifically to CEQ. CEQ certainly does not have anything approaching that authority now.

#### **HOW MUCH SHOULD AN EIS COST?**

In all of the reading I have done recently and over the years, I have never found anyone who thought to pose this question, let alone answer it. Indeed, there is almost nothing written about NEPA costs and that which is written is merely reported as if those costs were a fait accompli. I don't think anyone would argue that costs of complying with NEPA have escalated over the years. The reason for this lies in changes to the task. Originally, NEPA compliance involved getting science "off-the-shelf" and compiling it. It was then used to analyze the proposed federal action and alternatives and the resulting report was given to the decision maker. However, that relatively simple exercise did not last. In 1978, the Court of Appeals for the District of Columbia suggested that there was a cost of uncertainty concerning scientific information and possible future outcomes that need to be weighed in an environmental impact statement.<sup>22</sup> Then in 1986, citing that decision, CEQ revamped a regulation and established the concept that an agency must disclose that it doesn't have total information about the environmental impacts it is assessing and identify the area of incomplete information. Moreover, where such "incomplete or unavailable information" is disclosed, and the cost of filling the information gap is "not exorbitant", the agencies were (are) directed to get the information.<sup>23</sup> So, since then, the agencies are faced not only with acquiring off-the-shelf science but going out and producing science in order to write an environmental impact statement. Naturally costs have escalated.

In the recently completed NEPA Task Force Report, the results of the Rocky Mountain West roundtable include a reference to a "long-time agency employee" extolling the virtues of a ten-year programmatic environmental impact statement that cost \$20 million. More to the point, Chapter 6 of the report contains some interesting numbers. The report states that small environmental assessments typically cost between \$5,000 and \$20,000. Large environmental assessments, usually resulting in mitigated FONSI's, cost between \$50,000 and \$200,000. And environmental impact statements cost between \$250,000 and \$2 million.<sup>24</sup> The report also notes that EIS's take between a year and six years to complete while large EA's take nine to eighteen months. The report does not explain the origin of these numbers, whether they are only direct costs incurred by the federal agencies, or include direct costs to others, indirect costs, etc.

From my own experience, these numbers seem low. The Glen Canyon Environmental Studies, briefly mentioned in a 1997 CEQ report, demonstrate my point.<sup>25</sup> Since I have been personally involved in those studies since their inception, I can report to you that the Environmental Impact Statement for the Glen Canyon Dam Operating Criteria for daily power operations cost in excess of \$100 million. These are not my figures. These are the Bureau of Reclamation's figures reported in a Senate Energy Committee hearing record.<sup>26</sup> A byproduct of NEPA and other environmental laws is reflected in the General Account Office report on "environmental indicators" that came out last fall.<sup>27</sup> In that report, GAO included a table that shows that federal agencies spent over \$4 billion collecting statistical information on major environmental energy and natural resource statistical programs in FY 2002 (GAO-05-52, p. 102). While this is down from almost \$8 billion in 2000, it is still a staggering amount of money, even by Washington, D.C. terms.

<sup>21</sup> S. Rep. No. 1196, 91st Cong., 2d Sess. 43 (1970).

<sup>22</sup> *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978).

<sup>23</sup> 40 C.F.R. §1502.22 (May 27, 1986).

<sup>24</sup> The NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* (Sept. 2003).

<sup>25</sup> The National Environmental Policy Act, a Study on Its Effectiveness After Twenty-Five Years, Council on Environmental Quality, Executive Office of the President (Jan. 1997).

<sup>26</sup> Hearing before the Subcommittee on Investigations, Senate Committee on Energy and Natural Resources concerning Application of the National Environmental Policy Act, June 7, 1995 (S.Hrg. 104-81).

<sup>27</sup> Environmental Indicators, Better Coordination is Needed to Develop Environmental Indicator Sets That Inform Decisions, General Accounting Office, Report No. GAO-05-52 (Nov. 2004).

What can we do to reduce these costs? One of the things Congress could do is remove the requirement to fill in the information gaps as currently stated in the CEQ regulations. That construct is no longer viable. We now have the new world of adaptive management. It is the mantra of all of these emerging programs, whether under NEPA or other environmental statutes. The entire concept of adaptive management is built around the premise that you don't have all the answers. If that is true, then off-the-shelf science should be good enough for an environmental impact statement if it's going to be followed by an adaptive management program. Moreover, NEPA recognizes that later information may require a supplemental environmental impact statement. In other words, the basic design of the program from the outset was that agencies would assess the information they had and, if necessary, supplement the process at a later time when more information became available. It is true that an agency doesn't have to supplement an EIS or an EA "every time new information comes to light".<sup>28</sup> However, there is no reason why the combination of supplemental environmental impact statements and adaptive management aren't an adequate response to new information, allowing agencies to use what existing information they have at their disposal or can get from other sources, analyze that information and report.

Above all, someone should ask the question: How much should an EIS cost? And someone should be obligated to respond. Perhaps Congress should consider revamping and reenergizing Section 201 of NEPA and charging CEQ with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies. It wouldn't be the first time. Congress has previously set spending limits for data recovery under the National Historic Preservation Act<sup>29</sup> and specifically as to at least one project of which I am aware.<sup>30</sup> If we have entered the brave new world of adaptive management and therefore conceded that environmental analyses are more or less automatically incomplete when made, then there doesn't seem to be any particular logical reason why agencies couldn't use information off the shelf for the environmental analysis and use the adaptive management process to fill in the gaps later. Maybe this would not only cut costs but time. In the meantime, the costs incurred under NEPA need some serious analysis, both as to the direct costs to the federal government and the costs incurred by the entities and consumers that are impacted by federal agency activity under NEPA.

#### **WHO GETS TO PLAY?**

NEPA provides a mechanism for involvement of federal agencies by having them designated as cooperating agencies. However, in many instances state and local public officials are left out of the process except during public comment sessions if an environmental impact statement is to be prepared. CEQ recognized this problem in 1999 and issued a memorandum "urging" agencies to more actively solicit the participation of state, tribal, and local agencies as "cooperating agencies". It must be the general political wisdom that the agencies hadn't been doing this and still aren't because Congress has seen the introduction of at least three bills in the Senate and two in the House of Representatives addressing this very problem.<sup>31</sup> One other problem is in the phraseology. "Local agencies" is a term of art that normally means cities, towns, and counties. Thus, it excludes a large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA screening of a proposed federal action. Perhaps if the involvement included "political subdivisions" as a broader category, problems with proposed actions might be identified earlier with less local impact. Certainly, the cooperating agencies issue will not go away and the 1999 nudge from CEQ doesn't show any demonstrable results.

#### **DEFENDING THE END PRODUCT**

Whether it's \$20,000 to \$200,000 or more for an environmental assessment or hundreds of thousands or millions for an environmental impact statement, often all you have purchased is a lawsuit. The attacks often zero in on the agency concept of the purpose and need for the project which, in turn, weighs heavily on the determination of "reasonable alternatives" to be considered by the agency in its environmental analysis. But there ought to be limits. The Healthy Forests Restoration Act

<sup>28</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 373 (1989), cited in *Wyoming v. United States Department of the Interior*, 360 F.Supp. 2d 1214 (D. Wyo. March 18, 2005).  
<sup>29</sup> 16 U.S.C. § 469c.

<sup>30</sup> Act of July 2, 1980, Pub.L. 96-301, 94 Stat. 832.

<sup>31</sup> S. 1176, 105th Cong. 1st Sess. (Senator Thomas); S. 352, 106th Cong. 1st Sess. (Senator Thomas); S. 301, 107th Cong. 1st Sess. (Senator Thomas); H.R. 2029, 106th Cong. 1st Sess. (Rep. Radanovich); H.R. 1014, 108th Cong. 2nd Sess.—concerning "gateway communities" (Rep. Pombo).

is a model for improvements that need to be made to NEPA as a whole. Reasonable alternatives ought to be those defined by the agency or brought, with information, to the public process through comments. A person or entity ought not to be able to sandbag the process and, once you have spent all the money, come in and collaterally attack you because of some additional alternative you didn't include. Moreover, I see no particular reason why the mechanism of a warning letter, like is required in the Endangered Species Act, shouldn't be employed as well. If something has been overlooked, the agency ought to be put on notice that that has happened and it ought to be put on that notice before it issues its record of decision. It is of course true that a draft environmental impact statement is not judicially reviewable.<sup>32</sup> But the process of developing a draft environmental impact statement and taking it to the public is supposed to inform the agency as well as the public. Interested parties ought to have an obligation to come forward and express their concerns during the public process in order to later complain that the process contained some fatal flaw. Here again, the Healthy Forests Restoration Act presents us a good model to follow. There is no question but that NEPA interpretation and NEPA administration have been driven largely by court decisions over the last 35 years. That is partly due to the fact that no one is in charge. In a government of top down command and control, this law and this program stand out because the Executive Branch has neither mechanism. Providing more certainty of administration and control and, perhaps, more definition of responsibilities, might not lessen the number of lawsuits filed but it certainly ought to change the dialogue. Otherwise, NEPA responsibilities will continue to evolve on a case by case basis, creating even more time problems and continuing to escalate costs.

Thank you for the opportunity to present my thoughts on this important inquiry. Robert S. Lynch & Associates

[The response to questions submitted for the record by Mr. Lynch follows:]

ROBERT S. LYNCH & ASSOCIATES  
ATTORNEYS AT LAW  
340 E. PALM LANE  
SUITE 140  
PHOENIX, ARIZONA 85004-4603  
OFFICE: (602) 254-5908  
FACSIMILE: (602) 257-9542

JULY 12, 2005

Hon. Cathy McMorris, Chairwoman  
Task Force on Improving the National Environmental Policy Act  
Committee on Resources  
1320 Longworth House Office Building  
Washington, D.C. 20515

Re: Responses to further questions from the Task Force following my testimony on Saturday, June 18, 2005

Dear Chairwoman McMorris:

It is a pleasure to respond to your request. With your letter of June 23, 2005, which I unfortunately did not receive until July 1, 2005, you attached five questions. I will repeat the questions below and provide you my answers. Hopefully this will assist the Task Force in its important mission.

1. *In your remarks you state that the 1981 CEQ memo had specific timelines for preparing NEPA documents. You know that the CEQ regulations also contain page limits for NEPA documents. Why is it that the agencies choose not to follow these guidelines?*

Answer: The question actually answers itself. Neither the 1981 CEQ memo nor the relevant provisions of the CEQ regulations are mandates for agency behavior. See: Response #35, 40 Most Asked Questions Concerning CEQ's NEPA Regulations, 42 Fed.Reg. 26967 (1977); 40 C.F.R. §§ 1500.4(a), 1501.7(b)(1) and 1502.7.

<sup>32</sup> Friends of Potter Marsh v. Peters, 2005 W.L. 1283664 (D. AK, May 27, 2005).

Unless and until specific timelines for the conduct of NEPA processes and specific page limits for the EIS itself are adopted by statute or regulation, the federal agencies will continue their current practices. The kinds of limitations that could be imposed are similar to those that lawyers like myself live with in appellate practice all the time. At the federal level, there are mandated time limits. Federal Rules of Appellate Procedure, Rule 27(c). That same concept is carried over in most state rules, including Arizona's. Arizona Rules of Civil Appellate Procedure, Rule 6(b). Likewise, appellate briefs have page limits. Federal Rules of Appellate Procedure, Rule 28(g); Arizona Rules of Civil Appellate Procedure, Rule 14(b). Typical of these limitations, an attorney can always ask the court to exceed them. Were they in place in similar fashion for NEPA, some entity, possibly CEQ, could have the same role in deciding on requests to exceed timeframes or page limits. Many other environmental laws, such as the Clean Water Act, the Clean Air Act and the Endangered Species Act, have finite time limits set by Congress. NEPA does not. There are certainly enough models in other laws and regulations to find one that would appropriately fit NEPA while ensuring that the public is properly informed of the proposal and the federal decision-maker is properly informed prior to the decision involved.

2. *You state that no one entity is clearly in charge of NEPA and suggest that CEQ would be the ones that would have to be. How would that solve some of the problems we have heard about (delays and such)?*

Answer: While I said that in my testimony, that is, that no one is clearly in charge of NEPA, that is not just my conclusion but the conclusion of the courts and most of the scholars who write about NEPA. I merely voiced there what I and others actively involved with NEPA have concluded some time ago. Typically, the federal government is a top-down command and control structure. NEPA is unique in that it impacts all agencies but is not a program administered by any one of them.

CEQ might play that role but I doubt it could do so effectively as it is currently constituted. CEQ is an office within the Executive Office of the President. It is not an agency. It has no management function. It does not act as a filter of adequacy for NEPA actions taken by action agencies. Indeed, that filtration process is left to the courts. Fashioning a program manager for NEPA might not only save time, trees and dollars, it might make NEPA more effective by providing a coordination point for the scientific analysis of multiple agencies that typically have no mechanism for interaction or interdepartmental study sharing. However, CEQ as currently constituted would have a tough time filling that role.

3. *With respect to costs, I agree that something needs to be done. How would you respond to the argument that the costs to prepare the NEPA are irrelevant if a project proponent stands to make several times that cost in the sale of the commodity?*

Answer: The costs associated with preparation of NEPA documentation should be relevant to the information necessary to be gathered so that the decision-maker is properly informed before making the decision. It may very well be that the task at hand, regardless of how lucrative to an applicant for federal permission, can be analyzed based on existing documents prepared for similar decisions because of the repetitive nature of the process. The proper test is whether the costs are necessary to properly inform the federal decision-maker, not what the economic consequences of the decision may or may not be.

Here again, there is an opportunity to adjust NEPA practice back to its original format, assessing science that exists at the time the decision must be made. Supplemental environmental analysis has always been available under NEPA and, now that Adaptive Management has become the darling of the process, there really is no excuse for having to burden either a federal project or a federal permit program with the requirement to create science. Since we have admitted that we don't know everything, and installed processes to consider later acquired information, a proper NEPA analysis should be doable based on "off the shelf" assets.

Additionally, NEPA costs should be restricted by the functional equivalent of the rational basis test announced in the regulatory taking decision of the U.S. Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The example that comes to mind is from the testimony of one of the witnesses at our hearing who retold a story about a proposed timber salvage contract in New Mexico for approximately \$58,000 worth of timber and who was informed that the NEPA process would cost \$13 million. Ludicrous results like that cause people to avoid, rather than embrace, environmental laws and run counter to the very purposes for which those laws were enacted.

4. If "political subdivisions" were allowed to play, what is their value to the NEPA process?

Answer: The value of involving political subdivisions in any given NEPA process as cooperating agencies is directly related to their involvement in or impact incurred from proposed federal action affecting projects and programs under their management and supervision. For instance, the Fish and Wildlife Service proposed critical habitat for the cactus ferruginous pygmy owl in southern Arizona, which action, among other things, halted the construction of a school in the Tucson area. Surely the school district would have an interest in that process and the NEPA screening that accompanies a critical habitat designation. Additionally, many cities and towns, irrigation districts, electrical districts, public utility districts and the like provide utility services to consumers. Decisions with regard to the management, operation, control or even existence of hydropower facilities that supply power and/or water to these political subdivisions and their consumers clearly affect their interests and should qualify the affected political subdivision for cooperating agency status in the NEPA process. Moreover, the local political subdivisions most likely will have a better understanding of conditions "on the ground" than federal agency personnel who may be, at least in the West, operating at some distance from the location affected by the proposed federal action. The political subdivisions can provide invaluable insight and analysis that might otherwise go unconsidered.

5. You suggest that there should be a notice of intent to sue like there is in ESA. Often times, groups use the ESA's 60 notice as a chance to do a press release. Would the NEPA notice you recommend prevent lawsuits or just tell us all that more lawsuits are coming?

Answer: The notice of intent to sue is just one of several suggestions I made concerning ways to confine litigation to serious issues and not procedural objections that do nothing more than delay substantive considerations. The purpose of the ESA notice of intent is to allow the relevant federal official an opportunity to assess the complaint and decide whether to take action in response to that complaint. There are even occasions under the Endangered Species Act where that has headed off litigation.

Under NEPA, which is totally a process program, the questions are more elemental and the opportunity to cure a defect is even more real. If the issue is whether or not to subject the proposed federal action to NEPA screening, or to do so at the "intermediate level" (environmental assessment and finding of no significant impact), then the decision-maker would clearly have an opportunity to judge whether a full environmental impact statement should be pursued if given this type of notice. If the issue is whether or not there is a defect in the document created for the decision-maker, the agency has an opportunity to decide whether it should supplement its information before the decision-maker uses it in the decision-making process. In other words, the opportunity to cure a defect, should the federal agency agree that one exists, is even more real under NEPA than it is under the ESA.

But a notice of intent requirement, by itself, will not have enough of a streamlining effect. It must be accompanied by a requirement to participate in the process at some level and bring concerns and objections to the attention of the federal agency in that process. In other words, the development of documentation under NEPA should be considered the creation of an administrative record and review of the decision should be confined to it except under the most extraordinary circumstances. Those who choose to sue should have to prove to the court that they participated in the administrative process, brought their concerns to the agency in question and received a legally unsatisfactory response. This is what I call the "anti-sandbagging" rule. Too often now, people sit on their hands and watch the process go by and then attack. That is not good government, nor is it what was intended by the authors of NEPA.

Thank you for the opportunity to respond to your additional questions. Should there be anything further about which I can be of some assistance, please do not hesitate to contact me.

SINCERELY,  
ROBERT S. LYNCH

---

Mr. RENZI. Mr. Matson.

**STATEMENT OF JIM MATSON, AMERICAN FOREST RESOURCE  
COUNCIL, KANAB, UTAH**

Mr. MATSON. Thank you and good morning, Chairman Renzi and Members of the Task Force. My name is Jim Matson. I am the Four Corners Representative for the American Forest Resource Council located in Kanab, Utah. I appreciate the opportunity to testify before you today and provide my comments on the very important issue of streamlining and improving the National Environmental Policy Act, NEPA. Day after day as we debate, NEPA problems are compounding at a staggering pace. If you'll forgive the metaphor, NEPA has evolved into a logjam of overwhelming scale and proportions. Allow me to remind everyone here that we are just a mere "crown fire" away from the edge of the 467,000-acre Rodeo-Chediski wildfire of 2002, which without the grace of God would have leveled Lakeside, Pinetop and Show Low. Incredibly, NEPA has become the tool of choice of those who claim they want to protect forests, critical wildlife habitats and key watersheds, but in fact NEPA is actually causing forest watershed and habitats to deteriorate as a result of litigation, appeals and gridlock. Another unintended consequence is that NEPA has become an immovable barrier to protecting people and property in our national forests and other public lands in the Four Corners region.

We cannot lose sight of what NEPA was when it was passed and signed into law. NEPA was intended to be a procedural process that provided for public disclosure of Federal decisionmaking that results in environmental, social and economic consequences. NEPA was not intended to predispose a specific decision. The public involvement aspect of the Act's regulations was intended to make sure that the Federal decisionmaker is fully informed of all the issues and potential consequences of the proposed Federal action. It was not intended to be a straw poll where special interests can stuff the ballot box for a specific decision. Unfortunately, the common sense of the original and straightforward law has been driven off course by weak and misguided regulations and thousands of convoluted Federal Court decisions.

Whenever I'm asked about my profession prior to joining AFRC, I usually respond by saying, "I'm a refugee of the goshawk and Mexican spotted owl wars." It is becoming more obvious that my response should be, "I'm a refugee from the NEPA wars." From 1965 through 1995, I worked at an employee-owned forest products company—Kaibab Industries based in Phoenix, Arizona. From 1980 until 1995, I was responsible for all forestry and harvesting activities that supported three sawmilling operations and 800 rural families in Payson and Fredonia, Arizona, and in Panguitch, Utah. In a typical year, Kaibab would harvest one million logs. Eighty percent of these were 12 inches and smaller in diameter, harvested from trees cut and removed from the understory treatments.

Kaibab's story, unfortunately, isn't an isolated case.

This same fate of total closures befell Duke City Lumber Company in Winslow, Arizona, and Albuquerque and Espanola, New Mexico; Precision Pine and Timber Company in Heber/Overgaard and Eager, Arizona; Stone Forest Industries in Flagstaff and Eager, Arizona, and Reserve, New Mexico. Stone Container Corporation, a predecessor to the Abitibi Paper Corporation in Snow-

flake, Arizona, was forced to abandon round wood fiber harvested from small ponderosa pine pulpwood trees because it wasn't available from the surrounding national forests. Interestingly, this is the same material being harvested in the new White Mountain Stewardship contract at a cost to taxpayers of over \$400.00 per acre to the Treasury with a projected annual price tag of about \$6 million. In prior times, the Snowflake paper mill paid up-front cash for all of the associated harvesting of the small diameter trees, plus a payment to the Federal Treasury for harvesting rights. All the Forest Service had to do was prepare and offer for sale an adequate amount of pulpwood to keep Stone Container in this important market and supply segment, and they were paying for it. And I have to say, what a loss.

The mill closures in the Southwest during the mid 1990s to the present, are now coming back to haunt us.

Interestingly, the prime beneficiary at that time was the Forest Service as it carried out its management missions.

Over time, several misguided entities utilizing process-driven appeals and litigation have exploited weaknesses found in NEPA and CEQ directives. This reality played a major role in the wholesale dismantling of key forest products industry infrastructure and a highly skilled workforce. All of this capacity, which took years to accumulate, was cavalierly discarded for what is now recognized as a muddled mess, which is further compounded by the recent levels of eye-popping drought and resulting forest health crisis.

Without critical tools and infrastructure, public and private land managers have few options to employ in maintaining, rehabilitating and protecting their forests. Our first line of defense in combating the ravages of forest insects and disease is to have available loggers and manufacturing facilities that can utilize the dead and dying material to minimize needed treatment costs. Today in the Four Corners region, we lack essential infrastructure due to the recent history of NEPA malaise and associated litigation created by the courts and self-defeating agency imposed constraints.

For example, following the Rodeo-Chediski fire, the White Mountain Apache Tribe in cooperation with the BIA completely salvaged and harvested their fire-killed and damaged trees on Reservation lands by the summer of 2003. The Forest Service on the other hand, under CEQ and NEPA imposed programs, failed to implement salvage and restoration remedies on the Apache-Sitgreaves National Forest portions of the fire. There was a time in the not too distant past when the Forest Service exhibited this same capacity and unwillingness to put out a maximum effort in not wasting valuable forest resources and salvaging marketable forest products and to minimize site-specific post-fire hazards.

One need only to examine the Forest Service's Environmental Policy And Procedures Handbook—1909.15—to see that NEPA compliance procedures have evolved into a quagmire that will never satisfy the original intent of Congress for public disclosure of environmental impacts of Federal decisionmaking. The excessive time and money spent to make sure that every T is crossed and I dotted to satisfy agency and CEQ regulations does not make for better decisions or necessarily a better environment. It just delays important project implementation and creates opportunities for

obstructionist litigation. The will to implement critical forest-saving treatments is the apparent casualty of the NEPA wars.

We understand that the National Forest system needs more funding and people to meet NEPA standards before we can begin to treat the forest. When the NEPA analysis "Paradox" became apparent, we were told that the Forest Service needed to complete "bigger and better" environmental assessments, EA. When EAs were being successfully challenged in court, we were next told the "bigger and better" environmental impact statements, EIS, would get the process moving again. These "bigger and better" documents have only presented those who wish to stop all land management activities more procedural targets to challenge in court. Quite frankly, without improvements in NEPA, including modernizing this common sense law and its regulation, I have little hope that our land managers will be able to get back to managing and protecting forests, key watersheds, critical wildlife habitats, rural communities and people.

We need common sense environmental protection measures that contribute to the quality of American life, which includes people, communities and the vast landscapes that we are fortunate enough to live in, work in and recreate in. Nowhere in the NEPA debate is anyone asking what are the environmental consequences of not treating and restoring our national forests. Every summer during the dry season, it comes every year, we see only smoke-filled vistas and polluted air to breath, wasted natural resources, damaged watersheds, and ruined wildlife habitats. These are real losses, not perceived ones, and the situation has become a major, but hidden calamity.

Today, it would be uniquely appropriate to require regional programmatic NEPA analysis, listing in detail the very things that have to be considered if we are to leave healthy and functioning forest ecosystems for future generations. Unfortunately, by default we have opted for a no action posture by virtue of current NEPA policy. It's hard to imagine but painfully clear to me that at this moment, NEPA is actually killing the very forest and community values that we seek to protect and conserve.

It should be the job of all Americans to protect and restore our forests, watersheds and wildlife habitats, and to take responsibility for protecting nearby local communities.

To this end, allow me to offer the following recommendations for this Task Force's search for solutions to the current NEPA dilemma:

- 1) Modernize the Act and its regulations to refocus its common sense goal of public disclosure for Federal project decisionmaking in order to set aside the procedural morass of unending analysis that NEPA processes have become in the last three decades.

- 2) Reform NEPA to expedite salvage and rehabilitation projects that will rapidly restore areas ravaged by catastrophic events, such as wildfires and destructive insect infestations.

- 3) Require Federal agencies to consider the environmental impact of NOT taking an action on any proposed project.

- 4) Improving the NEPA framework, starting with categorical exclusion, CEs, to environmental impact statements, EIS. Reemphasize the purpose and utility of CEs. Environmental assessments,



EAs, are now little more than de facto environmental impact statements, EIs. There needs to be a clear differentiation between EAs and EISs.

5) Establish a set of criteria to define when supplemental NEPA documentation is required. Agencies are constantly faced with new or changes in information due to the fact that the NEPA process takes so long. It's virtually guaranteed that something will change between the start and completion of analysis process.

6) Something has to be done about the cumulative impact analysis. Current CEQ regulations are ambiguous and lack clear limits. The CEQ regulations for implementing NEPA say the agencies must consider the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."

7) You should also provide guidance on the extent of analysis required for irreversible and irremediable commitment of resources. This requirement has caused confusion and interpretation by the Courts, and agencies do not address this analysis requirement consistently.

8) Finally, please give very serious consideration to setting standards for judicial review, which was noticeably absent in the Act. It is for this reason that the Courts over time have had unbridled latitude to interpret the Act as they saw fit, resulting in gross inconsistencies across the country. In addition, the lack of such standards has allowed the Courts to basically direct the land management agencies how to manage the public lands instead of focusing on whether or not the agency met the letter and intent of NEPA of disclosing environmental consequences.

In closing my comments, while the economic impact of NEPA and the resulting impact on rural communities is truly tragic, I'm afraid that the damage wrought on our environment is more serious. The gridlock created and fostered by NEPA, is having a disastrous effect on forests, wildlife, watersheds, and communities. Without some rational and common sense changes to the implementation of NEPA, I'm afraid that the Rodeo-Chediski fire of 2002 is only a sign of things to come in many parts of the West.

I applaud your willingness to review how NEPA is being implemented across the country and explore possible opportunities to update and modernize this important law.

Thank you for the opportunity to testify and I would be happy to attempt to answer any questions that you might have. Thank you.

Mr. RENZI. Mr. Matson, thank you very much. Well done.

[The prepared statement of Mr. Matson follows:]

**Statement of Jim Matson, Four Corners Representative,  
American Forest Resource Council**

Good morning Task Force Chairwoman McMorris, and other members of the Task Force, my name is Jim Matson, I am the Four Corners Representative for American Forest Resource Council, (AFRC) located in Kanab, Utah. I appreciate the opportunity to testify before you today and provide my comments on the very important issue of streamlining and improving the National Environmental Policy Act (NEPA). Day after day as we debate, NEPA problems are compounding at a staggering pace. If you'll forgive the metaphor, NEPA has evolved into a logjam of overwhelming scale and proportions. Allow me to remind everyone here that we are just a mere "crown fire" away from the edge of the 467,000 acre, Rodeo-Chediski wildfire of 2002, which without the grace of God would have leveled Lakeside, Pinetop and

Show Low. Incredibly NEPA has become the tool of choice of those who claim they want to protect forests, critical wildlife habitats and key watersheds, but in fact NEPA is actually causing forest watersheds and habitats to deteriorate as a result of litigation, appeals, and gridlock. Another unintended consequence is that NEPA has become an immovable barrier to protecting people and property in our national forests and other public lands in the four corners region.

We cannot lose sight of what NEPA was when it was passed and signed into law—as I remember NEPA was intended to be a procedural process that provided for public disclosure of federal decision making that results in environmental, social and economic consequences. NEPA was not intended to predispose a specific decision. The public involvement aspect of the Act's regulations was intended to make sure that the federal decision maker is fully informed of all the issues and potential consequences of the proposed federal action. It was not intended to be a straw poll where special interests can stuff the ballot box for a specific decision. Unfortunately, the common sense of the original and straightforward law has been driven off course by weak and misguided regulations and thousands of convoluted federal court decisions.

Whenever I'm asked about my profession prior to joining AFRC, I usually respond by saying "I'm a refugee of the goshawk and Mexican spotted owl wars!" It is becoming more obvious that my response should be, "I'm a refugee from the NEPA wars!" From 1965 through 1995 I worked at an employee owned forest products company—Kaibab Industries, based in Phoenix, Arizona. From 1980 until 1995, I was responsible for all forestry and harvesting activities that supported three sawmilling operations and 800 rural families in Payson and Fredonia, Arizona and in Panguitch, Utah. In a typical year Kaibab would harvest 1 million logs—80% of these were 12 inches and smaller in diameter, harvested from trees cut and removed from the understory treatments. Kaibab's story unfortunately isn't an isolated case; this same fate of total closures befell Duke City Lumber Company in Winslow, Arizona and Albuquerque and Espanola, New Mexico; Precision Pine and Timber Company in Heber/Overgaard and Eager, Arizona, Stone Forest Industries in Flagstaff and Eager, Arizona and Reserve, New Mexico. Stone Container Corporation, a predecessor to the Abitibi Paper Corporation in Snowflake, Arizona was forced to abandon round wood fiber harvested from small ponderosa pine pulpwood trees because it wasn't available from the surrounding national forests. Interestingly this is the same material being harvested in the new White Mountain Stewardship contract at a cost to tax payers of over \$400.00 per acre to the treasury with a projected annual price tag of about \$6 million. In prior times the Snow Flake paper mill paid up front cash for all of the associated harvesting of the small diameter trees plus a payment to the federal treasury for harvesting rights. All the Forest Service had to do was prepare and offer for sale an adequate amount of pulpwood to keep Stone Container in this important market and supply segment, and they were paying for it. What a loss!

The mill closures in the southwest during the mid 1990's, to the present are now coming back to haunt us. Interestingly the prime beneficiary at that time was the Forest Service as it carried out its management missions. Over time, several misguided entities utilizing process driven appeals and litigation have exploited weaknesses found in NEPA and CEQ directives. This reality played a major role in the wholesale dismantling of key forest products industry infrastructure and a highly skilled workforce. All of this capacity, which took years to accumulate, was cavalierly discarded for what is now recognized as a muddled mess, which is further compounded by the recent levels of eye popping drought and resulting forest health crisis.

Without critical tools and infrastructure, public and private land managers have few options to employ in maintaining, rehabilitating, and protecting their forests. Our first line of defense in combating the ravages of forest insects and disease is to have available loggers and manufacturing facilities that can utilize the dead and dying material to minimize needed treatment costs. Today in the Four Corners Region, we lack essential infrastructure due to the recent history of NEPA malaise and associated litigation created by the courts and self-defeating agency imposed constraints.

For example, following the Rodeo-Chediski Fire, the White Mountain Apache Tribe in cooperation with the BIA completely salvaged and harvested their fire killed and damaged trees on reservation lands by the summer of 2003. The Forest Service on the other hand, under CEQ and NEPA imposed programs, failed to implement salvage and restoration remedies on the Apache-Sitgreaves National Forest portions of the fire. There was a time in the not too distant past when the Forest Service exhibited this same capacity and willingness to put out a maximum effort

in not wasting valuable forest resources and salvaging marketable forest products and to minimize site-specific post fire hazards.

One need only to examine the Forest Service's Environmental Policy And Procedures Handbook - 1909.15 to see that NEPA compliance procedures have evolved into a quagmire that will never satisfy the original intent of Congress for public disclosure of environmental impacts of federal decision making. The excessive time and money spent to make sure that every T is crossed and I dotted to satisfy agency and CEQ regulations does not make for better decisions or necessarily a better environment. It just delays important project implementation and creates opportunities for obstructionist litigation. The will to implement critical forest saving treatments is the apparent causality of the NEPA wars.

We understand that the national forest system needs more funding and people to meet NEPA standards before we can begin to treat the forest. When the NEPA analysis "Paradox" became apparent we were told that the Forest Service needed to complete "bigger and better" Environmental Assessments (EA). When EAs were being successfully challenged in court, we were next told that "bigger and better" Environmental Impact Statements (EIS) would get the process moving again. These "bigger and better" documents have only presented those who wish to stop all land management activities more procedural targets to challenge in court. Quite frankly, without improvements in NEPA, including modernizing this common sense law and its regulations, I have little hope that our land managers will be able to get back to managing and protecting forests, key watersheds, critical wildlife habitats, rural communities and people.

We need common sense environmental protection measures that contribute to the quality of American life, which includes people, communities and the vast landscapes that we are fortunate enough to live in, work in and recreate in. Nowhere in the NEPA debate is anyone asking what are the environmental consequences of not treating and restoring our national forests? Every summer during the dry season, it comes every year, we see only smoke-filled vistas and polluted air to breath, wasted natural resources, damaged watersheds, and ruined wildlife habitats. These are real losses, not perceived ones and the situation has become a major, but hidden calamity.

Today, it would be uniquely appropriate to require regional programmatic NEPA analysis, listing in detail the very things that have to be considered if we are to leave healthy and functioning forests ecosystems for future generations. Unfortunately, by default we have opted for a no action posture by virtue of current NEPA policy. It's hard to imagine but painfully clear to me that at this moment, NEPA is actually killing the very forest and community values that we seek to protect and conserve.

It should be the job of all Americans to protect and restore our forests, watersheds and wildlife habitats and to take responsibility for protecting nearby local communities. To this end allow me to offer the following recommendations for this task force's search for solutions to the current NEPA dilemma:

1. Modernize the Act and its regulations to refocus its common sense goal of public disclosure for federal project decision making in order to set-a-side the procedural morass of unending analysis that NEPA processes have become in the last three decades
2. Reform NEPA to expedite salvage and rehabilitation projects that will rapidly restore areas ravaged by catastrophic events, such as wildfires and destructive insect infestations.
3. Require federal agencies to consider the environmental impact of NOT taking an action on any proposed project.
4. Improving the NEPA framework, starting with categorical exclusions (CEs) to environmental impact statement (EIS). Reemphasize the purpose and utility of CEs. Environmental assessments (EAs) are now little more than defacto environmental impact statements (EISs). There needs to be a clear differentiation between EA's and EIS's.
5. Establish a set of criteria to define when supplemental NEPA documentation is required. Agencies are constantly faced with new or changes in information due to the fact that the NEPA process takes so long, it's virtually guaranteed that something will change between the start and completion of analysis process.
6. Something has to be done about the cumulative impact analysis. Current CEQ regulations are ambiguous and lack clear limits. The CEQ regulations for implementing NEPA say the agencies must consider the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."

7. You should also provide guidance on the extent of analysis required for irreversible and irretrievable commitment of resources. This requirement has caused confusion and interpretation by the Courts and agencies do not address this analysis requirement consistently.
8. Finally, please give very serious consideration to setting standards for judicial review, which was noticeably absent in the Act. It is for this reason that the courts, over time, have had unbridled latitude to interpret the Act as they saw fit resulting in gross inconsistencies across the country. In addition, the lack of such standards has allowed the courts to basically direct the land management agencies how to manage the public lands instead of focusing on whether or not the agency met the letter and intent of NEPA of disclosing environmental consequences.

In closing my comments, while the economic impact of NEPA and the resulting impact on rural communities is truly tragic, I'm afraid that the damage wrought on our environment is more serious. The gridlock—created and fostered by NEPA—is having a disastrous effect on forests, wildlife, watersheds, and communities. Without some rational and common sense changes to the implementation of NEPA, I'm afraid that the Rodeo-Chediski fire of 2002 is only a sign of things to come in many parts of the West. I applaud your willingness to review how NEPA is being implemented across the country and explore possible opportunities to update and modernize this important law.

Thank you for the opportunity to testify and I would be happy to attempt to answer any questions that you might have.

---

Mr. RENZI. Mr. Hutchinson.

**STATEMENT OF HOWARD HUTCHINSON, COALITION OF  
ARIZONA/NEW MEXICO COUNTIES, GLENWOOD, NEW MEXICO**

Mr. HUTCHINSON. Mr. Chairman and Members of the NEPA Task Force, on behalf of the member counties of the Coalition of Arizona/New Mexico Counties, which I'll refer to as the Coalition, I wish to thank you for the opportunity to present testimony on the role of NEPA in the Southwestern States.

The Coalition has focused on the inclusion of local government in impact analysis. In 1985, it became apparent that Federal Government decisions were having a profound effect on our environments, economies and social structures. Research into the Federal environmental laws found that many requirements existed requiring consultation, coordination and cooperation with local governments in Federal decisionmaking.

Up until that point, Federal land and wildlife management agencies' decisions had minimal impacts on local affairs.

This changed significantly with the listing in 1985, and designation of critical habitat in 1994, for the Spikedace and Loach minnows. No NEPA analysis was conducted on the proposed action and resulted in a legal challenge that was not concluded until February 1998.

In 1990, a decision by the regional forester to issue interim guidelines for protection of the Mexican spotted owl sent the region's timber industry into a downward spiral to total collapse. A mere signature with no NEPA analysis ravaged the region's economy, slashed school and county revenues, and had devastating social consequences.

Repeated attempts to have local government participation and meaningful input into the NEPA process have been met with extreme resistance by Federal agencies. This prompted the formation of the Coalition for the purposes of familiarizing Arizona Supervisors and New Mexico Commissioners in the Federal planning

laws, put together the necessary resources to effectively participate, and litigate to obtain our rightful seat at the table.

My written testimony only covers a few examples of the NEPA process that over the last two decades have produced decisions that are destroying the social structures and economies of rural Arizona and New Mexico with dubious benefits to the physical and biological environment.

The NEPA process has only produced the appearance of participation of State, Tribal and Local Government in Federal agency decisionmaking. It is our experience that a decision to act is made, and a NEPA document is produced to justify the proposed action.

This method is completely contrary to the concept of political accountability guaranteed by our Constitution. Nowhere in the process are elected representatives of the people given the ability to carry out their legal responsibilities. We are left with cumbersome, costly and time-consuming administrative remedies that do little more than send a flawed analysis and decision right back to the very individuals that erred in the first place.

Contemplating what might be suggested to fix the NEPA for this hearing was not easy. The NEPA is a simple law and laudable in its intentions. The law lays out an excellent process that allows a user to examine the potential impacts a decision may produce. The flaw comes in implementation and accountability.

I have always been cautioned when dealing with Government to be careful what you ask for since you are likely to get it. What the Coalition has suggested on numerous occasions is to separate the parties doing the analysis from the parties making the decision. This does not solve the fatal flaw of political accountability in the decisionmaking, but that is not the subject of this hearing.

Mr. Chairman, I again thank you on behalf of the Coalition for this opportunity to present testimony and am prepared to answer any questions you may have. Thank you.

Mr. RENZI. Mr. Hutchinson, thank you, sir, very much. I look forward to some questions.

[The prepared statement of Mr. Hutchinson follows:]

**Statement of Howard Hutchinson, Executive Director,  
Coalition of Arizona/New Mexico Counties for Stable Economic Growth**

**Introduction**

On behalf of the member counties of the Coalition of Arizona/New Mexico Counties (Coalition), I wish to thank the Chair and members of the Task Force for the opportunity to present testimony on the role of NEPA in the Southwestern States.

The Coalition is comprised of the Arizona Counties: Apache, Cochise, Gila, Graham, Greenlee and Navajo, and the New Mexico Counties: Catron, Chaves, Eddy, Harding, Hidalgo, Lincoln, Otero, Rio Arriba, Sierra, and Socorro, along with representation from the timber, farming, livestock, mining, small business, sportsman and outfitter industries. Our representation currently exceeds 592,923 in combined county populations.

I have fifteen years' experience with the NEPA process. This includes attending and conducting training on the NEPA, preparation of comments on proposed federal actions, appeal of agency decisions and assisting in NEPA related litigation on behalf of the Coalition and its member counties.

The Coalition has focused on the inclusion of local government in impact analysis. In 1985, it became apparent that federal government decisions were having a profound effect on our environments, economies and social structures. Research into the federal environmental laws found that many requirements existed requiring consultation, coordination and cooperation with local governments in federal decision making.

Up until that point, federal land and wildlife management agencies' decisions had minimal impacts on local affairs. This changed significantly with the listing (1985) and designation of critical habitat (1994) for the Spikedace and Loach minnows. No NEPA analysis was conducted on the proposed action and resulted in a legal challenge that was not concluded until February, 1998.

In 1990, a decision by the Regional Forester to issue interim guidelines for protection of the Mexican spotted owl sent the region's timber industry into a downward spiral to total collapse. A mere signature with no NEPA analysis ravaged the region's economy, slashed school and county revenues, and had devastating social consequences.

Repeated attempts to have local government participation and meaningful input into the NEPA process have been met with extreme resistance by federal agencies. This prompted the formation of the Coalition for the purposes of familiarizing Arizona Supervisors and New Mexico Commissioners in the federal planning laws, put together the necessary resources to effectively participate, and litigate to obtain our rightful seat at the table.

As this testimony will reveal, we have made significant strides in improving participation in the NEPA process, but are still encountering a federal agency culture of resistance to meaningful participation.

#### **A Tale of Two Minnows**

The Spikedace and loach minnow were listed in 1985. Designation of critical habitat was initiated in 1986. Throughout the process, Catron County petitioned the U.S. Fish and Wildlife Service (Service) for participation. The County was repeatedly rebuffed in its attempt to participate under the Endangered Species Act provisions and requests for completion of NEPA analysis of potential impacts.

The Service had adopted a nationwide policy, based on a 9th Circuit decision, that NEPA compliance was not required for designation of critical habitat. The Service concluded litigation with the Center for Biological Diversity with a settlement agreeing to designate critical habitat. Years of unsuccessful negotiations with the County culminated in a designation in 1994.

Coalition member county, Catron County, sued the U.S. Fish and Wildlife Service for failure to properly notify the County and solicit input and failure to take a hard look through NEPA at the impacts of critical habitat designation. In a unanimous decision, the Tenth Circuit Court stated, in regards to whether or not there were significant impacts, that:

"First, given the focus of the ESA together with the rather cursory directive that the Secretary is to take into account "economic and other relevant impacts," we do not believe that the ESA procedures have displaced NEPA requirements. Secondly, we likewise disagree with the panel that no actual impact flows from the critical habitat designation. Merely because the Secretary says it, does not make it so. The record in this case suggests that the impact will be immediate and the consequences could be disastrous. The preparation of an EA will enable all involved to determine what the effect will be. Finally, we believe that compliance with NEPA will further the goals of the ESA, and not vice versa as suggested by the Ninth Circuit panel. For these reasons and in view of our own circuit precedent, we conclude that the Secretary must comply with NEPA when designating critical habitat under ESA."

One would think that a Circuit Court decision would put the issue to rest. However, instead of revising regulations and policy, the Service, other federal agencies and environmental organizations embarked on a campaign to portray the county as ignorant industry agents bent on destruction of the environment and frustrating federal authority. This went so far as the Justice Department making threats of arrest to the County Commissioners.

This sordid tale concluded just recently with the settlement of another suit that the Coalition was party to. This suit removed the designation of critical habitat for the second time for failure to properly conduct the economic impact analysis.

The Service has reinitiated the designation process again. They have again failed to properly engage the local governments in the NEPA process or the economic impact analysis. We will no doubt end up before a federal judge again.

Hundreds of thousands of dollars have been expended by the counties and industry to attempt to get federal agencies to comply with the law. Millions have been wasted by the Service erroneously and unlawfully listing species and designating critical habitat.

The cumulative impacts to the Southwest in dollars alone is staggering. These cumulative impacts have, as yet, not been displayed in any federal agencies' EA or EIS. The Coalition's and member counties' comments pointing out these cumulative

impacts have been dismissed by claims that they are outside the scope of the impact statement or lack significance.

### **The Mexican Spotted Owl**

In 1990, the Region III Forester signed interim guidelines for the purpose of protecting Mexican spotted owls. These were incorporated into the forest plans of the region without any NEPA consideration. Interim guidelines are categorically excluded from NEPA analysis.

This began the destruction of the Southwest timber industry. The reason given for crafting the guidelines was to preclude the listing of the owl. However, almost concurrent with the guidelines, the newly formed Greater Gila Center for Biodiversity (Center) petitioned the Service to list the owl. Needless to say, the owl was listed.

A recovery plan for the owl was prepared and critical habitat was designated. Region III embarked upon a region wide forest plan amendment (Amendment) for protection of the owl. A lawsuit by the Center brought an injunction against all tree harvesting, including fuel wood.

A Draft EIS for region wide forest plan amendments to protect the owl was prepared. The Coalition funded the preparation of a county alternative. When the Final EIS and Record of Decision was issued, the county alternative was recognized as the environmentally preferable alternative. But, the Regional Forester selected another alternative that not only finished off the timber industry but increased pressures on the federal lands livestock operators.

Why would the environmentally preferable alternative not be selected? The reason stated was that it was not in compliance with the owl's recovery plan. Recovery plans are not subject to NEPA review. Why did the Coalition have to spend thousands of dollars to prepare the best alternative when the decision was already predetermined by the recovery plan? Why did the Forest Service have to spend hundreds of thousands of dollars and two years in NEPA documentation for a predetermined outcome?

### **NEPA Training and MOUs**

Not all the blame for failure to include county government in the NEPA process falls on the federal agencies. For two decades, most rural local governments in Arizona and New Mexico were uninformed about the NEPA and other federal land management and wildlife laws. They were focused on taking care of the roads and the day-to-day affairs of the counties.

The awareness set in, that decisions made by federal agencies were having a severe impact on their revenues and the people they represent. A steep learning curve was presented to them. A reading of the laws and regulations on land and wildlife management and the NEPA revealed that the counties simply were not taking advantage of their reserved seats at the table.

There had been a long absence of county governments from the federal decision-making table. So long, in fact, that there were no chairs at the table for the new participants. The new faces were not welcomed as long lost family members. There was visible hostility against participation that is still prevalent after years of negotiations, agreements and litigation.

In 1991, negotiations were initiated between counties and individual forests and districts to define the roles and responsibilities of county governments in the NEPA process. After two unsuccessful years, the Regional Forester stepped in and facilitated the first ever joint NEPA training exercise with county government officials and Forest Service personnel.

The training was conducted by Shipley Associates, a nationally recognized company dedicated to training in the NEPA and other federal procedural laws. In three days, the issues were resolved and an MOU was executed between the Coalition and the Regional Forester. A model MOU was also created for agreements between individual counties and District Rangers. The Chief of the Forest Service issued a memo to all regional foresters and supervisors suggesting they use this model to establish formal working agreements with county governments throughout the agency.

Shortly after reaching the decision on the owl protection and facilitating the execution of the MOUs, the Regional Forester retired. Within a couple of years, most of the District Rangers who had formalized MOUs with individual counties retired, transferred or were promoted to different positions. The MOUs were either ignored or were unknown to the successors. The counties were left with the job of reeducating new Regional Foresters, Supervisors and District Rangers in cooperating with local governments.

### **The Wildlands Project**

The Wildlands Project (Project) was the brainchild of Dr. Reed Noss and Dave Forman (founder of Earth First!). It calls for the rewilding of over fifty percent of the North American Continent. America has been divided up into ecoregions. Within each ecoregion, proponent groups litigate, agitate and promote for the purpose of removal of human activity from the core areas and linking corridors, and limiting activity in buffer zones surrounding the cores and corridors.

The Project received its primary funding from the Nature Conservancy and the Audubon Society. The Project is mentioned in the Global Biological Assessment as a model for implementing Agenda 21. Agenda 21 was packaged into the Biodiversity Treaty that, while signed by President Clinton, was not ratified by the Senate.

In the early 1990s, the Coalition became aware of the Project. As the years have passed, it became apparent that federal agency actions were running parallel to Non-Governmental Organizations' (NGO) agendas to implement the Project. We ascribed much of this parallel to settlement of appeals and litigation. We suspected that personnel within the agencies were at least sympathetic, if not supportive of the agenda.

It wasn't until a Southeast Arizona rancher sued the Center for Biological Diversity (Center) for libel, that our suspicions of collusion between federal agencies and the NGOs was revealed in discovery and testimony in the trial. The jury in that trial awarded the rancher \$100,000.00 in damages and a \$500,000.00 punitive award.

A Forest Service employee was writing biological assessments and NEPA analysis while his wife, an employee of the Fish and Wildlife Service was responsible for crafting the biological opinions on the information supplied by her husband. Records indicate that the Forest Service employee is a regular financial contributor to the Center. Testimony at the trial by reputable scientists showed that the data and conclusions of the husband and wife were at best erroneous.

The reason for raising this issue in testimony on the NEPA is that federal agency personnel are either knowingly or unknowingly advancing the agenda. The Coalition has, on several occasions, raised the question in NEPA document comments that the Project implementation needs to be addressed since it appears to be a logical outgrowth of proposed actions. We are answered that the issue would be beyond the scope of the analysis.

On several occasions, federal agencies have contracted all, or a portion of, NEPA analysis to private companies or NGOs that have been decidedly biased against rural natural resource communities. Our independent analyses have revealed these discrepancies. Our data, analyses and comments are routinely rejected.

One of the most recent examples has been the sole sourcing of a contract by Region III to have the Nature Conservancy do the baseline ecosystem analysis for the upcoming Forest Plan amendments. These will not be subject to NEPA review pursuant to the just released National Forest Management Act implementing regulations.

Our question now becomes: How many more "willing sellers" are going to be generated for the Nature Conservancy to purchase land from, when the results of their analysis concludes that natural resource use in our forests is not "sustainable."

The NEPA analysis is supposed to utilize sound science to produce an objective disclosure to the public and the decision-maker, the environmental consequences of a proposed action. This cannot be accomplished with biased federal agency personnel and NGOs performing the analysis, without some kind of check and accountability.

### **Peloncillo Fire Management Plan**

In 1997, the Coronado National Forest initiated the Peloncillo Fire Management Plan (PFMP) process that proposed to allow for the use of wildland fire in the Peloncillo Ecosystem Management Area to achieve resource benefits.

In January of 1990, the Nature Conservancy bought the Grey Ranch in southern Hidalgo County. After it was revealed that the Nature Conservancy had engaged in some questionable appraisals in its attempt to sell the land to the federal government, they sold to a private owner retaining management and conservation easement agreements.

While the ranch was under the management of the Nature Conservancy, the suggestion was made to use fire for resource management. The problem was that there were other ranches in the area that also held Forest Service and BLM grazing allotments. This checkerboard ownership would not allow for the grand management scheme the Conservancy had in mind.



Some local ranchers, lured by quick cash and guarantees of grass banking privileges, signed off on conservation easements that transferred their development rights. This was formed the Malpais Borderlands Group.

One of the problems associated with using fire as a management tool was, what do you do with your cattle when they have to be removed from pastures for up to two years to grow the fine fuels to carry the fire, and two years after before the livestock would be allowed back on?

Some ranchers were leery of the Conservancy and opted to not participate. However, with the advent of the PFMP they were drawn into the plan. The Coalition assisted Hidalgo County in preparing a county alternative. We were assured that we could develop a county alternative and it would be included in the EA. Although the County Alternative was discussed in the draft EA, it was obvious to those involved in writing the alternative that there were major differences between the Forest Service's preferred alternative and the County's. For example:

The County's plan for Desired Potential Future Conditions included an incentive for the ranchers to participate by including wording that allowed an increase in stocking capacities when the future conditions were met. This statement alone would have encouraged economic opportunities for the permittees, enhanced their quality of life and increased their standard of living.

In several paragraphs, where appropriate, wording was included that encouraged the Forest Service to work in close cooperation with the landowners/permittees on site-specific planning. We added this so the permittees would be included in the planning efforts and it would not be just another programmatic plan. We allow that the intent of the Service was honorable, but this is often corrupted by employees who do not agree that permittees have a right to be involved in the agency's planning efforts and are sometimes openly hostile to the ranching community.

We also added a paragraph that required the Service to monitor the effects of the fires to ensure the land was moving towards the desired vegetative conditions. Again, we are all aware the Forest Service intent is honorable, but it does not have a good track record in monitoring the effects their decisions have on the land, or the people.

In addition, we added language that required the Service to discuss with the permittees how the agency's actions would be mitigated before a fire was initiated. This would have included the costs of repairing fencing, buildings and corrals. As it now stands, the Forest Service has no liability if a prescribed fire escapes or if they decide to allow a naturally occurring fire to burn out of control, as we have witnessed over the last few years in so many of the fires in Arizona and New Mexico.

While these issues are in the administrative record, they were not given proper consideration. Nor was the county given a seat on the ID team and cooperating agency status.

There was a 30-day public review of the EA issued in March, 2001. The issue was shelved, pending an experimental burn and examination of effects on the ESA listed ridge-nosed rattlesnake. The Fish and Wildlife Service issued a "not likely to jeopardize" Biological Opinion on March 18, 2005. The Supervisor issued a Decision Notice with a Finding of No Significant Impact (FONSI) on April 29, 2005.

#### **The Mount Graham Telescope**

After millions of dollars in planning, years of appeals and litigation, it took an Act of Congress exempting the action from NEPA review, to clear the way for a new telescope complex on Mount Graham near Safford, Arizona.

#### **The Catwalk**

The Catwalk is located in Glenwood, New Mexico, and is a major tourist destination. The District Ranger determined that the trail system needed to be improved for handicapped access. After making a finding of no significant impact and using a categorical exclusion, a contract was issued for the work.

Local business owners were assured that the Catwalk would not be closed to visitors during the peak tourist season. However, the contract that was issued allowed the contractor to close the area at any time. The contractor exercised this option, closing the area not only on weekends in the off season, but for extended periods during the peak season.

This resulted in hundreds of thousands of dollars in impact to the local economy. The contract called for extensive blasting and trail reconstruction. The Fish and Wildlife Service issued a "not likely to jeopardize" opinion for the listed Spikedace and Loach minnow, even though extensive riparian area management actions were to take place.

At the same time, this action was taking place, grazing allotments were going through their permit renewal NEPA processes. These were considered significant ac-

tions and livestock grazing was identified as a major threat to the listed minnows and the Southwestern Willow flycatcher. Appeals and litigation by environmental groups are ongoing over this issue.

This calls into question the methods for determining "significance." On the one hand, blasting, heavy equipment operation and channelization are classified not significant, and livestock grazing which has coexisted with these species for a hundred years is considered significant.

### **Conclusion**

There has been a failure of federal agencies for meaningful inclusion of local governments in the NEPA process. There is a lack of clear direction in the law for inclusion of State, Tribal and local governments. Our system of government does not function well without checks and balances. The active participation of local representatives of the citizens affected by the decisions can insure that the NEPA is implemented in a transparent manner.

Our experience is that local government and public participation is only for the purpose of creating the appearance of participation. A look at the federal agency budgeting process reveals that the agencies are preparing for actions through budget requests some two years or more in advance. This process predisposes the agency personnel to a preferred alternative before analysis even begins. It should be made clear in the law that you go through the NEPA process first, then make application for funding.

Agency personnel are not immune to personal bias or prejudice. It has been shown in many instances that personnel are members and contributors to NGOs whose agenda is to thwart or discontinue resource access and use by humans. This is another reason to elevate the status of State, Tribal and local government participation.

There is a lack of uniform application of the NEPA procedure for ESA issues. There are conflicting Circuit Court decisions all over the nation. The Fish and Wildlife Service has been very selective in applying these decisions to nationwide regulations and policies. The NEPA should create clear guidance on when or when not to prepare an impact statement. Recovery plans and designations of critical habitat should be required to comply with NEPA.

There is no accountability for federal agencies' obligation under the NEPA. Injured parties are required to file suit under the Administrative Procedures Act and prove an arbitrary and capricious decision by the federal agency. This occurs when the agency leaves important information out of a NEPA document, when an agency fails to do a complete EIS, or uses FONSI after an EA that lacks sufficient information to disclose significant impacts to the public and the decision maker. This has resulted in the Court's deference to federal agency expertise, even when obvious impacts are occurring or will occur.

The lack of definition of "culture" in the law leaves the assumption that this only means bones, tools and artifacts from past human habitation and ignores the current cultures occupying the land. The law should make clear that existing cultures should be considered when conducting impact analysis. The NEPA should be amended to specifically require that social, cultural and economic impact analyses are required for all NEPA documents.

No party with conflicts of interest should be allowed to prepare NEPA documents in place of the federal agency or elected State, Tribal and local government representatives. Federal agencies should be prepared to fiscally assist State, Tribal and local governments in carrying out their responsibilities as Joint Lead and Cooperating Agencies. Congress should appropriate funds specifically earmarked for State, Tribal and local governments to carry out these functions.

The NEPA should have a clear definition of significance. The term is hardly recognizable from its application and use by federal agencies. Significance should not be determined by analyzing impacts beyond the scope of impact the decision will have. For example: A grazing allotment permit renewal in Navajo County, Arizona should not have its economic impact analysis compared to the National Gross Domestic Product. Doing so, renders the action unimportant compared to the national economy, but fails to disclose the importance to the local governments and economy.

Lastly, the NEPA should define "cumulative impact" in the law and require that federal agencies examine how the proposed action, in concert with other federal, State, Tribal and local government actions, have an impact. This should include a requirement to examine litigation settlement agreements to insure that they do not conflict with the federal agencies' adopted plans and Congressional policy.

[The response to questions submitted for the record by Mr. Hutchinson follows:]

JULY 12, 2005

The Honorable Cathy McMorris  
U.S. House of Representatives  
Committee on Resources  
Task Force on Improving the  
National Environmental Policy Act  
Washington, DC 20515

RE: Additional Questions on Testimony Presented in Lakeside, Arizona.

Dear Chairwoman McMorris,

On behalf of the member Counties of the Coalition of Arizona/New Mexico Counties, thank you for the opportunity to provide testimony for the purpose of improving the National Environmental Policy Act.

I am pleased to provide the following responses to the additional questions submitted. I hope you are able to consider any additional suggestions for remedy, along with what were contained in testimony.

1. Your "tale of two minnows" is alarming. It seems to show what happens when the government abuses or ignores NEPA to make sure its own environmental goals are met no matter the cost. Is that right? What can be done so this doesn't happen?

*Comment on Your Statement:*

As to the question, "Is that right?" your statement would be more accurate if instead of "environmental goals," it stated "environmental agenda." The problem described stems from the makeup of the agency personnel, their mandate under the Endangered Species Act (ESA) and selective adherence to conflicting Circuit Court Decisions.

Agency personnel makeup is dominated by biologists. Over the last fifteen years, "biological biodiversity" and the so-called science of "conservation biology" has crept into, and now dominates, the curriculum in the colleges and universities. Most employees enter the agency workforce immediately out of college with Bachelor of Science degrees in biology and, increasingly, conservation biology.

For example, this is a statement from the Web site of Prescott College in Arizona:

"Conservation Biology Emphasis

Conservation Biology is an interdisciplinary field that has developed rapidly to respond to a global crisis confronting biological diversity. Practitioners of Conservation Biology attempt to guide society toward the preservation of organisms, landscapes, ecological processes, and natural systems, and toward sustainable management of environmental and evolutionary resources. Firmly grounded in the natural sciences, this emphasis area also draws upon ethics, history, economics, political science, and other human studies. Students in this field will become competent to conduct relevant research, make balanced value judgments, and take effective action on behalf of the environment."

Some graduates of these programs enter the federal agency and some take employment with environmental organizations. Normally, both are also members of conservation biologist associations, and other professional associations. Some agency personnel also hold membership in the environmental organizations.

These arrangements lend themselves to establishment of a common agenda accompanied by collusion for implementing the agenda. There is also created a perverse incentive to list species and a disincentive to actually recover them.

Many agency personnel specialize in a particular species. They obtain their advanced degrees by studying them. This increases their pay scale. If one can get a specie listed and become involved in their protection, one has a guaranteed job until retirement. Once retired, there are a host of opportunities awaiting for employment with environmental organizations. This specie specialization often blinds the employee to unintended consequences of their management actions to protect that single specie.

The mandate under the ESA as interpreted by the courts is to save listed species no matter what the cost. This has created a mindset in federal agency personnel to ignore adverse impacts to the economy and social well being. This, coupled with

the conservation biology philosophy, establishes the foundation for implementation of the Wildlands Project and Agenda 21.

The mandate is also contained in the report from the President's Council on Sustainable Development, established during the Clinton Administration. The report was acted upon through the Environmental Protection Agency and the Council on Environmental Quality (CEQ).

The product of this effort was an interagency MOU to establish ecosystem management under the concept of the precautionary principle. This management philosophy is well entrenched in the agencies and NGOs committed to its implementation. The lead NGO for this effort is the Nature Conservancy. Hundreds of millions of federal dollars are being given to the Nature Conservancy and many other NGOs through a host of federal programs to carry out the agenda.

The Justice Department and agency legal council very selectively appeal decisions to the U.S. Supreme Court. In the vast majority of cases, only environmental, industry and individual citizen plaintiffs appeal to the High Court.

Many of the attorneys in the Justice Department, agency legal council and those employed by the environmental groups have revolving doors between them and/or share the same environmental philosophies. Therefore, defense of the federal agencies are usually weak and bear closer resemblance to friendly suits.

Most suits are dealt with through settlements, which leaves impacted industries and affected citizens with only the very expensive option of intervention. This is true because, as an intervener, legal costs are not recoverable under the ESA or the Equal Access to Justice Act.

The agency referred to in the "tale" is the U.S. Fish and Wildlife Service. Their actions are driven by mandates under the ESA. Currently, they are only under Court direction to comply with the NEPA in a couple of U.S. Circuits.

Nationally, the agency has chosen to abide by the 9th Circuit's decision, holding that the NEPA is not required for the listing of species or designation of critical habitat. The 10th Circuit has ruled contrary, as stated in the testimony.

*Answer to Your Question:*

Some of what I suggest that can be done is addressed in the responses to your Items 2 and 4 below. One thing missing in the NEPA is accountability enforcement. CEQ is charged under the NEPA with giving advice to the Executive Branch. CEQ has issued implementing regulations and each agency is required to establish their internal guidelines for implementation.

However, CEQ has no enforcement authority over the implementing agencies. There is also lacking an ability of an injured party to seek redress through administrative remedy or the courts.

The only access an injured party has to due process and remedy is through the Administrative Procedures Act in court. This is only available after a record of decision has been handed down. So the injured party has to, not only proceed on the merits, but also seek injunctive relief to halt implementation of the action. This process is time consuming and costly, not only for the injured party, but the federal agencies and the courts.

The solution may lie in establishing enforcement oversight in the CEQ. An injured party could seek administrative remedy through this process before having to sue in federal court. This would also allow for States, Tribes and Local Governments to have issues of joint lead and cooperating agency status addressed before a decision is made.

2. *It seems as though we really have to get NEPA involved with ESA decisions— if we don't, groups and government officials that have it out for industries will have a powerful weapon at their disposal. Would you comment?*

*Comment on Your Statement:*

"Groups and government officials that have it out for industries" already have a powerful weapon in the ESA. The ESA, as noted in the 10th Circuit decisions I cited in testimony, has NEPA-like requirements for designation of critical habitat and other regulatory actions. Without NEPA, no analysis of the impacts from the use of that weapon is disclosed to the public, decision makers, the President and Congress.

Intended or unintended negative impacts to economies and communities results in less will and ability of local inhabitants to take care of their environments. In many cases, species protection that harms local people creates a hostile attitude against even beneficial conservation.

I have often wondered why the original drafters of the ESA didn't incorporate NEPA into the act. I have attached a flow chart and narrative on how NEPA could be easily incorporated into the ESA critical habitat process. This would result in

significant cost savings for the U.S. Fish and Wildlife Service and foster a better decision making process.

There is a more significant problem with leaving the ESA free of NEPA compliance. That stems from the apparent assumption that protecting species is automatically beneficial to the environment. This may be true in a very generalized sense but not at the specie and habitat-specific level.

Analysis needs to be performed on ESA actions (especially recovery plans) that takes into account the potential of impacts on the physical, biological, economic and social environment. Without such analysis we are exposed to situations, described in my testimony, where protection of a single specie places an entire ecosystem at risk, including the economic and social structure of a region. Another risk associated with not doing the NEPA analysis when dealing with single species is that recovery strategies and regulations for one specie may be harmful to another listed specie in the same habitat. This is the case with the Southwestern willow flycatcher and several listed fish species.

When a number of species are listed in a given region, there is also a cumulative impact that we have, as yet, to get the U.S. Fish and Wildlife to acknowledge.

3. *What was the effect of the counties having to "retrain" Forest Service staff about the MOUs? It seems like having to do that really diminishes the value of doing them in the first place.*

*Answer to Your Question:*

In virtually all of the cases, the new Forest Service personnel balked at recognizing the MOUs. None have been renewed at the local level.

The Coalition of Counties agreed at the end of 2004 that we would wait until the new Forest Planning Regulations were released to re-negotiate the MOU with Region 3. In March of this year, we agreed to wait until staff at the Region was off vacation and training to enter into negotiations. We are still waiting.

If there is a genuine desire on the part of Federal agencies and local governments to insure that the NEPA is carried out in an efficient manner, then there needs to be an understanding of each party's roles and responsibilities.

I agree that the example provided seems to diminish the value. The procedure needs to be institutionalized within each agency so that the frequent changes in personnel at the field and regional levels doesn't result in a constant revisiting and revising these working agreements.

4. *I agree that the NGO-agency personnel link needs to be broken. What can we do to build in some checks and accountabilities? Follow up: Did the Center for Biological Diversity ever make the payment to the rancher?*

*Answer to Your Question:*

Agency personnel get around the Hatch Act provisions that forbid them to lobby Congress. They also share the extreme biocentrist philosophy described above.

All agency personnel have to do is join an environmental group and they have free rein to lobby for funds for their agencies and agendas. They often have discretion to disperse federal funds to their environmental allies and withhold it from others.

It may be possible to amend the Hatch Act to cover these unholy alliances and conflicts of interest. Doing so would allow for better oversight by Congress. This, however, has some political land mines. When this issue was raised several years ago by the late Representative Joe Skeen, federal employees and the media accused the Congressman of going on a witch hunt and interfering with the employees' freedom to associate on their free time.

It may also be possible to require federal employees to disclose possible conflicts of interest. I know that in my capacity as an elected official, I am required to recuse myself on votes on issues that may pose conflicts of interest. Federal employees dealing with federal funds and decisions should have no less a requirement.

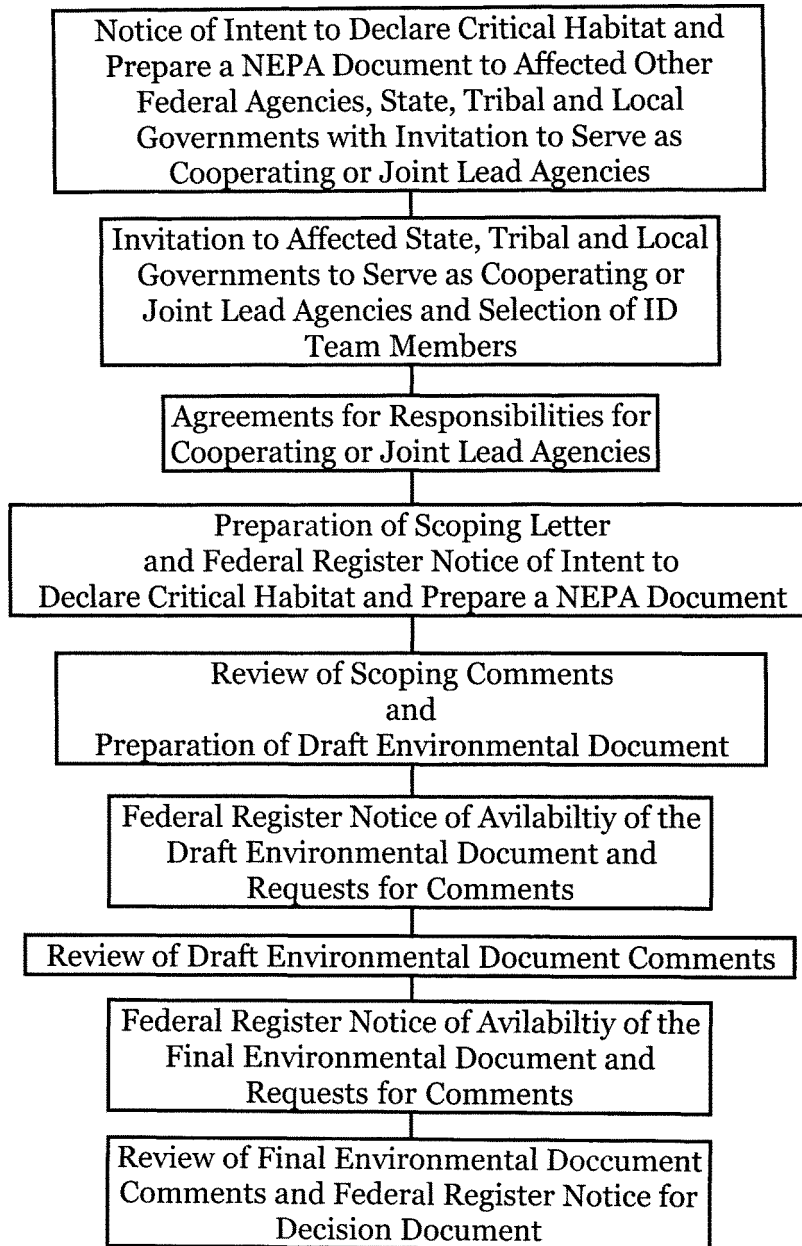
*Answer to follow-up:*

The Center has not paid anything at this time. Last month, the Judge in the case refused the Center's petition for a review and let stand the jury award. The Center has not indicated if they will make an appellate court appeal. I believe the deadline for that decision is imminent.

I hope that you will be able to use this information in your quest to make improvements to the NEPA. If you have any need for additional information please let me know and I will be happy to assist.

SINCERELY,  
HOWARD HUTCHINSON  
EXECUTIVE DIRECTOR

Attachments: Flow Chart for use of NEPA in Designation of Critical Habitat and  
Accompanying Narrative



**NARRATION FOR FLOW CHART PROPOSAL FOR STREAMLINING AND PROPERLY DECLARING CRITICAL HABITAT UNDER CURRENT LAW**

**Notice of Intent to Declare Critical Habitat and Prepare a NEPA Document to Affected Other Federal Agencies, State, Tribal and Local Governments with Invitation to Serve as Cooperating or Joint Lead Agencies**

A notice of intent to declare critical habitat and prepare a NEPA document letter would be sent to affected federal agencies, state, tribal and local governments (participating entities) at the time of proposed listing of the species or within the statutory time limit extensions. The letter would also serve to invite participation, as appropriate, as cooperating or joint lead agencies.

**Selection of Interdisciplinary Team Members ( ID Team)**

Following the transmittal of the notice letter and receipt of expressions of interest, the Fish and Wildlife Service lead agency (lead agency) will cooperate with the participating entities in selecting ID Team Members (ID Team).

**Agreements for Responsibilities for Cooperating or Joint Lead Agencies**

A MOU or other appropriate document would be executed between the lead agency and participating entities describing the roles and responsibilities of the cooperating and/or joint lead agencies and their representatives on the ID Team

**Preparation of Scoping Letter and Federal Register Notice of Intent to Declare Critical Habitat and Prepare a NEPA Document**

The ID team would prepare a scoping letter and the lead agency would transmit the scoping letter to appropriate parties and publish a federal register notice of intent to declare critical habitat and prepare a NEPA Document. This could be in conjunction with the listing notice for a particular species unless postponed pursuant to statutory allowance for additional time to declare critical habitat.

**Review of Scoping Comments and Preparation of Draft Environmental Document (DED)**

The ID Team would receive and review scoping comments, identify the significant issues for analysis, and prepare the DED. A range of alternative designations of critical habitat would be prepared by the ID Team. The no action alternative would be the no designation of habitat as the base line for analysis.

**Special Note:**

The cumulative impact analyses in the DED shall include but not be limited to analysis of impacts:

- Of restrictions on management of private, federal, state, Tribal and local government lands to take into account short term adverse impacts on the listed species or their critical habitat vs. the long term benefits from specific management activities or lack thereof;
- Of Section 9 enforcement impacts for listing and critical habitat protections;
- On increased fiscal and personnel commitments for other federal agencies; states, Tribes and local governments created by listing and declaration of critical habitat;
- On state, Tribal and local government infrastructure development and maintenance, tax base, tax revenues and economic activities affected by Section 9 protections for listed species and declared critical habitat;
- On the social and cultural environments affected by Section 9 protections for listed species and declared critical habitat.

The DED shall also include monitoring provisions capable of determining the efficacy of the decision and mitigation provisions for any adverse impacts to the physical, biological, cultural, social and economic environments.

**Federal Register Notice of Availability of the Draft Environmental Document and Requests for Comments**

The lead agency publishes the notice of the availability of the DED and requests for comments in the federal register, on its web site and complies with any other notice requirements.

**Review of Draft Environmental Document Comments**

The ID Team reviews the DED comments and prepares the Final Environmental Document (FED) with responses to comments and incorporation of comment suggestions as appropriate.

**Federal Register Notice of Availability of the Final Environmental Document and Requests for Comments**

The lead agency publishes the FED in the federal register, publishes it on its web site and sends copies to those who commented and requested the final document.

**Review of Final Environmental Document Comments and Federal Register Notice for Decision Document**

The ID team reviews comments on the FED, makes appropriate changes and submits the final document or recommendation to do a supplemental ED to the responsible official at the lead agency. The responsible official at the lead agency then publishes their decision document in the federal register and notifies those who commented on the proposed action or requested notification of the decision.

In the event that a joint lead agency is involved, the responsible joint lead agency responsible official also signs the decision document and publishes it in accordance with their requirements.

---

Mr. RENZI. Ms. Craft, thank you so very much for coming. Your testimony, please.

**STATEMENT OF KATHLEEN CRAFT, FREHNER CONSTRUCTION COMPANY, INC., LAS VEGAS, NEVADA**

Ms. CRAFT. Good morning, Members of the Task Force. I am Kathleen Craft, Executive Secretary of Frehner Construction, and I am here on behalf of the President of Frehner Construction to represent the American Road & Transportation Builders Association, ARTBA. I would like to begin my testimony by thanking the House Committee on Resources and the Members present today for initiating a review of the National Environmental Policy Act known as NEPA. As my testimony will demonstrate, ARTBA thinks NEPA is due for a much needed update.

Frehner Construction Company is an ARTBA Member located in Las Vegas, Nevada, with satellite offices in several western states. Frehner Construction provides both public and private engineering and construction services and employs between 700 to 1300 employees during our peak construction season. Much of Frehner Construction's work involves large civil governmental projects. Currently Frehner Construction does more work for the Nevada Department of Transportation than any other contractor.

This work includes construction associated with the widening of U.S. Highway 95 from six to ten lanes outside of Las Vegas. This project is currently halted due to a NEPA lawsuit that was filed four years after the completion of all the environmental requirements, and that will be the focus of my testimony today.

Let me stress at the outset that ARTBA shares this Task Force's goal of protecting the environment and minimizing impacts of development. This was the original intent of NEPA. However, in its current state, NEPA generates far more documents than decisions.

At Frehner Construction, we do not participate in the actual NEPA review process, nor do I claim to be an authority on the statutes and regulations involved in its decisionmaking. Frehner's role in the NEPA process is that we rely on it to provide a final determination as to what work we can and cannot begin. It is upon this reliance that Frehner determines business plans and work schedules that affect the livelihood of hundreds of Nevadans that comprise our work force.

The halting of the U.S. 95 widening project, demonstrates that we can no longer rely upon NEPA to give us this kind of reliability.



The final environmental impact statement for this project was issued in 1999. At that point Frehner and other Nevada-based firms began participating in the project. However, four years later in August of 2004, the project was abruptly stopped because of a NEPA lawsuit. This halting took place despite the fact that construction had already begun, and in some cases had even been completed on many different segments of the U.S. 95 improvement project.

This type of disruption has a bigger effect than simply putting the construction project on hold while litigation takes place. It affects business plans, work schedules, and the local economy, and in the case of the U.S. 95, there is roughly 85 million dollars in construction that is on hold.

The longer this construction remains on hold, the more expensive materials necessary to complete the project become. In the time that the U.S. 95 project has been delayed, the cost of the materials has already risen by more than three million dollars, and these prices continue to rise the longer the project is delayed. These increased costs are not born solely by Frehner, but the taxpayers nationwide, as well.

Also while this project is delayed, Frehner is prevented from developing a reliable business plan and work schedule. Employees cannot be scheduled, and we have no idea if and when a project stopped by NEPA litigation will be allowed to continue.

In addition, to the economic hardship caused to Frehner, the halting of the U.S. 95 project has also disrupted the lives of myself and other Nevadans who realize just how much this project is needed. The fact that a nationwide organization was able to use NEPA to bring this lawsuit, after local Nevada residents had already participated in and completed the environmental review process, demonstrates a flaw in NEPA that needs to be remedied.

Also, no consideration has been given to the increased congestion directly caused by this lawsuit or to prevent us both from the environmental and public health standpoint that will result when and if this project is completed.

It is with this in mind, that I offer the Task Force the following recommendations for implementing NEPA. Number one, set a time limit on project-related NEPA lawsuits. Allowing a project to be stopped four years after filing an environmental impact statement, is not acceptable.

Number two, NEPA litigation should be limited to only those issues that have been fully raised and discussed during the public comment period of the project. This will help ensure that litigation over projects is a last resource, rather than a first stop for the opponent of the project.

Number three, consideration of the environmental benefits of the proposed projects, as opposed to just their impacts. Also, the environmental consequences of not undertaking a project should also be considered.

I would respectfully direct that members of the Task Force to my written statement for other recommendations to improving the NEPA process. In summary, NEPA should be reformed in a manner that will allow its regulations to be crafted by the policymakers in the Legislature and the Administration, rather than be defined

on a case-by-case basis throughout the NEPA litigation initiated by a national environmental organization and codified by activist judicial decisionmaking.

Members of the Task Force, ARTBA deeply appreciates this opportunity to present testimony to you, and I look forward to answering any questions you have.

Mr. RENZI. Ms. Craft, thank you.

[The prepared statement of Ms. Craft follows:]

**Statement of Kathleen Craft, Executive Assistant, Frehner Construction Company, on behalf of the American Road & Transportation Builders Association**

Good morning, Chairwoman McMorris. Thank you very much for providing the American Road and Transportation Builders Association ("ARTBA") the chance to present its views before this task force on the effects of the National Environmental Policy Act (NEPA) on transportation construction projects.

I am Kathy Craft, Executive Assistant, with Frehner Construction Company, located in Las Vegas, Nevada, with satellite offices in several western states. Frehner Construction is an ARTBA member that provides both public and private engineering and construction services and employs between 700 to 1,300 employees during their peak construction season. Much of Frehner Construction's work involves large civil government projects. Currently, Frehner Construction does more work for the Nevada Department of Transportation than any other contractor. This work includes construction associated with the widening of highway U.S. 95 from six to ten lanes outside of Las Vegas. This project is currently halted due to a NEPA lawsuit filed four years after the completion of all environmental requirements and will be the focus of later parts of my testimony linking NEPA reform to problems faced by the transportation construction industry.

I am here today representing ARTBA, whose eight membership divisions and more than 5,000 members nationwide, represent all sectors—public and private—of the U.S. transportation design and construction industry. ARTBA, which is based in Washington, D.C., has provided the industry's consensus policy views before Congress, the Executive Branch, federal judiciary and the federal agencies for 103 years. ARTBA submitted a "friend of the court" brief to the United States Court of Appeals for the Ninth Circuit supporting the continuation of the U.S. 95 widening project in Las Vegas.

The transportation design and construction industry ARTBA represents generates \$200 billion annually to the nation's Gross Domestic Product and sustains the employment of more than 2.5 million Americans.

Let me stress at the outset that ARTBA shares the task force's goal of protecting the environment and minimizing the impacts of development. In fact, this is a sentiment that ARTBA stresses every year when we hand out our Globe Awards to those transportation construction professionals, firms and public agencies that do an outstanding job in protecting and/or enhancing the natural environment in the planning, design and construction of U.S. transportation infrastructure projects.

**NEPA Background**

Madame Chairwoman, transportation infrastructure projects must navigate through an often time-consuming and complex planning process. In 1969, Congress passed the National Environmental Policy Act ("NEPA"), which is a process-guiding act of general applicability designed to ensure compliance with the many specific federal environmental laws, permitting and consultation activities that involve a number of federal agencies. NEPA establishes general policy, sets goals and provides a means for carrying out these policies.

NEPA is triggered any time an action by the federal government will result in an "environmental impact." The White House Council on Environmental Quality defines "environmental impacts" as any impact on the environment or historic and cultural resources. Agencies such as the U.S. Army Corps of Engineers ("Corps") (for wetland and water permits), the U.S. Fish and Wildlife Service ("FWS") (for Endangered Species Act compliance), the Advisory Council on Historic Preservation ("ACHP") (for historic preservation laws), the U.S. Environmental Protection Agency ("EPA"), and many other agencies are commonly involved in this process. NEPA does not mandate specific outcomes. It simply governs how the process must take place. NEPA is triggered in the transportation construction planning process when federal funds are being used to finance the project.

NEPA establishes three classes of environmental reviews that must take place, based on the magnitude of the anticipated impact of the proposed transportation project:

- 1) Environmental Impact Statement ("EIS"). Projects where a significant environmental impact is anticipated must complete a full EIS. Many federal agencies, such as the Federal Highway Administration ("FHWA"), have developed their own policies to implement NEPA and to address the necessity of an EIS. For example, FHWA regulations mandate that an EIS be prepared where a new controlled access highway or road project with four or more lanes is going to be constructed on a new location.
- 2) Environmental Assessment ("EA"). In instances where neither NEPA nor FHWA's own regulations dictate that an EIS must be completed, a less strenuous EA must be completed. An EA will result in one of two results: there will be a "finding of no significant impact" (FONSI) to the environment; or the agencies will determine that there will be a significant impact, thereby prompting them to conduct a full EIS. Widening or expanding the capacity of an existing highway is a typical highway project that would require an EA.
- 3) Categorical Exclusion ("CE"). Projects that neither individually nor cumulatively have a significant environmental impact can be treated as a CE. State agencies must provide FHWA with sufficient information on a case-by-case basis to demonstrate that environmental impacts associated with a project will not rise above the CE threshold. Road rehabilitation or bridge replacement projects are typical highway projects that would only require a CE.

An EIS is the most intensive and time-consuming of the processes described above. If an EIS is performed, the agency performing the review, i.e., the state department of transportation ("DOT"), must prepare a document that identifies each environmental impact of a proposed project, as well as alternatives that may have different impacts and the pros and cons of each. This document must be released in draft form to allow the public and other government agencies to submit comments. These comments must then be addressed when the EIS is published in its final form. In rejecting different alternatives, NEPA requires the agency to carefully document why other alternatives were not selected.

#### **Delays in the Process**

Madame Chairwoman, you don't have to be an expert to know that our transportation planning process has reached a state of gridlock. Today, it is almost as if one needs a global positioning system to keep track of where a transportation improvement project is in the review process. According to a recent report by the U.S. Government Accountability Office ("GAO"), as many as 200 major steps are involved in developing a transportation project from the identification of the project need to the start of construction. According to the same report, it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally funded highway project. This process involves dozens of overlapping state and federal laws, including NEPA, state NEPA equivalents, wetland permits, endangered species implementation, clean air conformity, etc. Often times these procedures mask disparate agendas or, at a minimum, demonstrate an institutional lack of interagency coordination that results in a seemingly endless string of delays.

It is true—according to FHWA—that only about three percent of federally funded highway projects require the completion of an in-depth EIS. Since 1990, Interstate lane miles have only increased by about six percent. The truth is there are very few projects in terms of numbers that involve new construction, thereby requiring an EIS. However, most of these projects are very large in scope and account for a large portion of each state's construction budget in any given year. Many of these projects, while small in number, are very large in terms of cost, often in the range of tens of millions of dollars and even in excess of a billion dollars each. These projects also have a very large potential benefits for public safety and mobility for the traveling public and are, therefore, the highest priority projects for most states.

A recent study by FHWA found the time required to process environmental documents for large projects has doubled over the past two decades. In the 1970s, the average time for completion of an EIS was 2.2 years. Former U.S. DOT Assistant Secretary for Policy Emil Frankel recently reported that from 1999-2001 the median time for completing an EIS was 4.4 years. If federal Clean Water Act section 404 wetland permit issues or section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)") historic preservation or parkland avoidance issues come into play, the average time period grows by an additional two years, on average.

However, delays in the transportation project environmental review and approval process are not only limited to large projects. While according to FHWA three percent of federally funded transportation improvement projects require an EIS, the

remaining 97 percent require an EA, (6.5 percent) or CE (90.6 percent). A recent report conducted by the National Cooperative Highway Research Program ("NCHRP") stated:

"[D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs."

According to the report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs and 81 percent reported similar delays involving EAs. These delays triple average environmental review times for CEs—from about eight months to just under two years—and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years. The most common reason for these delays: section 4(f) requirements (66 percent); section 106 of the National Historic Preservation Act (NHPA) (61 percent); and section 404 of the Clean Water Act (53 percent). These numbers are consistent with a survey ARTBA conducted in 2001 of 49 state DOTs on delays in the environmental review process.

Because of these lengthy delays, many state DOTs have simply assumed extended time periods in their planning schedules, giving the misimpression that the environmental review process is not taking an inordinately lengthy period of time. While many environmental groups state that delays are primarily due to funding issues, the complexity of the project or low priority of the project, just the opposite is true. State DOTs often withhold funding on projects until the environmental review process is complete, making it appear that funding is the reason for the delay.

The basic problem is that the development of a transportation project involves multiple agencies evaluating the impacts of the project as required by NEPA. While it would seem that the NEPA process would establish a uniform set of regulations and submittal documents nationwide, this has not been the case. For example, the EPA, Corps, FWS and their companion state agencies each require a separate review and approval process, forcing separate reviews of separate regulations, and separate determinations of key benchmark issues, such as the purpose and needs of a project, and requiring planners to answer separate requests for additional information. Also, each of these agencies issues approvals according to independent schedules.

The original intent of NEPA was to coordinate the federal decision-making process, rather than splintering it. However, in its current state, NEPA generates far more documents than it does actual decisions. Instead of spreading out the environmental review process among various agencies, NEPA should consolidate that process among the agency with oversight of that particular project. In the case of a highway project, the U.S. DOT should be the "lead agency" in the environmental review process. Also, NEPA should coordinate the different aspects of the environmental review process so that they can be done concurrently, and data generated can be used for multiple aspects of the environmental review process. ARTBA is pleased that reforms of this nature are currently being considered by the House and the Senate legislation to reauthorize the federal highway and transit programs, H.R. 3, the "Transportation Equity Act—A Legacy for Users."

Even some environmentalists have admitted there are many needless delays in the environmental review process for transportation projects. In April 29, 1999, testimony before the U.S. Senate Environment and Public Works Committee, Roy Kienitz, then executive director of the Surface Transportation Policy Project said:

"There is no good reason for federal approval to take years if there are no major disagreements over the project being proposed. These delays are the most needless of all and are the easiest ones to attack."

### **Delay Kills**

Sadly though, delays in the environmental review and approval process for transportation improvement projects can have tragic consequences. According to the U.S. DOT, almost 42,000 people are killed each year on the nation's highways. One person in the U.S. dies from a traffic crash every 13 minutes and there is one crash-related injury every 10 seconds. Traffic crashes are the leading cause of death in the U.S. for people ages 6 to 33, and their economic cost is estimated to be \$230.6 billion each year in added medical, insurance, and other expenses. That's about 2.3 percent of the U.S. gross domestic product. To put this figure in perspective, the total annual public and private health care expenditures caused by tobacco use have been estimated at \$93 billion annually.

Roadway safety is a huge public health crisis! The sad part is that, according to the U.S. DOT, approximately 15,000 of these deaths annually—are in crashes in

which substandard roadway conditions, obsolete designs or roadside hazards are a factor. These are accidents that we can prevent through improved transportation infrastructure. According to FHWA, for every \$100 million we spend on highway safety improvements, we can save over 145 lives over a 10-year period.

#### **Las Vegas, Nevada: The U.S. 95 Case**

Nevada has experienced the greatest population growth of any state in the United States since 2000. Specifically, the Las Vegas metropolitan area in Clark County, Nevada has experienced substantial population growth since 1970, with over a 300 percent increase in population between 1970 and 1996. This growth, and the economic activity that accompanies it, has led to greater use and resulting traffic congestion on the highways of Nevada, particularly those around Las Vegas. According to the Texas Transportation Institute's 2005 Urban Mobility Report, in the year 2002 alone, traffic congestion cost Las Vegas area residents and businesses \$380 million and resulted in the additional consumption of 14 million gallons of motor fuel.

U.S. 95 is the primary north-south travel corridor in the northwest region of Las Vegas. By 1995, the corridor was operating at near capacity during peak periods and experiencing heavy congestion during certain times of the day due to the aforementioned population growth and the resulting demand for highway travel. According to the FHWA travel demand modeling and anticipated continuation of past growth trends, these conditions are projected to worsen, with U.S. 95 operating at 50 to 75 percent above capacity by 2020.

FHWA data shows that the segment of U.S. 95 at issue in this case services and accesses some of the fastest growing neighborhoods in Las Vegas. An estimated 190,000 vehicles travel through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles. Currently, traffic congestion slows commuters to one-half of the 55 mile per hour speed limit on the corridor. Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95.

As a result of these factors, a Major Investment Study ("MIS") was begun in 1995 to provide a detailed evaluation of alternative strategies to address the deteriorating conditions of the area served by U.S. 95. One of the key improvements recommended by the MIS was to widen key portions of U.S. 95 from six to ten lanes. The NEPA process began shortly after the MIS was completed in 1997. A final Environmental Impact Statement ("FEIS") was issued in 1999 with a Record of Decision ("ROD") issued in 2000. Two years later, the Sierra Club filed suit in federal district court under NEPA claiming that an epidemiologic study not conducted in the Las Vegas area (rather, it was conducted in Las Angeles) was enough to re-open the NEPA process and warrant a supplemental Environmental Impact Statement. At this point construction had already started on significant portions of the U.S. 95 improvement project. Though the Sierra Club's complaint was dismissed at the district level, the United States Court of Appeals for the Ninth Circuit accepted the Sierra Club's appeal of the decision and issued an injunction halting construction while litigation continued. That was in August of 2004, and construction on the project is still halted today.

This delay has had a direct effect on Frehner Construction. Frehner is involved in many aspects of the U.S. 95 improvement project. The delays caused by the Sierra Club have disrupted Frehner's workforce and business plan. By holding up one aspect of the U.S. 95 improvement process, the Sierra Club litigation is delaying many other aspects of U.S. 95 construction. This delay hurts Frehner's ability to keep its workforce steadily busy and as a result, workers are forced to look elsewhere for employment while the U.S. 95 widening is on hold.

The improvements that make up the U.S. 95 widening project are needed in order to keep pace with the rapid population growth currently being experienced in the Las Vegas area and prevent the effects of traffic congestion from worsening. The widening of U.S. 95, once completed, will lead to enormous environmental, public health and safety benefits. Once finished, improvement of U.S. 95 will result in a significant reduction in so-called "greenhouse gasses."

Specifically, according to a study by Cambridge Systematics, Inc., there will be a 58.8 ton reduction in carbon monoxide emissions, a 54.3 ton reduction in volatile organic compounds (VOCs) and an 87.8 ton reduction in carbon dioxide emissions between now and the year 2025. Further, it is estimated that within that time span there will also be an 87.8 percent reduction in motor fuel usage by U.S. 95 commuters, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter over the life of the project). Also, the time Las Vegas commuters spend stuck in traffic will decrease by an average of 86.5 percent, which for commuters who use U.S. 95 twice per day, would mean 30 minutes of time saved per

day while going through the area to be improved. Finally, the U.S. 95 improvements are projected to result in 3,524 fewer total motor vehicle crashes, 14 fewer fatalities, and 1,730 fewer injuries to commuters through 2025. This will undoubtedly lead to reductions in both health care costs and insurance rates for Las Vegas area residents (in addition to the emotional benefits of not having to deal with a friend or relative that has been in an automobile accident).

The EPA reported in September 2004 "between 1970 and 2003, that gross domestic product increased 176 percent, vehicle miles traveled increased 155 percent, energy consumption increased 45 percent, and U.S. population grew by 39 percent. During the same time period, total emissions of the six principal air pollutants (nitrogen dioxide, ozone, sulfur dioxide, particulate matter, carbon monoxide and lead) dropped by 51 percent." The finding by the EPA that these pollutant levels have decreased despite increased travel and an increased population demonstrates that there is no connection between any increased travel which would occur on U.S. 95 as a result of the widening project and a subsequent increase in pollutant levels, despite Sierra Club arguments to the contrary.

There are two primary reasons for these decreased pollutant levels. First, motor vehicle emission levels change with vehicle speed. Once vehicles reach a speed greater than 15 miles per hour, DOT data shows that both volatile organic compound ("VOC") and carbon monoxide emissions decline dramatically. The congestion currently experienced on U.S. 95 causes vehicles to either remain at lower speeds or have to stop and start repeatedly during a commute. The United States Department of Transportation has acknowledged this, stating "[e]mission rates are higher during stop-and-go, congested traffic conditions than free flow conditions operating at the same speed." By widening U.S. 95, commuters will be able to travel at a level where emissions of key pollutants will be greatly reduced. Second, pollutant levels continue to decline as cleaner and more fuel efficient vehicles make up a greater percent of the nation's motor vehicle fleet. According to the U.S. DOT, today's average motor vehicle produces 80 to 90 percent less pollution than it did in 1967. As technology develops even further, vehicle emissions will continue to go down as automobile usage increases.

A recent study by the Texas Transportation Institute at Texas A&M University concluded "congestion has grown everywhere in areas of all sizes. Congestion occurs during longer portions of the day and delays more travelers and goods than ever before." Recent estimates show that congestion on the nation's highways causes 3.5 billion hours of delay, 5.7 billion gallons of wasted fuel, and results in an overall cost to the U.S. economy of \$63.2 billion. Since 1982 the amount of free flowing traffic within the United States has decreased by over 50 percent. These delays caused by traffic congestion affect not only commuters, but also first responders such as police, firefighters, ambulances, and other services vital to Las Vegas and all communities in the United States. Further, with the increased potential for terrorism directed at the populations of large cities throughout the United States, including Las Vegas, it is more important than ever before to mitigate traffic congestion and keep traffic flowing in case there is a need for an evacuation or emergency response. Taking this level of congestion and gridlock into account, it is important that new highway projects and capacity improvements are allowed to proceed without unnecessary delay.

It should also be noted that the costs of delay associated with this and other NEPA related litigation are borne primarily by United States taxpayers. In the U.S. 95 case, the projects being delayed by the Sierra Club's lawsuit comprise roughly \$85 million worth of work at the time the injunction to halt construction was granted (in August of 2004). The longer these projects are delayed, the more expensive the materials needed to complete those projects become. According to the FHWA, construction materials represented approximately 45 percent of total costs for federal-aid highway construction contracts over \$1 million on the national highway system in 2003. In the case of the U.S. 95 project, this means an estimated \$38.25 million worth of construction materials were involved when construction was halted. Since then, the Producer Price Index (published by the Bureau of Labor Statistics) for highway and street construction has risen 8 percent. Thus, equipment costs associated with the U.S. 95 project have risen approximately \$3,060,000 during the time of the injunction. That means taxpayers must pay more than \$3 million additional dollars as a result of the delays caused by this NEPA related litigation.

#### **What does the U.S. 95 Case Illustrate about the NEPA Process?**

The U.S. 95 situation, unfortunately, is only one of the latest examples in what has become a myriad of NEPA related litigation. There are currently in excess of 1,500 cases which "define" NEPA. The statute has been transformed from a vehicle which once helped to mitigate the environmental impacts of development to a tool

which enables special interest anti-growth groups to delay needed and environmentally beneficial transportation infrastructure through the use of unending litigation.

In the U.S. 95 situation, the project in question had already gone through extensive environmental review and complied with NEPA's requirements. However, a single epidemiologic study discovered by U.S. 95 project opponents nearly two years after the fact was enough to completely halt construction while litigation was underway. This is unacceptable for a number of reasons. First and foremost, the government had, as part of the NEPA process, reviewed thousands of studies and other voluminous evidence of the environmental effects of the U.S. 95 project. Second, the NEPA process has to have an end point. Transportation planners, project officials, and state and local government need some point of finality in the NEPA process in order to provide enough certainty to allow the project to be planned effectively. The NEPA process, as illustrated in the U.S. 95 case, is far too easy to "re-open" and cause unnecessary delay to transportation projects. After a project has completed its NEPA requirements, the process should not be re-opened except in extreme circumstances which truly warrant such action.

This brings me to another flaw in the NEPA process. It does not consider the environmental benefits of fully completed projects. NEPA should not only be limited to the consideration of environmental impacts, but expanded to include environmental benefits. As I previously mentioned, the U.S. 95 project, once completed will yield significant reductions in mobile source emissions as well as reductions in traffic congestion and fuel use. This needs to be given proper weight and consideration by the NEPA process.

Also, the NEPA process needs to consider the environmental impact of not undertaking federal highway transportation projects. In the U.S. 95 case, part of the NEPA consideration should be the environmental consequences of continued congestion along the U.S. 95 Las Vegas corridor. As previously stated, vehicles stuck in congestion yield significantly greater emissions than vehicles in free-flowing traffic.

The litigation of the U.S. 95 project demonstrates that when court battles do arise over NEPA, many important issues often go unaddressed. When the federal government responds to NEPA claims, it is constrained to only addressing the statutory legal points raised by whichever group is challenging a projects. Greater issues such as the project's environmental benefits or the potential effects of project delay on other highway projects and the nation's infrastructure as a whole are not considered, and they need to be. Had ARTBA not submitted a "friend of the court" brief in the U.S. 95 case, the projects environmental and public health benefits would have gone completely unaddressed in appellate litigation. Also, ARTBA was the only party to raise the question of what effect delaying the U.S. 95 project would have on the nation's highway system as a whole. Both of these issues can and should have been considered by the main parties in the U.S. 95 litigation, rather than having ARTBA raise them as a non-party.

NEPA should not operate in a vacuum in this way. When the environmental impacts of a project are considered, its benefits must be considered as well. Also, the term "environment" cannot be narrowly defined as the impact on the air quality of a region without also considering appropriate public health concerns. These concerns, which all factor into the state of an area's environment must include factors such as traffic congestion. Also, related public health issues such as the stress caused by lengthy commutes and traffic impact on first-responders should be considered in any analysis.

#### **ARTBA's Recommendations for Changing the NEPA Process**

As you can see, Madame Chairwoman, the NEPA process is in need of fine-tuning. For nearly a decade, reform to the environmental review process has been a top ARTBA priority. Indeed, ARTBA is extremely appreciative of the formation of this task force and its goal of taking a hard look at NEPA and its effects on local environments and economies.

The goal of these efforts is not—as some have suggested—to undermine the environmental review process. Rather, it is to coordinate the process in order to more effectively deal with the transportation needs and congestion issues facing the nation. If handled appropriately, improving the delivery of transportation projects would increase the efficiency of the transportation network, and ensure the traveling public receives the full benefit of the user fee-financed transportation system. We are not seeking changes that are outcome determinative; we are seeking process improvements that would generate the same answer in a more timely manner.

Particular changes to the NEPA process ARTBA recommends are:

- A set time limit on project related NEPA lawsuits. The House version of the highway and transportation systems reauthorization bill, H.R. 3, includes a

provision that would set a ninety day limit for NEPA lawsuits concerning transportation projects.

- NEPA litigation should be limited to only those issues that have been fully raised and discussed during the public comment period for a project. This will help insure that litigation over projects is a last resort, rather than a first stop for opponents of a project.
- Consideration of the environmental benefits of proposed projects as opposed to just their impacts. Also, the environmental consequences of not undertaking a project should also be considered.
- Provision of a degree of proportionality and common sense to Section 4(f) historical preservation decisions by establishment of a proportionality test for evaluating the prudence of following avoidance or minimization alternatives. Under this proportionality test, the threshold for rejecting an alternative as imprudent would depend on three factors: (1) the true relative historic and/or cultural value of the resource being avoided; (2) the nature and extent of the impact on that resource; and (3) the likelihood that the resource itself will remain intact over the long term.
- In compliance with President Bush's Executive order on Environmental Streamlining, the NEPA review process must be shortened and coordinated among the various federal agencies that take part in it. With regard to federal transportation construction projects, the Department of Transportation should be given lead agency status in order to facilitate this process.
- Where possible, duplicative review and analysis should be eliminated. Studies done as part of the transportation planning process should be acceptable in the NEPA review process and vice-versa.

Many of these proposals are represented to some degree in the Administration's "Safe, Accountable, Flexible and Efficient Transportation Equity Act" (SAFE-TEA) reauthorization bill and in the House and Senate versions of H.R. 3. It is important that these ideas are talked about not only in this conversation regarding NEPA, but also throughout the transportation reauthorization process and are part of any final reauthorization bill.

Once again, Madame Chairwoman, ARTBA thanks you not only for the opportunity to participate in this hearing, but also for the establishment of this task force. I would be happy to answer any questions you or the other members may have.

---

**Response to questions submitted for the record by A. Kathleen Craft,  
Executive Assistant, Frehner Construction Company, Inc.**

1. *One of the goals of this Task Force is to examine the effect of the National Environmental Policy Act (NEPA) on communities and local businesses such as yours. We do this so that we can know what improvements can be made to the law in order to minimize NEPA's effects on local economies. In your testimony you mentioned that your business (Frehner) has been affected by a NEPA lawsuit regarding U.S. 95 in Las Vegas. Can you please provide the Task Force with more details about what specific effects this NEPA litigation had on your business.*

In the case of the U.S. 95 project, the NEPA litigation halted construction four years after the issuance of the Final Environmental Impact Statement. This sudden disruption affected Frehner's ability to develop a feasible work plan for construction on the project and also prevented Frehner from providing its employees with a reliable prediction about future employment. Without the certainty that a project will proceed after the NEPA process is concluded, Frehner cannot know what amount of resources will be necessary for project construction. Also, the value of the construction that was delayed by litigation was \$85 million. During the time of the delay, the cost of materials associated with the construction rose, and as a result, the overall cost of the project increased by at least \$3 million.

It should be noted that a settlement has been reached in the U.S. 95 litigation and, pending approval by the court, construction on the U.S. 95 project should resume by November of this year. This does not, however, mitigate the effects of the delay caused by this litigation, nor does it ease the concerns of Frehner and the American Road and Transportation Builders Association (ARTBA) regarding the NEPA process.



2. *The Task Force is also interested in NEPA's effect on the community and transportation planning. As a member of the Las Vegas community, can you give the Task Force an idea of how long discussions on improving U.S. 95 have been ongoing and what the sentiment of the community is regarding the need for the widening of U.S. 95 from six to ten lanes. Also, please describe what effect the litigation and the halting of construction on the U.S. 95 project had on Las Vegas residents. Can you give some examples of "extreme circumstances" that might necessitate reopening an EIS? What shouldn't qualify as something that should reopen an EIS?*

Residents of Las Vegas are struggling to keep up with a city that has experienced some of the fastest recent population growth anywhere in the United States. Between 1970 and 1996, the Las Vegas population has grown by over 300 percent. Discussions concerning improving U.S. 95 began in 1995 with a two-year "Major Investment Study" (MIS). The NEPA process began after the completion of the MIS, and throughout the process there was significant public support for widening U.S. 95.

The section of U.S. 95 to be widened is in one of the most congested areas of Las Vegas, if not the entire country. If nothing is done, U.S. 95 will be operating at 50 to 75 percent above capacity by 2020. An estimated 190,000 vehicles travel through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles. Currently, traffic congestion slows commuters to one-half of the 55 mile per hour speed limit on the corridor. Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95. As mentioned in my written testimony, according to the Texas Transportation Institute's 2005 Urban Mobility Report, in the year 2002 alone, traffic congestion cost Las Vegas area residents and businesses \$380 million and resulted in the additional consumption of 14 million gallons of motor fuel. The U.S. 95 litigation only served to prolong these problems for Las Vegas residents.

An Environmental Impact Statement (EIS) is the most intensive and time consuming part of the NEPA process. Currently, the EIS portion of the NEPA process can take anywhere from four to six years to complete. During this time, voluminous amounts of environmental information are considered. Indeed, as the Department of Justice attorney representing the FHWA noted in her oral argument, thousands of studies on all sides of the air quality issue were considered during the EIS for the U.S. 95 project. With this in mind, once a final EIS is issued, the process should not be reopened lightly. While it is impossible to predict a specific instance where this would be warranted, any request to reopen an EIS should be viewed with the strictest scrutiny.

The air quality study used by the Sierra Club to obtain the injunction which halted construction on U.S. 95 represents exactly the type of document which should not be used as a reason for re-opening an EIS. It was an air quality modeling study which was performed in Los Angeles, California as opposed to Las Vegas. On its face, it is not directly relevant to the project in question. Also, many similar studies were considered during the EIS. An EIS cannot be reopened every time a new study comes out. If the issue has already been thoroughly analyzed as part of the EIS process, the process should not be reopened unless the information is directly relevant and ignoring it would pose dire, immediate consequences for the area surrounding the project. Again, this would be only in the most serious, extreme circumstances.

3. *I agree that it seems like much of the NEPA analysis focuses on the negative. What do you mean by "proper" weight for the environmental benefits?*

The NEPA process only considers environmental impacts. It does not consider the environmental benefits of a project. In the case of the U.S. 95 project, as documented in my written testimony, the following benefits will be realized upon the project's completion through the year 2025:

- a 58.8 ton reduction in carbon monoxide emission;
- a 54.3 ton reduction in volatile organic compounds (VOCs);
- an 87.8 ton reduction in carbon dioxide emissions;
- an 87.8 percent reduction in motor fuel usage by U.S. 95 commuters, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter over the life of the project);
- the time Las Vegas commuters spend stuck in traffic will decrease by an average of 86.5 percent, which for commuters who use U.S. 95 twice per day, would mean 30 minutes of time saved per day while going through the area to be improved;
- 3,524 fewer total motor vehicle crashes;
- 1,730 fewer injuries to commuters; and most importantly;
- 14 fewer fatalities.

These benefits should be given equal consideration when the environmental impacts of the project are discussed during the EIS process. Also, the environmental impact of not going forward with the project should be weighed as part of the process. With U.S. 95, this would mean continuing the present state of congestion, and the environmental harms, discussed in response to question two, that result from it.

4. *In your recommendation about limiting the issues that can be raised in litigation, it seems as though if it were limited to only those issues that were fully raised and discussed, there might not be much to fight over. Is that true?*

Yes, ideally, upon the completion of an EIS there should be nothing to fight over. The NEPA process should be undertaken in a manner which minimizes the possibility for litigation. If an issue is serious enough to warrant litigation, it deserves to be discussed in the public participation portion of an EIS first. The goal of NEPA is to address legitimate environmental concerns within the federal decision making process. The problem that has arisen with the NEPA process is that it has been too often manipulated by project opponents to become a tool of obstruction, rather than the intended coordinating structure for necessary environmental reviews. By requiring issues to be raised during the public participation part of the NEPA process, the chance for them to be resolved within the process increases greatly.

---

Mr. RENZI. Ms. Poppie.

**STATEMENT OF MARINEL POPPIE, NEW MEXICO CATTLE  
GROWERS' ASSOCIATION, GLENWOOD, NEW MEXICO**

Ms. POPPIE. Members of the Task Force, on behalf of the New Mexico Cattle Growers and everyone affected by NEPA, thank you for holding this meeting in the Southwest, and I thank you for the opportunity to testify before you.

My name is Marinel Poppie. I am a third generation rancher and I have practiced large animal veterinary medicine for 36 years.

I have ranched in Montana and in Southern Arizona for 10 years. I currently live near Glenwood, New Mexico, a cattle ranch I purchased in 2001. I have been told by NEPA that my allotment has no endangered species. I was largely unfamiliar with NEPA, as our Montana ranches were deeded ranches, and it was our family's policy to never post a "no trespassing" sign, as we felt blessed to live on a ranch and to share nature's gifts with the public. I am an environmentalist, as are all ranchers. The environment is our survival.

I have learned many costly and painful lessons about NEPA which I present to you. Number one, in September 2001, I left my veterinary practice, and with all available resources to me, I purchased Roberts Park Allotment in Catron County, New Mexico.

Number two, I purchased this allotment in good faith that it would run a number of cattle on the face of the permit, 396 cows and 8 horses, which I will call a 400-animal unit permit. This permit was issued to me and signed by the Glenwood District Ranger. The permit was to be effective for ten years.

Due to the 2002 drought, I took a temporary and voluntary reduction in my allotted number of cattle to allow recovery of the range. I would like to bring to your attention that during this drought, my ranch had adequate water in the high country, but a shortage of feed. The United States Forest Service would not allow me to take feed or even protein blocks to these starving animals and, thus, many of them died.

The range made a great recovery on my ranch in 2003.

Both the annual and perennial grasses recovered. The Forest Service stated that my ranch was 100-percent watered and that this is the key to prevent over-grazing. On June 5th, 2003, the Forest Service stated that I was their best permittee due to the improvements that I had made to the range and for my cooperating and working with them. They stated that if more permittees were like me, they would have many, many less lawsuits, and then they handed me a proposed action to cut my permitted number of cattle in half from 400 to 200. They gave me no reason for this cut, and when asked—when I asked them to supply me data to back the cut to my permit, they had none.

Their action cut my financial status in half. I asked them how they would react if I tore their paychecks in half. This action has caused a severe economic loss for me, as the value of an allotment is based on a number of permitted cattle. I feel that I was blindsided and stabbed in the back by my Federal Government. I was not and I should have been involved in the development of this proposed action. When issuing a proposed action, it is to be put in writing with concrete facts to back the action.

They sent me a summary in August of 2004, which invites a lawsuit. It is incorrect and biased. I was not invited to participate in the executive summary. Alternatives one and two, which basically say no cattle, had no data to back them. Alternative three permits me 217 animals versus the 400. Alternative four maintained my permitted number and has good data to back it. This data was not available to the public. The public has been misinformed.

I hired Southwest Resource Consultants to conduct forage production studies in 2003 and 2004. The 2003 study concluded that my allotment had adequate forage to support more than 450 head of cattle. This data was substantiated by the Forest Service.

The 2004 production said I had a 24-percent increase in forage production from 2003. This 24-percent increase, as applied to the number of cattle, could support as high as 558 animal units. This data was collected with the aid of the Glenwood Forest Service.

In 2003, I invested \$25,000 of my money toward improvement of my allotment. Sound data collected by professional resource consultants indicated that my allotment could easily support the number of cattle originally permitted and more.

I am fully aware that the range is constantly changing and its condition depends on good management and rainfall. I, therefore, feel that any increase or decrease in cattle numbers be determined by careful monitoring, by cooperative effort between the Forest Service and the permittee. Changes should then be made by the annual operating plan.

In conclusion, numerous areas of NEPA need to be changed. As a livestock producer, I would request that, one, involvement of the allotment owners in the beginning of the process. Two, using the NEPA process as Congress intended, not as a vehicle to justify decisions that have already been made.

As each day is unique in its environmental properties, I would like to see the State monitor and regulate the management of our allotments in a joint effort with the permittee. Our State land grantologists and highly trained graze specialists have a knowledge of range management and a knowledge of the special needs of the

Southwest area. If NEPA is to improve, they should do so by making their decisions on sound professional advice.

However, I believe grazing should be—fall under a categorical exclusion from NEPA. The Glenwood Ranger District is now staffed by personnel that are more knowledgeable and honest than the previous District personnel. This has made for better data and better cooperation. This improvement, however, could change at any time, as a District Ranger has too much power. This reinforces my feeling that the U.S. Government has too much power in the important decisions involving the State.

Thank you again for your time. I hope that together we can create a law that achieves the goal of environmental stability without harming people like me and my family. Thank you.

Mr. RENZI. Thank you for your testimony. I appreciate it.  
[The prepared statement of Ms. Poppie follows:]

**Statement of Marinel Poppie, D.V.M., Glenwood, New Mexico**

Madam Chairwoman and members of the Task Force and Committee, on behalf of the New Mexico Cattle Growers' Association (NMCGA) and everyone affected by the National Environmental Policy Act (NEPA), thank you for holding a field hearing in the Southwest on this issue so vital to our livelihoods and futures, and for the opportunity to testify before you.

My name is Marinel Poppie. I am a third generation rancher and a single grandmother. I bought a New Mexico ranch containing a U.S. Forest Service (USFS) allotment in late 2001, investing everything my family and I ever had to make the purchase. Prior to that I ranched in southern Arizona for 10 years and practiced as a large animal veterinarian for 36 years. During that time I was also an associate researcher with Washington State University on genetic diseases. I wrote and spoke extensively in the United States and Canada as part of that work.

I was largely unfamiliar with NEPA until I came to New Mexico nearly four (4) years ago and created my Rocking Arrow Cattle Company that includes the Roberts Park Allotment within the Glenwood Ranger District of the Gila National Forest. Over the past four years I have learned many costly and painful lessons. I want to point out at the onset that there are many wonderful and dedicated people who work for the USFS and the federal government. However, they are hamstrung by processes such as NEPA, dictated by federal law, and made worse by individual agency regulations.

As I understand it, as a federal law NEPA was intended to provide a forum for public participation in federal decisions affecting the natural environment, taking into account impacts on the HUMAN environment. Section 1508.14 of the Council on Environmental Quality (CEQ) Regulations states, "Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment."

It is also my understanding of NEPA that the process is to be used to involve the public and gather the data to reach a sound decision for sustainable resource management. That has not necessarily been my experience. Instead, we find that agencies are reaching a decision and then using the NEPA process to justify it.

I am confused by the application of some of the definitions. NEPA is required on "major federal actions." Although the CEQ regs apply and Congress or the courts have apparently mandated it, I fail to see how the renewal of a livestock grazing permit where grazing has taken place for literally hundreds of years, predating federal land management agencies, is a "major federal action." We are simply doing business as usual out here on the ground. The abundance of wildlife should be able to tell us and the government that we are doing something right.

Both the USFS and the Bureau of Land Management (BLM) have huge backlogs of NEPA compliance on grazing allotments, only to be faced with doing it all over again for the next 10-year cycle before they have finished with the last. It has taken several acts of Congress to keep thousands of livestock producers working on ranches that have been family operations for generations. I hope that one of the things your Task Force can do is determine how much NEPA is costing federal agencies, not just in terms of the actual cost of each project, but what other work is being left undone while this paper is being shuffled around.

Among the other issues that have negatively impacted me personally is the use of the “no action alternative” in NEPA on grazing allotments. It only takes common sense to understand that “no action” means nothing changes, right? Although the BLM has figured this out, that’s not the view of the USFS. As applied to my allotment and all others in the USFS system, “no action” means that grazing will be removed. By characterizing the alternative in that manner, the agency is just providing a forum for those who would drive livestock producers from the land.

Unfortunately, I don’t think my NEPA horror story is that different from most of my neighbors or other allotment owners throughout Region 3. On October 27, 2001, I was issued a term grazing permit for 396 cows and eight horses. The permit was to be effective until February 28, 2011 per the terms and conditions of the permit. Little did I know at the time the region was entering into a severe drought. In 2002, due to that drought, I took a temporary and voluntary reduction in my number to approximately 300 cows and eight horses. I have obtained the bills for the actual number of cattle run on the Roberts Park Allotment for the 16 years previous to my purchase. That averaged 379 head per year. (See attachment A)

One of the statements made by the range staff officer over my allotment was that adequate livestock water is the key to prevention of overgrazing. He further stated my allotment was 100 percent watered.

In June of 2003, I learned that the USFS had begun NEPA analysis on my allotment and had provided scoping documentation to the public without ever involving me in any of the process. The USFS was proposing to cut my allotment by 50 percent. Can you imagine what cutting your pay check by 50 percent would do to you and your family?

When I was informed of the proposed action, I received no justification for such drastic action. When I requested that justification, all I was provided was a few old data sheets with no dates or signatures. There was no recent monitoring data or even historic trend data available on which to base a decision.

For the past two years, I have hired my own range management consultant to provide scientific data on the condition of my allotment. His data indicates that there is ample forage not only for my permitted numbers, but additional livestock (attachment B).

My allotment has 43 stock tanks that were not disclosed to the public, as well as three drinkers and two water storage tanks. I have been diligent in continuing to improve watering facilities on the allotment. I have repaired two major watering systems that have opened vast areas of rangeland that had not been grazed for years. I have and will continue to improve the allotment and have worked toward a good working relationship with the USFS. In 2003 I was asked to list improvements I planned for the future. It was a three-page typed list, yet even after I completed some of the projects on the list, I was told that no matter how much I improved the rangeland, my allotment would be cut by 50 percent or more. It certainly appeared to be a predetermined decision and not something that could or would change through any public process.

Equally as egregious is the fact the USFS planted the seed with the public that my allotment should be cut and provided them incorrect information about the allotment, so that there would be public support for their proposed cut.

During the balance of 2003 and into 2004, there were some staff changes at the ground level in my district. The working relationship with the USFS improved and there was support to provide some management flexibility for my operation based on actual range condition.

Then the next bomb hit. On August 19, 2004, the USFS issued an “executive summary” of the NEPA required environmental assessment (EA) of my Roberts Park Allotment. Generally, EAs are 10 to 15 page documents, while environmental impact statements (EISs) are more full blown in-depth analysis that can run in the hundreds of pages.

Imagine my surprise when I received a 35-page document (attachment C) with the USFS’s “proposed” alternative to cut my permit to 240 head of livestock, with 40 head of those suspended for five (5) years. Although I had worked to craft an alternative of my own that would allow me to stay in business, it was completely ignored at the supervisor’s office level. Additionally, the document was biased to the “preferred alternative” and grazing is maligned throughout.

Adding insult to injury is the fact that the document did not even provide a firm comment deadline. Many of these documents now days only tell those who wish to participate in the process that they have 30 days from the date the notice of the document appears in the local paper closest to the allotment or forest supervisor’s office. And, when you call the office, they won’t tell when it appeared in the paper. This makes participation by groups like the New Mexico Cattle Growers’ Association

and others difficult because they don't get the local paper for every forest allotment in the state.

Another weakness in my NEPA document is the economic and social analysis. About three pages of the "executive summary" are devoted to those subjects, yet there is not one dollar amount included. How can you discuss economic impact without talking about numbers of dollars? The document admits that my income would be reduced, but points out that the USFS would not be asking me to spend any money.

Additionally, the USFS totally ignored the cumulative impacts of the cuts they are planning for me along with the cuts of other allotments within Catron County.

Fortunately, there is research available to demonstrate the impacts of the arbitrary and capricious decisions of the USFS. According to the Range Improvement Task Force at New Mexico State University (attachment E) well over 200,000 animal unit months (AUMs) have been lost in Catron County alone. That amounts to millions of dollars of lost revenue to the county.

Since that document came out in August 2004, I have participated in numerous meetings and various groups, economists and scientists have weighed into the issue on my behalf. There has been no formal decision made by the USFS. My allotment is still listed on the schedule of proposed actions that appears on the Gila National Forest web page with a decision expected this month and implementation expected in September 2005.

I could go on for hours about similar experiences of my friends and neighbors, many of whom are in the audience today. The one issue that I would like to briefly address is the U.S. Fish and Wildlife Services' (FWS) use of NEPA in the Mexican Wolf reintroduction program that is destroying ranchers just north of me as we speak. In 2000 when the FWS wanted to release wolves into New Mexico they engaged in the NEPA process on the action. The comment period closed one afternoon and the wolves were released literally the next day.

Our county governments and trade organizations have attempted to work with the federal agencies on NEPA. USFS Region 3 issued new policy direction in February 2004. My "executive summary" may be a good indication of how well that worked.

In conclusion, I think there are numerous areas of NEPA that need work, but from a livestock producers perspective I would like to see:

- Involvement of the allotment owners or people on the ground at the beginning of the process. These are the people that are on the ground every day. They know what is going on and are the most likely to have pertinent data.
  - Using the NEPA process as Congress intended, not as a vehicle to justify decisions that have already been made
  - Ongoing activities, like livestock grazing, that have been going on for hundreds of years should fall under a categorical exclusion. If uses, such as grazing, are to be analyzed that should be on the overarching use of the land, not micro managing items like seasons of use, grazing methods, and animal numbers.
- There is extensive NEPA analysis at the forest management level, which includes grazing. Why is there additional NEPA necessary?

Thank you once again for your time and interest. I hope that together we can create a law that achieves the noble goal of environmental sustainability without harming people like me and my family.

**Attachments:**

- A. History of Roberts Park Allotment Grazing Billings
- B. 2003/2004 Roberts Park Allotment Monitoring Data Comparison
- C. August 2004 Roberts Park Allotment Executive Summary
- D. 2003 Roberts Park Allotment Improvements
- E. Catron County Economic Data

**NOTE: Attachments to Dr. Poppie's statement have been retained in the Committee's official files.**

---

[A letter submitted for the record by Mr. Poppie follows:]

**ROCKING ARROW CATTLE COMPANY**

**MARINEL J. POPPIE, D.V.M.**

P.O. Box 188

Glenwood, NM 88039

Telephone: (505) 539-2204



NEPA Task Force  
C/O Joanna MacKay  
1320 Longworth House Office Building  
Washington, D.C. 20515

Dear Committee on Resources, NEPA Task Force:

Below are my replies to your four questions concerning the roll of NEPA in the Southwestern states:

Question # 1: In my allotment the work I did to improve the range conditions prior to the ES of August 2004 may be under consideration by the current Glenwood District Ranger Station and the Supervisors Office. My allotment is still under NEPA study and I have been advised that it will not be completed until October 2005. The prior Forest Service administration that issued a proposed action on June 5, 2003 to cut my allotment in half told me that no matter how much I improved the range land they would not increase my permitted numbers. Ed Holloway stated that my allotment would be cut by 50% and if I didn't like it, he and the District Ranger would cut my permit to zero permitted livestock or the "no action" alternative.

It seems that the Forest Service did completely discount my choice of alternatives. This agency action greatly affects public participation when they respond to the "scooping letter". There should be no preferred alternative. It is a biased opinion by the Forest Service in that district. The public should be given all alternatives with data in order that they be able to make a sound judgement based on facts. Only, then should a preferred alternative be considered.

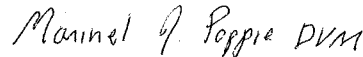
Question # 2: The cattle losses from the Mexican Wolf appear to be increasing as the wolf population increases. Several ranches just north of me are reporting cattle losses to the wolves. NEPA could be improved by bringing the U.S. Fish and Wildlife to the table only if the U.S. Fish and Wildlife would collect their own data in the district on a personal ground level. At present the Fish and Wildlife seem to concur with the Forest Service without doing their independent studies. Our organization S.O.R.E. (Save Our Rural Environment) held a public meeting with the Forest Service and the Fish and Wildlife to try to resolve this problem. Fish and Wildlife said they would make an effort to do their own independent studies.

Question # 3: There is duplication in having NEPA done at the forest level and again for each allotment. The same group of anti-grazing public are sent letters at both the Supervisors level concerning Forest issues and again with the scoping letter concerning each grazing allotment.

Question # 4: The "no action" alternative "for grazing allotments was probably designed to remove grazing allotments that were abusive to the range land. This alternative, however, has become a double edged sword. The Forest Service can use this "no action" alternative to eliminate an allotment owner from grazing any cattle on the allotment depending on the personal at the district Forest Service level. As stated earlier, I was subjected to this when Ed Holloway told me he could cut my allotment to zero livestock if I didn't like the 50 % cut they issued in their proposed action June 5, 2003.

It is hopeful that these answers will be helpful to you. I appreciate being able to be involved with the NEPA Task Force. I greatly appreciate your concern and help.

Yours very truly,



Marinel J. Poppie DVM  
July 7, 2005

Mr. RENZI. I move to Ms. Struhsacker with the Women's Mining Coalition.

**STATEMENT OF DEBRA STRUHSACKER,  
WOMEN'S MINING COALITION, RENO, NEVADA**

Ms. STRUHSACKER. Congressman Renzi and other Members of the Task Force, I am Debra Struhsacker and I am here testifying today on behalf of the Women's Mining Coalition. We are a grass-roots Coalition supporting environmentally responsible mining. I, along with two other female geologists, started this Coalition in 1993 for the purpose of giving Members of Congress information about the industry that we work in.

Today our members live coast to coast in numerous mining states. We represent all sectors of the mining industry; hard-rock mining, coal, uranium, industrial minerals, and stone and gravel. We are thrilled to have this opportunity and want to express our appreciation to Chairman Pombo for developing this Task Force to look at NEPA. We think it is a good time to take a look at this law that was passed in 1969, because a lot has happened since enactment of NEPA, and I have put together a chart that I would like to draw your attention to. There is a copy of it in my testimony, as well, and I apologize to members of the audience. I know you can't see this, so I'm going to describe it a little bit.



This chart describes a chronology of enactment of laws in this country, and you will see that the National Environmental Policy Act, which was enacted in 1969, was one of the first environmental laws to be passed by the Congress. Congressman Renzi, you said the law was visionary. Indeed, it was. It was landmark legislation, but I think it is important to realize it was enacted in a vacuum because there were hardly any other laws in this country at that time to protect the environment.

As this chart illustrates, many laws to protect our environment have been passed subsequent to NEPA in 1969.

Just a couple examples, in 1970, the Clean Water Act, and in 1978, The Resource Conservation and Recovery Act. The list goes on. 1980, Superfund law.

The point here is that a lot has changed with our laws to protect the environment in this country since NEPA was enacted in 1969, and that in and of itself is a very appropriate reason for this Task Force to take a look at NEPA and how it relates to this other body of law that was passed subsequent to NEPA.

Now, as you examine that question, we would like to emphasize that in order to have a dialog about NEPA, everybody has to understand what the difference between NEPA and all the rest of these environmental laws is, because there is a real difference. NEPA stands for the National Environmental Policy Act, not the Environmental Protection Act. It creates a procedure. It requires Federal agencies to look at the environmental impacts of their decisions, to take public comments, and to disclose what those impacts are.

There are no environmental protection standards per se in NEPA. All of those standards to protect our environment come from the rest of the laws that were passed since NEPA. The Women's Mining Coalition is convinced if we could all take a good look at how NEPA interacts with those laws that have very substantive, on-the-ground environmental protection mandates and standards and permitting processes, we could find a way to make NEPA work better, to make the process work more smoothly, and to integrate it into this overall environmental permitting process that we now have in this country and which is doing an excellent job of protecting the environment. So that's one of our first recommendations.

Our second observation is that we are concerned, like others in the panel, that the NEPA process has been hijacked. Instead of the meaningful opportunity for collaboration and communication that Congress envisioned in 1969 when it passed NEPA, today the NEPA process is one of conflict and confrontation, and the reason for that, we believe, rests with the appeal process that is built into the NEPA process. Virtually anyone for the price of a 37-cent stamp can appeal a NEPA decision.

I think we heard a real horror story from Ms. Craft about just how that can work. We would like the Task Force to examine ways to give local stakeholders a stronger voice and more importance in the NEPA scoping and comment process. The reason for that is that we think local people know best what is good for their community, what is good for their environment, and that outside interests should have less of a say to what happens, and with that, we feel

that those who seek to overturn a NEPA decision, should be required to post a bond, that in the event their appeal fails, they are held responsible for the costs that is due, not only to the private sector, but to the public sector, as well, because Federal agencies spend an enormous amount of time and energy defending their NEPA decisions.

I see that my time is running out, and my testimony has a number of suggestions. I would like to make a couple very quick additional remarks. I think that one of the reasons that NEPA has become so controversial, is that people misuse it, or perhaps misunderstand it. They try to use it as a surrogate land management law. It is not. I think it is very important, as we have this dialog about NEPA, to understand who had what role, and the Constitution gives the Congress the role to say what happens on Federal land. In 1976, Congress enacted the Federal Land Policy and Management Act that gave Federal land managers a lot of the authority to say how enactments are to be done in order to protect the environment.

In the case of mining, FLPMA says that mining on Federal land must prevent unnecessary or undue degradation, and the Federal land agencies have regulations to implement that unnecessary or undue degradation standard.

Now, people who seek to stop mining projects through the NEPA process, often are seeking a decision from land managers the land managers don't have the authority to do, because it's your job to say where mining can occur. It is the Federal land managers' job to say how that mining must be done in order to protect the environment.

So we suggest that this Task Force examine ways to give Federal land managers more authority to discount comments in the NEPA process that seek an outcome that is really infringing upon your authority to say where these activities can occur. And in conclusion, again, I want to thank the Task Force for this opportunity to testify on behalf of the Women's Mining Coalition and ask us all maybe to step out of the box for a minute and to think about what could have happened if the millions and millions of dollars that have been spent in the NEPA process since 1969, if just a fraction of those resources could have been actually redirected to on-the-ground environmental benefits, and we would like to ask the Task Force to think about how NEPA might be changed so that more of this country's resources can be diverted from this paper exercise, and put to meaningful, tangible environmental projects on the ground. Thank you very much.

Mr. RENZI. Thank you very much for your substantive analysis.  
[The prepared statement of Ms. Struhsacker follows:]

**Statement of Debra W. Struhsacker, Co-Founder,  
Women's Mining Coalition**

**INTRODUCTION**

My name is Debra Struhsacker. I very much appreciate the opportunity to present written and oral testimony to the House Resources Committee, NEPA Task Force today on behalf of the Women's Mining Coalition (WMC), a grassroots group supporting environmentally responsible mining. I, along with two other Reno-based female geologists, founded WMC in 1993 to provide factual information about the mining industry to Members of Congress. I currently serve on WMC's Board of

Directors. WMC is comprised of women working in many facets of mining including geology and exploration, engineering, management, government affairs, environmental permitting, mining and heavy equipment operation, equipment manufacturing, and sales of goods and services to the mining industry. We have members located from coast to coast in many different states. I, along with many WMC members, have extensive working experience with NEPA.

My testimony describes some of the problems the NEPA process creates for the mining industry and presents some suggestions for improving NEPA to solve these problems. WMC is convinced that the NEPA process can be modified and streamlined in ways that will improve the timeliness, quality, and relevance of NEPA decisions for mining projects. These improvements will benefit all stakeholders and result in mineral projects that are the best they can be for the environment and local communities.

### EXECUTIVE SUMMARY

1. As one of the first environmental laws in this country, NEPA was landmark legislation, signaling the dawning of environmental awareness and the first step down the path of enacting what has become a comprehensive and effective statutory framework to protect the environment. NEPA is a procedural law that creates a process to seek public comments, consider alternatives, and disclose impacts. It does not include any substantive, on-the-ground environmental protection requirements or standards. These environmental protection authorities are derived from the many other environmental laws passed since the enactment of NEPA.

**Recommendation:** The Task Force should evaluate NEPA in the context of the many substantive environmental laws enacted since 1969 to:

- Evaluate whether NEPA and this body of environmental laws work well together;
  - Determine if there is duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication; and
  - Develop ways to integrate and optimize the NEPA analysis and impact disclosure process with the environmental permitting processes established in other laws.
2. Anti-development groups have hijacked NEPA by turning it into a process of conflict and confrontation rather than an opportunity for communication and collaboration, as Congress originally intended. These groups use NEPA as their 37-cent ticket to delay, oppose, and litigate natural resource development projects on public lands. As such, NEPA has become the anti-development groups' dream and the natural resource developers' nightmare.

**Recommendation:** The Task Force should recommend changes in the NEPA public scoping and appeal processes. Issues and concerns raised by local interests should be accorded more importance than comments from outside groups and individuals who are not directly affected by a proposed project or land use decision because local people know what is best for their environment and their community. Additionally, NEPA appellants should be required to post bonds to cover the government's and the private-sector's costs due to delays and legal fees if the agency's NEPA decision is sustained.

3. Project opponents are misusing the NEPA process as a surrogate land use management law to stop mining on public lands on a project-by-project. These anti-development activists seek an outcome that is inconsistent with current land-use plans that authorize multiple use, including mineral development, and that exceeds the agencies' authority to reject Plans of Operation. Congress has constitutional authority to determine where mining can occur on public lands. Federal land managers do not have authority under NEPA to prohibit mining or to withdraw specific project areas from operation of the U.S. Mining Law.

**Recommendation:** The Task Force should recommend that NEPA public comment scoping notices specify the range of decision options authorized by statute and land use plans, and establish that project-specific NEPA documents cannot be used to change existing law or to challenge previously authorized land use plans. Interest groups seeking to oppose natural resource development on public lands already have an opportunity to express their viewpoint in NEPA documents that agencies prepare for their land use plans. Agencies should thus be granted the authority to dismiss public comments that attempt to change land management status in project-specific NEPA documents.

4. The NEPA alternatives analysis requirement creates specific problems for mineral exploration and development projects which must occur at specific locations based on geologic factors. Because mineral deposits cannot be moved, exploration

must be performed in areas of favorable geology, and deposits can only be mined where mineral deposits are discovered. Unfortunately, the requirement to analyze alternatives to the Proposed Action adds considerable complexity to many NEPA documents for mineral projects with little or no commensurate environmental benefit.

**Recommendation:** The Task Force should recommend modifications to the NEPA alternatives analysis requirement that recognize the fixed location of mineral deposits and other natural resources due to geologic constraints.

5. Greater use of programmatic NEPA documents, categorical exclusions, and NEPA checklists to evaluate mineral exploration projects would save agency and private-sector time and resources. The types of environmental impacts associated with short-duration exploration drilling projects are predictable, well understood, and readily reclaimed. A programmatic approach for reviewing exploration proposals would save significant agency and private-sector resources.

**Recommendation:** The Task Force should recommend greater use of programmatic documents to evaluate mineral and energy exploration projects that propose using a pre-determined set of Best Management Practices. Following preparation of a statewide or agency-wide programmatic NEPA document, exploration projects should be approved using categorical exclusions or NEPA checklists rather than individual NEPA documents.

6. The uncertainties, delays, and costs associated with the NEPA process are compromising this Nation's ability to develop domestic mineral and energy resources. Proposed projects are held hostage because agencies are reluctant to make NEPA decisions, fearing their decisions will be challenged in court, thus jeopardizing responsible development of this Country's natural resources.

**Recommendation:** The Task Force should recommend that all NEPA decisions analyze impacts to domestic mineral and energy resource development and require that NEPA decisions evaluate compliance with the following:

- The Mining and Mineral Policy Act of 1970, 30 U.S.C. §21(a), that states the federal government must encourage the development of an economically sound and stable domestic mining industry and the development of domestic mineral resources to satisfy industrial, security and environmental needs;
  - The Federal Land Policy and Management Act of 1976 at 43 U.S.C. §1701(a)(12) which requires managing the public lands in ways that recognize the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands; and
  - The Presidential Executive Order 13211 to consider domestic energy supply, distribution, or use.
7. The NEPA process consumes agency resources and private-sector capital that would be better spent on projects with tangible environmental benefits.

**Recommendation:** The NEPA Task Force should evaluate ways to re-direct the public- and private- sector resources that are currently being spent on the NEPA process to on-the-ground environmental improvement projects. Instead of having to prepare lengthy and complex NEPA documents, there should be provisions added to NEPA that encourage direct investment in projects to enhance and improve our environment.

#### **NEPA SHOULD BE REVIEWED IN THE CONTEXT OF THE MANY ENVIRONMENTAL LAWS THAT POST-DATE NEPA**

As one of the country's first environmental laws, the National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, 42 U.S.C. §§4321-4347, January 1, 1970, as amended, was visionary for its day. Passage of NEPA in 1969 laid the foundation for what has become a comprehensive framework of federal environmental protection statutes. As shown in Table 1, in the 35 years since NEPA was enacted, Congress has developed many other federal laws designed to protect all aspects of the Nation's environment.

In evaluating NEPA and its interaction with other federal environmental statutes, it is important to recognize the substantially different purposes between NEPA and other environmental laws. The acronym NEPA stands for "National Environmental Policy Act"—not the "National Environmental Protection Act." As such, NEPA is a process, a procedural law that requires federal decision makers to seek public comment, to consider alternatives, and to evaluate and disclose impacts.

In contrast, the environmental laws that post-date NEPA, like the Clean Air Act of 1970 and the Clean Water Act of 1972, protect specific environmental resources. Other post-NEPA environmental statutes deal with other aspects of environmental protection. For example, the Resource Conservation and Recovery Act of 1976

governs the management and disposal of solid and hazardous wastes. The Toxic Substances Control Act of 1976 deals with the manufacture, distribution, use, and disposal of toxic substances. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 pertains to the cleanup of the Nation's most polluted sites. These and the other laws shown in Table 1 provide substantive on-the-ground environmental protection mandates and compliance requirements.

Table 1 Chronology of Enactment of Selected U.S. Environmental Laws	
Enactment Date	Federal Environmental Protection Statute
1966	National Historic Preservation Act (NHPA)
1967	Air Quality Act
1969	National Environmental Policy Act (NEPA)
1970	Clean Air Act (CAA)
1972	Federal Water Pollution Control Act/Clean Water Act (CWA)
1973	Endangered Species Act (ESA)
1976	Federal Land Policy and Management Act (FLPMA) Resource Conservation and Recovery Act (RCRA) The Toxic Substances Control Act (TSCA)
1977	Surface Mining Control and Reclamation Act (SMCRA) Clean Water Act Amendments (CWAA)
1979	Archaeological Resources Protection Act (ARPA)
1980	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also known as "the Superfund,"
1984	Hazardous and Solid Waste Amendments (HSWA)
1986	Superfund Amendments and Reauthorization Act (SARA)
1990	Clean Air Act Amendments (CAAA)

The environmental statutory and regulatory framework of this country is thus significantly different than it was in 1969 when Congress developed NEPA in response to a growing awareness and concern about the importance of environmental protection. Now, 35 years later, it is appropriate to examine NEPA in the context of this environmental statutory and regulatory framework to determine if there are areas of duplication and overlap, ways to strengthen and improve NEPA, or opportunities to achieve better coordination of NEPA with the body of other environmental laws.

Understanding the difference between NEPA and other environmental laws is critical to engaging in a constructive and meaningful dialogue about NEPA. Broader public awareness of this difference would greatly enhance the tenor of this discourse because NEPA must be evaluated in the context of the entire body of law to protect the environment. Since their enactment, the environmental laws that post-date NEPA have been enormously effective in improving the quality of our environment and will continue to provide comprehensive environmental protection for the future. Modifying the NEPA process will not change or compromise these substantive environmental laws. To the contrary, changing NEPA in ways that would allow federal decision-makers to get to a decision point sooner could actually improve environmental protection by expediting the approval process for proposed reclamation, cleanup, and other environmentally beneficial projects.

**Recommendation No. 1:** The NEPA Task Force should evaluate NEPA in the context of the many substantive environmental statutes that post-date NEPA. This evaluation should:

1. Examine whether NEPA and this body of environmental law are working well together;
2. Determine if there is unnecessary duplication and overlap, and if so, how to eliminate or minimize this duplication; and
3. Develop ways to make the NEPA analysis and impact disclosure process work more efficiently with the process for obtaining permits under the CWA, CAA, etc.

#### **TIGHTER STANDING REQUIREMENTS AND APPEAL PROCEDURES WOULD IMPROVE THE NEPA PROCESS**

As enacted, NEPA was designed to be a process of communication and collaboration. Unfortunately, anti-development interests have hijacked the NEPA process and turned it into a process of conflict and confrontation with the goal of stopping natural resource development on public lands. These interest groups misuse NEPA as a tool with which to categorically oppose mining and other natural resource development on public lands. This is in marked contrast to Congress' intent for NEPA,

which was to create a constructive process to identify and evaluate the environmental impacts of activities and agency decisions affecting public land.

The misuse of NEPA stems largely from the NEPA appeal provisions, which anti-development groups use as their 37-cent ticket to delay and stop projects. The NEPA process has consequently become a far too fertile field for litigation, giving interest groups nearly endless opportunities to challenge NEPA decisions.

This litigious atmosphere severely clouds NEPA's strengths and purpose. Congress passed NEPA with the laudable intent to balance the need for an adequate supply of natural resources, while at the same time, protecting the environment. Unfortunately, the NEPA process does not achieve the balance of interests as originally intended. Instead, NEPA has become the anti-development groups' dream and the resource developers' nightmare. NEPA also creates nightmares for federal agencies charged with conducting NEPA analyses and preparing NEPA documents. These officials are often reluctant to make NEPA decisions for fear of having their decisions appealed and ending up in time-consuming and expensive legal battles.

This fear of litigation contributes significantly to the costs and delays associated with the NEPA process. In an attempt to minimize the potential for their NEPA decisions to be appealed, federal agencies frequently require additional studies and engage in "analysis by paralysis," with the hope that these extra measures will make their NEPA documents less vulnerable to appeal. Unfortunately, these additional steps rarely provide protection from an appeal because the process itself—not the technical findings of the NEPA document, are typically the subject of the appeal.

**Recommendation No. 2:** The Task Force should recommend changes in the NEPA public scoping and appeal processes. Issues and concerns raised by local interests should be accorded more importance than comments from outside groups and individuals who are not directly affected by a proposed project or land use decision because local people know what is best for their environment and their community. Giving local viewpoints more consideration in the NEPA process would ensure that the real economic and social impacts associated with a proposed action are properly evaluated, and that local and state concerns are adequately considered. Additionally, appellants should be required to post bonds to cover the government's and private-sector's costs due to delays and legal fees if the agency's NEPA decision is sustained.

#### **THE FEDERAL LAND POLICY AND MANAGEMENT ACT—NOT NEPA GOVERNS USE, DEVELOPMENT, AND WITHDRAWAL OF PUBLIC LANDS**

NEPA does not govern land use and does not authorize federal land managers to make decisions that functionally withdraw public lands from responsible development that complies with land use plans and environmental statutory requirements. The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 et seq., governs the management of the public lands. Congress passed this landmark legislation in 1976, seven years after NEPA was enacted. FLPMA establishes guidelines for administering the public lands consistent with the constitutional authority that grants Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (United States Constitution, at Article IV, § 3, cl. 2.)

FLPMA clearly establishes that Congress, not the Executive Branch, has the principal authority to withdraw public lands:

"The Congress declares that it is the policy of the United States that—  
...the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4).

FLPMA at 43 U.S.C. § 1701(a)(2) establishes a land use planning and inventory requirement that directs federal land managers to conduct a periodic and systematic land use planning process to inventory present and future use. Federal land managers prepare NEPA documents, typically an Environmental Impact Statement (EIS), in conjunction with this land use inventory and planning process. The resulting NEPA documents consider public comments and land use alternatives and disclose the environmental impacts associated with agency land use decisions. Thus, as required by FLPMA, there is considerable public involvement in agencies' land use management decisions. Sometimes these decisions are the subject of considerable public debate and controversy.

In the case of mining, FLPMA at 43 U.S.C. § 1732(b) directs the Secretary of the Interior to manage the public lands "by regulation or otherwise take any action necessary to prevent unnecessary or undue degradation of the lands." In response

to this directive, BLM developed surface management regulations at 43 C.F.R. Subpart 3809 that define compliance with the mandate “to prevent unnecessary or undue degradation.” In this manner, Congress has given BLM the authority to say how mining is done in order to prevent unnecessary or undue degradation while retaining for itself the authority to say where mining can occur on public lands.

There is no provision in NEPA that confers any authority upon the Executive Branch to make land use decisions that trump Congress’ plenary authority over public lands. Unfortunately, anti-development groups frequently attempt to use NEPA as if it were a land management law that gives federal land managers authority to withdraw public lands from mining and other natural resource development. In doing so, these activists create a very awkward situation for federal land managers because they are essentially asking them to go beyond their authority to designate where natural resource development on public lands can occur with the hope of restricting or precluding development. This tactic, which is used during both the land use planning and project permitting processes, causes agencies to expend significant time and effort during the NEPA process to respond to comments seeking an outcome that exceeds the regulators’ authority. This is a tremendous waste of both public- and private-sector resources.

**Recommendation No. 3:** The NEPA Task Force should evaluate ways to discourage the misuse of the NEPA process as a surrogate land management law. The Task Force should recommend that NEPA public comment scoping notices specify the range of decision options authorized by statute and land use plans, and establish that project-specific NEPA documents cannot be used to change existing law or to challenge previously authorized land use management decisions. Interest groups seeking to oppose mining and other natural resource development on public lands already have an opportunity to express their viewpoint in NEPA documents that agencies prepare for land use plans. Agencies should be granted the authority to dismiss public comments that attempt to change land use status in project-specific NEPA documents

### **IMPROVING THE NEPA PROCESS FOR MINERAL PROJECTS ON PUBLIC LANDS**

The Council on Environmental Quality (CEQ) regulations that implement NEPA (40 C.F.R. Parts 1500–1518) create specific problems for proposed mineral projects. The requirement at 40 CFR Part 1502 §14 to analyze alternatives to the Proposed Action is not well suited for many mineral projects because geologic factors must dictate where mineral exploration and development occurs. Unlike some commercial development projects where it makes sense to perform a site selection study to identify the optimal location for a proposed project, miners do not have the ability to choose where they mine. They have to explore and mine at the exact locations where mineral resources are found. Unfortunately, satisfying the alternatives analysis requirement is often a time-consuming paper exercise that adds unnecessary length and complexity to NEPA documents without adding much value to the environmental analysis.

Once a mineral deposit is discovered, there may be some flexibility in locating the mineral processing and ancillary facilities at some projects depending upon site-specific factors such as topography and land ownership patterns. In these situations, analyzing alternative locations for discrete project components may be a meaningful exercise. However, for many mineral projects, the range of alternatives that is practical, technically and economically feasible, and environmentally beneficial is extremely limited.

It should be noted that the FLPMA mandate to prevent unnecessary or undue degradation from mineral activities functions as a requirement to analyze and select alternatives that would reduce environmental impacts. In order to satisfy this mandate, mineral project proponents must prove that the proposed project facilities and mining and reclamation techniques will not create unnecessary or undue environmental impacts. This burden of proof necessarily considers different project layouts and other mining methods to determine whether there are technically achievable and economically feasible alternatives that would reduce impacts. The FLPMA unnecessary or undue degradation mandate requires that exploration and mining projects use feasible alternatives that minimize environmental impacts.

The requirement at 40 CFR Part 1502 §14(d) to analyze the No Action Alternative creates a unique problem for mineral projects because federal land managers usually cannot select this alternative due to mandates in the U.S. Mining Law (30 U.S.C. §21(a) et seq.) and FLPMA that authorize mining on public lands.

Specifically, the Mining Law at 30 U.S.C. §22 states:

“Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States.”

The following sections of FLPMA specifically authorize mining on public lands: “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber and fiber from the public lands.” (43 U.S.C. §1701(a)(12)); and

“no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.” (43 U.S.C. §1732(b)).

So long as a proposed mineral project complies with the FLPMA mandate to prevent unnecessary or undue degradation, an agency cannot wholesale reject a Plan of Operations. Rather, the agency’s authority rests with regulating how the proposed activity must be conducted to comply with the unnecessary or undue degradation requirement.

Although agencies cannot typically select the No Action Alternative, the requirement to consider the No Action Alternative adds considerable length and complexity to some NEPA documents with no meaningful environmental or land management benefits.

For these reasons, aspects of CEQ’s current NEPA rules are not ideal for evaluating impacts associated with proposed mineral activities. Agencies charged with preparing NEPA documents for mineral projects have to force-fit the project into the NEPA document template that revolves around considering alternatives including the No Action Alternative.

**Recommendation No. 4:** The NEPA Task Force should recommend modifications to the NEPA alternatives analysis requirement for mineral and other natural resource development projects in ways that recognize the fixed location of mineral deposits and other natural resources due to geologic constraints. The Task Force should also eliminate the requirement to consider the No Action Alternative for mineral projects that comply with the FLPMA mandate to prevent unnecessary or undue degradation.

#### **AGENCY RESOURCES WOULD BE BETTER SPENT BY DEVELOPING PROGRAMMATIC NEPA DOCUMENTS FOR EXPLORATION PROJECTS**

BLM and USFS currently devote enormous time and energy preparing individual NEPA documents, typically Environmental Assessments (EAs), for exploration drilling projects. A more efficient and cost-effective approach would be to prepare a programmatic document that analyses the environmental impacts and appropriate mitigation measures for a typical exploration drilling project that employs a pre-determined set of Best Management Practices. This document could then be used as the basis for evaluating individual exploration drilling project proposals. Projects that fit within the parameters of the programmatic document and that adopt the recommended Best Management Practices and mitigation measures recommended in the programmatic document could then be approved with either a Categorical Exclusion or a Determination of NEPA Adequacy (DNA) checklist.

A typical exploration drilling program involves a limited range of activities that result in easily predictable and well understood environmental impacts. Constructing temporary access roads and drill pads disturbs soils and vegetation on a temporary basis. The mining industry has a demonstrated track record of successfully reclaiming this disturbance. Moreover, the outcome of the NEPA analysis for a typical proposed exploration project is predictable. Assuming the project is located on lands open to operation of the Mining Law, and the project complies with the FLPMA mandate to prevent unnecessary or undue degradation, the agencies approve the project. Their approval may include special stipulations or required mitigation measures as necessary to address site-specific conditions and to avoid any environmentally sensitive areas with cultural resources or sensitive habitat. However, as discussed above, the agencies do not have the authority to categorically reject a Plan of Operations.

Using a programmatic approach to approve routine, short-duration projects would not modify in any way the level of environmental protection or reclamation applied to these projects. Operators would still have to collect site-specific baseline data to determine whether cultural resources or sensitive species or habitats exist in the project area, and if so, how to apply the Best Management Practices to mitigate impacts to these resources. It would, however, get to a decision point much sooner, with obvious benefits to the private sector and the Nation’s supply of energy and



mineral resources. It would also substantially benefit the quality of BLM's and USFS' land management activities because it would allow the agencies to spend more of their time on more complex and important decisions and less time preparing pro forma NEPA documents on routine matters. Moreover, a programmatic approach is consistent with 40 C.F.R. Part 1500 § 4(i) that directs agencies to use "program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20)."

**Recommendation No. 5:** The Task Force should recommend greater use of programmatic documents to evaluate mineral and energy exploration projects that propose using a pre-determined set of Best Management Practices. Following preparation of a statewide or agency-wide programmatic NEPA document, these types of projects should be approved using categorical exclusions and NEPA checklists rather than individual NEPA documents.

### **NEPA IS ADVERSELY AFFECTING THE NATION'S SUPPLY OF DOMESTIC ENERGY AND MINERAL RESOURCES**

Reducing our reliance on foreign sources of mineral and energy resources is critical to this country's economic health and national defense. Unfortunately, the delays, costs, and uncertainties associated with the NEPA process create a significant and sometimes insurmountable barrier to responsible natural resource development.

This barrier is inconsistent the original intent of NEPA to achieve a balance of interests. NEPA at U.S.C. 42 § 4331(b)(5) describes the balance of interests Congress intended for NEPA, speaking specifically to the objective of balancing the need for natural resource development and environmental protection:

"In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may".achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

**Recommendation No. 6:** The Task Force should recommend that all NEPA decisions analyze impacts to domestic mineral and energy resource development and require that NEPA decisions evaluate compliance with the following:

1. The Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21(a), which mandates "that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs;"
2. The Federal Land Policy and Management Act of 1976 at 43 U.S.C. § 1701(a)(12) which mandates that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970;" and
3. Presidential Executive Order 13211 to consider domestic energy supply, distribution, or use.

### **CONCLUSION**

WMC is confident that the NEPA process can be improved for mineral projects on public lands. Instead of the confrontation and conflict that all too often cloud the NEPA process for many mineral projects, a far better use of public and private sector resources would result if the NEPA process were managed in a different way. WMC's vision for an improved and updated NEPA process would be one of collaboration and communication in which stakeholders participate in the process with the mutual goal of making proposed mineral projects the best they can be for both the environment and local communities.

WMC can only speculate upon what could have been accomplished over the past 35 years since enactment of NEPA if even just a fraction of the public- and private-sector resources devoted to the NEPA process could have been spent instead on tangible environmental improvements. WMC contends that the Nation's resources could

be better spent if the NEPA process were changed in ways that would allow federal agencies to make decisions faster in order to facilitate projects that include water quality improvements, wildlife habitat enhancement, abandoned mine reclamation, cultural resource preservation, etc. This change would be a far better way to comply with the NEPA mandate at 42 U.S.C. § 4331(b)(1) to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" than the current NEPA paper exercise.

**Recommendation No. 7:** The NEPA Task Force should evaluate ways to re-direct the public- and private- sector resources that are currently being spent on the NEPA process to on-the-ground environmental improvement projects. Instead of having to prepare lengthy and complex NEPA documents, there should be provisions added to NEPA that encourage direct investment in projects to enhance and improve our environment.

[The response to questions submitted for the record by Ms. Struhsacker follows:]

DEBRA W. STRUHSACKER  
3610 BIG BEND LANE  
RENO, NV 89509

The Honorable Cathy McMorris  
Chairwoman  
Task Force on Improving the National Environmental Policy Act  
Committee on Resources

RE: Response to Additional Questions from the Task Force On Improving the National Environmental Policy Act

Dear Congresswoman McMorris:

Thank you once again for the opportunity to appear on behalf of the Women's Mining Coalition before the Task Force on Improving the National Environmental Policy Act (NEPA) at the June 18th hearing in Show Low, AZ. This letter is in response to the questions you asked in your June 23rd letter.

*Question No. 1: Please Provide Some Suggestions for ways to Re-direct Some of the Resources Currently Spent on the NEPA Process to Projects with Tangible On-the-Ground Benefits.*

Time is money for the private sector, which spends a tremendous amount of time and money on project permitting as a result of the NEPA process. A protracted NEPA review increases project development costs, which is an obvious concern for the private sector. Additionally, the inability to forecast how long the NEPA process will take creates another concern for project proponents because this uncertainty makes planning for the future very difficult.

With these factors in mind, the Women's Mining Coalition would like to suggest that the NEPA Task Force consider modifications to NEPA that would create an incentive for the private sector to undertake environmental enhancement projects in exchange for a streamlined and predictable NEPA schedule. An expedited NEPA process could be guaranteed for projects that include a voluntary, on-the-ground environmental improvement component. This would stimulate private-sector investments in the environment and would also create incentives for the federal agencies responsible for NEPA to complete the NEPA process in a timely manner in order to benefit from the proposed environmental enhancement project. If an agency were unable to meet the expedited NEPA schedule commitment, then the project proponent would no longer be obligated to construct the enhancement project.

I would like to offer the following case history to illustrate the point that the private sector is willing to make voluntary investments in environmental enhancement projects when the uncertainties surrounding the NEPA process are eliminated.

**Facilitating Corporate Environmental Investments—The Ken Snyder Mine Case History.**

In the 1996-1998 timeframe, I was a consultant to Franco-Nevada Mining Corporation, Inc. and helped them secure the necessary permits for a small, underground gold mine in Elko County, Nevada called the Ken Snyder Mine. Unlike most Nevada mining operations, which are located wholly or partially on public land, the proposed Ken Snyder Mine was solely on private land. Therefore, the project was regulated entirely by the State of Nevada and the county; federal land managers

had no regulatory role in evaluating the proposed project. Consequently, there was no requirement to conduct a NEPA analysis to approve the project.

Because there was no NEPA jurisdiction over the proposed mine, the company had no concerns about the permitting process, and viewed the state permitting process as having a predictable outcome and schedule. This straightforward and timely permitting process facilitated Franco-Nevada's discretionary corporate environmental investment at the Ken Snyder Mine and at the nearby town of Midas, Nevada. The certainty of the substance of Nevada's regulatory requirements and the timeliness of their implementation allowed the company to plan with some level of confidence on the length of time required to secure permits for the mine. Moreover, as a result of the predictable nature of Nevada's permitting process, Franco-Nevada was able to devote more of its resources to working closely with the community and State regulators to identify measures to fine tune and enhance the project in ways to benefit the environment and the town of Midas. Examples of these discretionary environmental investments included the following:

- Good Samaritan reclamation of land disturbed by previous mining activities;
- Installing an INCO cyanide detoxification circuit, which, although not required for operations, guaranteed protection of the environment;
- Relocating the mill to avoid impacting a Native American site on Franco-Nevada private land (at a cost in excess of \$1 million); and
- Rehabilitating the historic Midas Schoolhouse to be used as a museum and a community center.

None of these activities were the subject of regulatory requirements, but they enhanced the environment and community in which the mine and the company operated. At the same time, the mine was built with the same environmental protection measures that would have been required had the mine been located on public land and subject to the NEPA process. Thus, the absence of NEPA jurisdiction in this case resulted in an environmentally responsible project that met all federal environmental standards plus the enhancements that were possible thanks to the State's predictable permitting process.

*Question No. 2: Does NEPA Create Any Unique Problems for Mining Projects*

The answer to this question is quite simply, "yes." These special problems stem from two factors: 1) the way in which NEPA is misused as a land management statute; and 2) the NEPA requirement to evaluate alternatives to the proposed project. These factors are discussed below.

**NEPA is Not a Land Management Statute—But it is Often Misused for this Purpose**

NEPA does not govern land use and does not authorize federal land managers to make decisions that functionally withdraw public lands from responsible development that complies with land use plans and environmental statutory requirements. The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 et seq., governs the management of the public lands. Congress passed this landmark legislation in 1976, seven years after NEPA was enacted. FLPMA establishes guidelines for administering the public lands consistent with the constitutional authority that grants Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (United States Constitution, at Article IV, §3, cl. 2.)

FLPMA clearly establishes that Congress, not the Executive Branch, has the principal authority to withdraw public lands:

"The Congress declares that it is the policy of the United States that—  
...the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4).

FLPMA at 43 U.S.C. § 1701(a)(2) establishes a land use planning and inventory requirement that directs federal land managers to conduct a periodic and systematic land use planning process to inventory present and future use. Federal land managers prepare NEPA documents, typically an Environmental Impact Statement (EIS), in conjunction with this land use inventory and planning process. The resulting NEPA documents consider public comments and land use alternatives and disclose the environmental impacts associated with agency land use decisions. Thus, as required by FLPMA, there is considerable public involvement in agencies' land use management decisions. Sometimes these decisions are the subject of considerable public debate and controversy.

In the case of mining, FLPMA at 43 U.S.C. § 1732(b) directs the Secretary of the Interior to manage the public lands "by regulation or otherwise take any action

necessary to prevent unnecessary or undue degradation of the lands." In response to this directive, BLM developed surface management regulations at 43 C.F.R. Subpart 3809 that define compliance with the mandate "to prevent unnecessary or undue degradation." In this manner, Congress has given BLM the authority to say how mining is done in order to prevent unnecessary or undue degradation while retaining for itself the authority to say where mining can occur on public lands.

There is no provision in NEPA that confers any authority upon the Executive Branch to make land use decisions that trump Congress' plenary authority over public lands. Unfortunately, anti-development groups frequently attempt to use NEPA as if it were a land management law that gives federal land managers authority to withdraw public lands from mining and other natural resource development. In doing so, these activists create a very awkward situation for federal land managers because they are essentially asking them to go beyond their authority to designate where natural resource development on public lands can occur with the hope of restricting or precluding development. This tactic, which is used during both the land use planning and project permitting processes, causes agencies to expend significant time and effort during the NEPA process to respond to comments seeking an outcome that exceeds the regulators' authority. This is a tremendous waste of both public- and private-sector resources.

The Women's Mining Coalition would like to suggest that the NEPA Task Force evaluate ways to discourage the misuse of the NEPA process as a surrogate land management law. The Task Force should recommend that NEPA public comment scoping notices specify the range of decision options authorized by statute and land use plans, and establish that project-specific NEPA documents cannot be used to change existing law or to challenge previously authorized land use management decisions. Interest groups seeking to oppose mining and other natural resource development on public lands already have an opportunity to express their viewpoint in NEPA documents that agencies prepare for land use plans. Agencies should be granted the authority to dismiss public comments that attempt to change land use status in project-specific NEPA documents

#### **The NEPA Alternatives Analysis Requirement Creates Special Problems for Mining**

The Council on Environmental Quality (CEQ) regulations that implement NEPA (40 C.F.R. Parts 1500—1518) create specific problems for proposed mineral projects. The requirement at 40 CFR Part 1502 § 14 to analyze alternatives to the Proposed Action is not well suited for many mineral projects because geologic factors must dictate where mineral exploration and development occurs. Unlike some commercial development projects where it makes sense to perform a site selection study to identify the optimal location for a proposed project, miners do not have the ability to choose where they mine. They have to explore and mine at the exact locations where mineral resources are found. Unfortunately, satisfying the alternatives analysis requirement is often a time-consuming paper exercise that adds unnecessary length and complexity to NEPA documents without adding much value to the environmental analysis.

Once a mineral deposit is discovered, there may be some flexibility in locating the mineral processing and ancillary facilities at some projects depending upon site-specific factors such as topography and land ownership patterns. In these situations, analyzing alternative locations for discrete project components may be a meaningful exercise. However, for many mineral projects, the range of alternatives that is practical, technically and economically feasible, and environmentally beneficial is extremely limited.

It should be noted that the FLPMA mandate to prevent unnecessary or undue degradation from mineral activities functions as a requirement to analyze and select alternatives that would reduce environmental impacts. In order to satisfy this mandate, mineral project proponents must prove that the proposed project facilities and mining and reclamation techniques will not create unnecessary or undue environmental impacts. This burden of proof necessarily considers different project layouts and other mining methods to determine whether there are technically achievable and economically feasible alternatives that would reduce impacts. The FLPMA unnecessary or undue degradation mandate requires that exploration and mining projects use feasible alternatives that minimize environmental impacts.

The requirement at 40 CFR Part 1502 § 14(d) to analyze the No Action Alternative creates a unique problem for mineral projects because federal land managers usually cannot select this alternative due to mandates in the U.S. Mining Law (30 U.S.C. § 21(a) et seq.) and FLPMA that authorize mining on public lands.

Specifically, the Mining Law at 30 U.S.C. § 22 states:

“Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States.”

The following sections of FLPMA specifically authorize mining on public lands: “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber and fiber from the public lands.” (43 U.S.C. §1701(a)(12)); and

“no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.” (43 U.S.C. §1732(b)).

So long as a proposed mineral project complies with the FLPMA mandate to prevent unnecessary or undue degradation, an agency cannot wholesale reject a Plan of Operations. Rather, the agency’s authority rests with regulating how the proposed activity must be conducted to comply with the unnecessary or undue degradation requirement.

Although agencies cannot typically select the No Action Alternative, the requirement to consider the No Action Alternative adds considerable length and complexity to some NEPA documents with no meaningful environmental or land management benefits.

For these reasons, aspects of CEQ’s current NEPA rules are not ideal for evaluating impacts associated with proposed mineral activities. Agencies charged with preparing NEPA documents for mineral projects have to force-fit the project into the NEPA document template that revolves around considering alternatives including the No Action Alternative.

The Women’s Mining Coalition would like to recommend that the NEPA Task Force suggest modifications to the NEPA alternatives analysis requirement for mineral and other natural resource development projects in ways that recognize the fixed location of mineral deposits and other natural resources due to geologic constraints. The Task Force should also eliminate the requirement to consider the No Action Alternative for mineral projects that comply with the FLPMA mandate to prevent unnecessary or undue degradation.

Once again, on behalf of the Women’s Mining Coalition, I would like to thank you, Chairman Pombo, and the Task Force on Improving NEPA for the opportunity to provide comments at the June 18th hearing. We applaud Chairman Pombo for his vision in creating the NEPA Task Force and would like to express our willingness to work closely with the Task Force as it completes its evaluation of how to update and modernize NEPA.

SINCERELY YOURS,  
DEBRA W. STRUHSACKER  
CO-FOUNDER AND DIRECTOR  
WOMEN’S MINING COALITION

Mr. RENZI. Mr. Beck.

**STATEMENT OF ED BECK, TUCSON ELECTRIC POWER  
COMPANY, TUCSON, ARIZONA**

Mr. BECK. Congressman Renzi and Members of the NEPA Task Force, I also would like to thank you for the opportunity to participate today and provide some input as far as the project that Tucson Electric Power has been involved in for over five years now. My name is Ed Beck. I am the Superintendent of Transmission Planning for Tucson Electric Power, and I’ve been involved in transmission design and construction for over 26 years.

First of all, TEP supports the vision and the goals of NEPA. We are not suggesting that NEPA itself needs to be removed, but it is the process we have a problem with. TEP has been a very environmentally friendly organization over the years, and actually built one of the first transmission lines after the enactment of NEPA,

which was unusual in the fact that we did a feathering of trees through the forest. Rather than clear cutting, we left the trees in place and trimmed them to allow clearance for the lines. That was part of the Forest Service recommendations.

The Forest Service was so impressed with the project, that they created a video and used it in the region for training and education for many years, and TEP personnel and directors supported that. Interestingly enough, the issue of feathering has changed in the last year. As a result of the 2004 black-out in the east, the Forest Service is now promoting clear-cutting on in particular the Tucson Electric right-of-way, both from I think a liability perspective to them if a forest fire were to take the electric system out of service, and also for the potential to use the clearing as a fire break.

We've had a very cooperative experience with at least the Apache Forest over the years, and when we started the project that we're proposing in Southern Arizona on the Coronado National Forest, we were rather disturbed to find there was absolutely no cooperation with the Forest Service personnel involved.

Very briefly, the project that we are looking at, goes from Tucson to Nogales, Arizona, and goes down right on the Mexico border. There was a proposal for a 115 kV transmission line by another utility, and Tucson Electric had an interest in building a larger line that would ultimately connect with Mexico. So we felt this would be one opportunity for Southern Arizona to build the project, and we felt that there would only be one project that would get permitted.

So we jointly worked with the other utility and came up with an application to the State, because the State has jurisdiction over siting location for transmission lines, and in parallel we made application to the Department of Energy and the Forest Service.

The Forest Service did not act on our application for over a year. They really didn't want to deal with it at all. The Department of Energy, because of the Presidential permit requirement for crossing an international border, took on the lead agency role for the EIS that we were preparing.

The Forest Service was funded by TEP directly to work on the EIS process. We funded the project manager. That project manager sat through the ACC, which is our Arizona Corporation Commission hearings for siting for eight months, provided basically no input to the State as to what the Forest Service might do relative to right-of-way grants, and listened as the ACC heard the regional public, locals input, that directed—or, resulted in the Corporation Commission identifying with recall that the western route was the right job for the project.

In fact, the Commission actually gave Tucson Electric Power the right to build on the westerly route only, and the other two alternatives were specifically denied.

The Forest Service then wrote a letter two months after the fact to the Chairman of the Commission saying you have no business granting a right-of-way—a permit for this project over, quote, "my land," close quotes, and that was the Forest Supervisor's statement.

Throughout the process there has been no communication or cooperation amongst the agencies. We actually had five Federal

agencies involved with the EIS. It seemed to be a never-ending process. We continue to have new requirements to the analysis as we move along. Even in the draft EIS that was prepared for the project, the Forest Service did not indicate any preference for a route, while we said any route basically was acceptable, but chose western as their preferred because the State had identified that.

Another problem we ran into is the Fish and Wildlife Service has to be consulted on any proposed route that would be a preferred route. When the DLE did that, the Fish and Wildlife Service said we could only consult on one route. So even knowing there was a potential that the Forest Service won't accept the route, the Fish and Wildlife said, "We won't do a consultation on that simultaneously." That resulted in delaying the process.

Today, the TEP has spent three million dollars directly on the actual consultant work for the EIS, but probably five million dollars in total for the EIS process, as well as the environmental work that went into that.

In conclusion, we've got some recommendations we would like to make, and that is there is a need for consistent process or procedure amongst Federal agencies to process an EIS, and there needs to be close coordination between the State and Federal, and in fact for siting the issuance of the utility line, because the State has jurisdiction over that, there is a State and Federal rights issue that needs to be addressed.

We feel that there should be deadlines for EIS processing and they should be held to. The Fish and Wildlife Service should be allowed to consult on more than one project at a time. There is a real need to develop a cooperative process that would involve all parties up front, and the one last item I throw in is that early on in the Forest Service process, we were doing a roads analysis for the Forest Service, and we started to work with one of the environmental groups. The environmental group dropped out of that process along the way because of future litigation. So again I would like to thank you for this opportunity, and I'd be glad to answer any questions.

Mr. RENZI. Sir, thank you much.

[The prepared statement of Mr. Beck follows:]

**Statement of Edmond A. Beck, Superintendent, Planning & Contracts,  
Tucson Electric Power Co.**

Madame Chairwoman and Members of the Task Force, thank you for the opportunity to participate in today's field hearing. I appreciate having a chance to discuss specific issues that Tucson Electric Power Co. ("TEP") has experienced in trying to obtain approval for a project that involves NEPA.

The purpose of my testimony is to discuss a project that I would consider to be a "Poster Child" for the complications involved in obtaining federal approvals of an electric transmission line project involving NEPA. The project I will be speaking about, generally known as the "Sahuarita—Nogales Transmission Line" or the "Gateway Transmission Project" has been under development by TEP for the last five years. I have been directly involved in the project from its inception. I will briefly touch upon the various processes that TEP has undertaken in an attempt to obtain the necessary permits for construction of this 60 mile long, 345kV transmission line in Southern Arizona and the various impediments along the way.

The transmission line is planned to extend southward from Sahuarita, Arizona, near Tucson, to the City of Nogales, Arizona, on the U.S.-Mexico border, and cross the border to interconnect with the Mexican electric grid just south of Nogales, Sonora.

TEP is pursuing the project in connection with an order from the ACC, which has determined that the transmission grid serving the Nogales area is inadequate to provide reliable electric service. The area is currently served by a single 115 kV transmission line and has experienced frequent outages and voltage problems that are not only inconvenient and disruptive to normal business and household uses, but represent potential threats to public health and safety in the fast-growing border area. A recent example of such a disruption occurred on May 27 of this year when a storm damaged the single transmission line serving the Nogales region. As a result of the storm most customers in Santa Cruz County were out of power for five hours. The new transmission line will, if built, provide the reliability the ACC requires for southern Arizona power users. The new line will also allow power exchanges between U.S. and Mexican energy markets, a step that will improve the reliability and efficiency of the regional grid and support economic growth on both sides of the border.

The project requires approval by state and federal regulatory agencies. The state has two regulatory responsibilities, vested exclusively in the ACC, one is to decide whether the transmission line is necessary to provide adequate electrical service; assuming such a decision is reached the second responsibility is to balance environmental impacts of proposed routes against the public interest. The ACC has made a determination regarding need: the new line is needed and in the public interest. Based on public hearings and extensive analysis and testimony, the ACC identified the route that will best meet the public interest while balancing environmental impacts to the state. The state's intensive review process took 10 months to complete and has been complete for nearly four years.

The federal review process has been underway since 2000 and a final EIS<sup>1</sup> was released this past February. Five federal agencies (US Department of Energy, U.S. Forest Service, U.S. Fish and Wildlife Service, Bureau of Land Management, and the U.S. Section of the International Boundary Waters Commission) are involved in the project's review. Each agency has a distinct but fragmentary institutional interest in the potential transmission line, but none of the individual federal agencies has overall responsibility or authority. None of the federal agencies reviewing the project describes its mission (or reasons for participating in the review) to include helping ensure reliability of present or future electric service in Arizona (although the Department of Energy will consider the impact of the proposed international interconnection on the reliability of the U.S. grid and domestic energy supplies). Four of the federal agencies are collaborating in preparation of an environmental review of the project.

The new line is exactly the type of investment in America's future that the Bush Administration has supported and urged the private sector to undertake. TEP and the State of Arizona are ready to proceed, but the federal review process became bogged down in process. As a result of the apparent inability of the federal agencies to make progress on the process and in an attempt to prevent the process from degenerating into overt conflict among the agencies or with the state of Arizona, TEP brought the issue to the attention of the White House Task Force on Energy Project Streamlining in late 2003<sup>2</sup>. TEP recognized that an exceptional level of interagency coordination and cooperation would be needed to allow the agencies to reconcile their different roles and perspectives with those of each other and with the State of Arizona. The Task Force was established to provide that type of leadership and appeared to be uniquely equipped to do so. TEP hoped that the Task Force could provide the leadership and direction necessary for the agency's to complete their processes by mid 2004. The Task Force provided little improvement in the process. It quickly became evident that the agencies involved were beyond the reach of even this White House level Task Force.

#### **State of Arizona Administrative Proceedings**

The impetus to construct a transmission line linking Tucson to Nogales and the Mexican grid arises from two primary sources. First, the transmission infrastructure serving southern Arizona is inadequate for current and future needs. Second, energy analysts representing government and industry on both sides of the border have long seen compelling operational and economic advantages in joining the two countries' power systems in the Arizona-Sonora region. This was clearly identified in joint studies conducted by the U.S. DOE and Mexico's equivalent CFE conducted in the early 1990s. The results of those studies clearly indicated the value of international interconnections between the electric grids of the U.S. and Mexico but left it to the industry to pursue the connections.

<sup>1</sup> A copy of the final EIS can be found at: <http://www.ttclients.com/tep/>.

<sup>2</sup> A copy of the filing letter is attached as Attachment A



The Arizona Corporation Commission is the state agency charged with regulation of Arizona's electric utilities and responsible for assuring Arizona citizens a safe, reliable power system. State law also charges the ACC with safeguarding the public interest by balancing the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of Arizona.<sup>3</sup>

Early in 2000, TEP and Citizens utilities jointly applied to the ACC for a Certificate of Environmental Compatibility<sup>4</sup> for a 345kV transmission line that would, first, supply the Nogales-Santa Cruz County area and, second, interconnect with the Mexican power grid.<sup>5</sup>

The ACC, acting through its Siting Committee, held eight public hearings between May and October 2001 on the TEP-Citizens proposal. The ACC itself held two public hearings in December 2001.

The hearings considered three potential alignments or corridors for the new 345kV transmission line. The options considered by the ACC's Siting Committee and by the Commission itself included an "eastern" "central" and "western" corridor. Each route ran essentially on a north-south axis, with the eastern corridor located to the east of Interstate 19 (I-19), the central corridor located west and relatively close to I-19, and the western corridor running well to the west of the other two routes on the opposite side of a mountain range. Each proposed route involved some use of federal public lands under the jurisdiction of the Bureau of Land Management or the U.S. Forest Service. TEP and Citizens requested the western corridor as the preferred route, and the central corridor as the preferred alternative should federal approvals prove difficult to obtain for the western corridor.

Federal agencies were invited to participate in the Siting Committee and ACC hearings and attended the majority of them. The Siting Committee was aware that the proposed transmission line would need federal approvals to cross federal lands and the international border, and Siting Committee members went to considerable lengths to question federal agency officials on the federal approvals process and to understand the relationship between the state and federal reviews.<sup>6</sup>

<sup>3</sup>Arizona Rev. Stat. 40-360-07(b).

<sup>4</sup>Transmission line siting decisions by the ACC are based upon deliberations by and recommendations of the ACC-appointed "Power Plant and Transmission Line Siting Committee." The Committee has eleven members, five ex officio members representing various state agencies, and six appointed members of the public. The Committee is chaired by the ex officio member representing the state attorney general's office. The Siting Committee is responsible for issuance of a Certificate of Environmental Compatibility (CEC) for proposed transmission projects, with such certificates subject to final review and approval by the ACC itself.

<sup>5</sup>The proposed 345kV line would run approximately 60 miles from Tucson to Nogales where a new substation would be sited. The 345kV line would be interconnected to the Nogales-area grid through a new 115kV power line. The 345kV line would interconnect with the Mexican grid at a substation approximately 5 miles south of the border.

<sup>6</sup>For example, representatives from both the Department of Energy and U.S. Forest Service participated in and testified during the May 17, 2001 public meeting of the ACC's Siting Committee. The Forest Service's representative responded to committee members' questions about the relationship between the ACC proceedings and the Forest Service's own permitting processes and role in the federal EIS review of the project, though the record of the May 17th hearing, as well as the various other public hearings, does not reveal that, at any point, the Forest Service voiced specific concerns or opinions related to any of the routes. The following exchange on May 17, 2002, between a member of the Line Siting Committee and the Forest Service representative is typical:

MEMBER WAYNE SMITH: Would our decision have much bearing on yours, or would you study it totally independently of ours?

MR. CONNER: The analysis in the [NEPA] document would drive us in our decision.

MEMBER WAYNE SMITH: Are you aware of, say, the preferred route?

MR. CONNER: Yes.

MEMBER WAYNE SMITH: Are there any glitches that you might be aware of?

MR. CONNER: Until the analysis is complete, I don't know.

MEMBER WAYNE SMITH: I was just wondering if our decision had any bearing on yours.

MR. CONNER: The analysis itself would have, would be the driving force for our decision.

At another point in the same hearing, the Department of Energy's representative was questioned by the Siting Committee's chairman on the comprehensiveness of the federal environmental review. The record indicates that the Chairman was trying to discern whether the federal environmental review would be as comprehensive as the ACC's own:

CHMN. WOODALL: What is going to be the focus of this environmental impact statement? And I ask because the Committee has some statutory criteria that they have to use to look at environmental matters, and I'm trying to determine the extent to which there's going to be an overlap in the subject areas that the Committee is supposed to look at, and those that you will be looking at as a part of your environmental impact statement".I'd like to ask you some questions about—basically I'm going to be reading to you from our Arizona statute that

Continued

The three alternative routes were studied extensively for their environmental impacts and the public interest in each. Each route received positive and negative testimony in the hearings, although the great majority of public testimony opposed the central route because of its proximity to and visibility from developed and growing residential areas along I-19, particularly the communities of Green Valley and Tubac.

Based on the testimony provided at the hearings, the ACC's Siting Committee formally issued a Certificate of Environmental Compatibility (CEC) for only the western route on October 29, 2001. The ACC itself voted unanimously on January 3, 2002 to approve the CEC for the western route and expressly denied permission to use the central or eastern corridors.<sup>7</sup>

The ACC imposed significant environmental mitigation on the project. Among other things, the ACC ordered TEP to construct the transmission line in compliance with "all existing applicable laws, environmental control standards and regulations, ordinances, master plans and regulations of the United States" and the "recommendations, mitigation measures, and actions to reduce or prevent environmental impacts" included in the federal environmental impact statement and record of decision covering the project. The ACC, while moving forward to expedite siting of the new line, showed clear and appropriate recognition of the role of the federal agencies and the importance of completing the NEPA-based environmental review.

#### **Federal Agency Proceedings and Involvement**

TEP has been diligent in seeking to engage the relevant federal agencies in the planning process for the new transmission line. TEP provided the several agencies with notice, and in some cases filed applications for federal approvals related to the project prior to completion of the ACC's site selection process, asking the agencies to consider and express their views on each of the three alternative routes. Input, particularly by the Forest Service, in the siting process could have been very informative to the ACC as well as streamlining the process. As a practical matter, the federal agencies have been informed of and involved with the new transmission line project since the year 2000.

##### *1. U.S. Department of Energy Involvement*

Federal law requires a Presidential Permit issued by the U.S. Department of Energy (DOE) to allow construction of an electric transmission line crossing the U.S. border. TEP filed for a DOE Presidential Permit for this project in August 2000.

DOE considers the proposed permit in this case to be a "major federal action" under the National Environmental Policy Act (NEPA) and, since mid-2001, the agency has been preparing an Environmental Impact Statement on the project. In issuing a Presidential Permit, DOE is required to determine, among other things, whether doing so is in the public interest. DOE has no transmission line siting

---

sets forth the factors that we have to consider in issuing that Certificate of Environmental Compatibility, and it's A.R.S. 40-360.06. And we are supposed to consider fish, wildlife and plant life and associated forms of life upon which they are dependent. Is that something that's going to be covered in the EIS?

MS. RUSSELL: Yes.

CHMN. WOODALL: We're supposed to examine noise, emissions levels, and interference with communications signals. Will that be encompassed in the EIS? Noise, emissions levels, and communications signals.

MS. RUSSELL: Yes, definitely.

CHMN. WOODALL: The next factor, the proposed availability of the site to the public for recreational purposes consistent with safety considerations and regulations.

MS. RUSSELL: Yes.

CHMN. WOODALL: The fifth criteria is existing scenic areas, historic sites, and structures or archeological sites at or in the vicinity of the proposed site.

MS. RUSSELL: Yes.

CHMN. WOODALL: The total environment of the area.

MS. RUSSELL: Yes.

CHMN. WOODALL: All of these are going to be studied as a part of the EIS process?

MS. RUSSELL: That is correct.

CHMN. WOODALL: Those are all the questions that I have.

ACC Power Plant and Transmission Line Siting Committee, Transcript of Proceedings, In the Matter of the Joint Application of Tucson Electric Power Company and Citizens Communications Company for a Certificate of Environmental Compatibility, May 17, 2001, at pages 649-50 (Testimony of Mr. Jerry Conner, U.S. Forest Service), and pages 637-639 (Testimony of Ms. Ellen Russell, U.S. Department of Energy).

<sup>7</sup>As noted above, TEP's parent company, UniSource Energy, acquired all of Citizens' electric operations in Arizona. UniSource is thus responsible for fulfilling Citizen's obligation to construct a second transmission line to Nogales by the ACC-specified deadline. That deadline, originally December 31, 2003, has been extended by the ACC until June 1, 2004. UniSource faces significant financial penalties from the ACC if it fails to meet the deadline.

authority, per se, but because of the centrality of the Presidential Permit to the entire project, DOE is serving as lead agency in preparing the NEPA analysis.

DOE's scoping hearings in 2001 drew many witnesses. As was the case with the ACC hearings, each proposed route received support and opposition, but the large majority of public comments at the scoping hearings opposed use of the central route.

The draft EIS was released in August 2003 and opened for public comment through mid-October 2003. Four public hearings in Arizona were conducted on the draft during September 2003. DOE and the contractor considered the comments received from the public and agencies.<sup>8</sup>

The draft EIS evaluated three routing alternatives, including two that match the western and central corridors that were also studied by the ACC, and a third route, called the crossover corridor, which follows the western route for much of its initial length, but returns eastward to the I-19 corridor farther north than does the western corridor. The crossover corridor was added to consideration at the same time that DOE determined to drop the eastern corridor from further consideration.

DOE, noting that the ACC had ordered use of the western route, and that TEP had expressed favor for that route, selected the western corridor as the "preferred alternative" for study under the EIS.

The Department of Energy initially projected that the EIS would take 12 months and three days to complete and agreed to a contract cost of \$555,000. Actual time expended so far is 48 months and, due to change orders from DOE, the contract price for the environmental review has exceeded \$2.4 million. All these costs are being borne by TEP.

## 2. U.S. Forest Service Involvement

The proposed new transmission line would, under any of the proposed alignments, cross some amount of U.S. Forest Service land in the Coronado National Forest. Any such use of Forest land is evaluated under the Federal Land Policy and Management Act (FLPMA), which requires the agency to consider the public interest in the proposed use and its consistency with applicable forest plans. For the purposes relevant here, the Forest Service relies on NEPA-based analysis to develop the information needed to determine whether to approve a special use permit under FLPMA.

Citizens Utilities had originally applied to the Forest Service in March 2000 for a special use permit for a 115kV transmission line on Coronado National Forest lands. In June 2000, following the decision by Citizens and TEP to pursue a joint project, Citizens submitted an amended application to the Forest Service for a special use permit to build and operate a new 345kV transmission line. In March 2001, after meeting with Coronado Forest personnel and filing its application for a CEC with the ACC, and at the direction of Forest Personnel, TEP filed a new special use permit application for the 345kV project. TEP's permit application requested that the Forest Service evaluate each of the three routes then under consideration by the ACC.

At the same time that TEP applied for a special use permit, TEP and the Coronado National Forest executed a Memorandum of Understanding (MOU) for the "processing of the right-of-way application." The MOU notes that TEP "desires to expedite the [Forest Service] decision process and is willing to make funding available on an annual basis to help finance salary and support costs for case processing and analysis." The agreement committed TEP to pay the Forest Service \$473,850 to cover "development and preparation of the [DOE-led] National Environmental Policy Act (NEPA) process" related to the new transmission line. Among other specifications, the agreement committed TEP to fund the cost of a Project Coordinator

<sup>8</sup>The Staff of the Arizona Corporation Commission submitted comments on the draft EIS which emphasized many of the key findings of the ACC in approving the project. [Attachment D]. The Staff wrote:

"[C]ontinuity of service could not be assured for the residents of Santa Cruz County as long as the [current] transmission line is the sole means of connecting—to the state grid". A second transmission line to Citizens' electric service area is required to resolve this service reliability problem.

[A]dditional benefits are derived from the project as currently defined in the DEIS. Service reliability to Citizens' customers via the proposed project will be better than what could have been achieved solely with a new 115kV line from [Tucson] to Nogales. The proposed transmission interconnection—to Mexico offers two other new benefits. It offers the opportunity for bilateral international power transactions between parties on either side of the U.S.-Mexico border. The international interconnection also affords TEP the opportunity to import power to the Tucson service area from the south thereby helping to mitigate its local transmission import constraint.

[More importantly, it] is expected that the Santa Cruz County load will consistently exceed the 60MW rating for the existing 115kV line in the summer of 2004 and beyond."

The Forest Service is participating as a cooperating agency with the Department of Energy in preparation of the transmission line environmental impact statement and has been involved in determining the scope and substance of the environmental analyses that underpin both the EIS and the Service's own decision regarding issuance of a special use permit. The Service has determined that any of the three alternative routes would, if approved, require amendment of the current Coronado National Forest Land and Resource Management Plan.<sup>9</sup>

As described above, TEP has been working with the Forest Service since 2000 to engage and support in every possible way the agency's evaluation of the proposed line's effects on Coronado National Forest lands. TEP fully acknowledges the Forest Service's land and resource management responsibilities. But in the final EIS there is no resolution of the underlying challenge of siting the transmission line under conditions considered appropriate by all responsible regulatory authorities. As an example of the animosity between state and federal agencies on February 19, 2002, the then-supervisor of the Coronado National Forest wrote the Chairman of the ACC regarding the Commission's decision to authorize and direct TEP to pursue only the western corridor (subject to TEP's obligation to comply with applicable federal laws and the outcome of the federal EIS on the project). The Forest Supervisor's letter stated, in relevant part:

*As Forest Supervisor of the Coronado National Forest, it is my responsibility to make decisions on use of these NFS lands....I will use [the DOE-led EIS analysis] to decide if transmission line development is appropriate, and if so, through which portion of the Coronado National Forest...It appears to me that the Commission's January 3, 2002, action is either premature and/or circumvents federal jurisdiction and my authority.*<sup>10</sup>

### 3. U.S. Bureau of Land Management Involvement

A very small segment (1.25 mi) of each of the three alternatives under study in the DOE-led EIS would cross land administered by the U.S. Bureau of Land Management (BLM). TEP applied to BLM for a special use permit in March 2001, and like the Forest Service, BLM must evaluate the application under FLPMA. BLM is serving as a cooperating agency with DOE in preparation of the overall transmission line environmental analysis under NEPA and is relying on that analysis to develop the information needed to make the FLPMA-mandated determination of whether granting the special use permit is in the public interest.

The BLM has stated that the agency may not be in a position to allow construction over its lands for more than three years, assuming challenges are filed to its determination.

### 4. U.S. Section of the International Boundary and Water Commission Involvement

The U.S. Section of the International Boundary Water Commission (USIBWC) is a cooperating agency with DOE in the NEPA review of the proposed transmission line. The USIBWC is charged with determining whether the proposed project will affect the international boundary and, in particular, transboundary water flows. The agency has indicated that, so long as the project's transmission towers are sited at least 60 feet from the international border, and do not cause changes in water flow, the agency will not object to the project.

<sup>9</sup>TEP notes that the Service's conclusion regarding a requirement to amend the current Forest Plan as to the central corridor alternative seems inconsistent with the fact that the proposed corridor would be adjacent to an existing utility corridor identified in the current Land and Resource Management Plan, a routing also identified in the 1992 Western Regional Corridor Study that was endorsed by the Chief of the Forest Service in July 1993. The Coronado National Forest Supervisor's February 19, 2002 letter cited below also notes: "For your information, the Coronado Forest Plan identifies a corridor in the vicinity of the desired routes within the two proposals. The Forest Plan (page 41) states: 'existing utility and transportation corridors will continue to be used for those types of uses.'"

<sup>10</sup>The ACC Chairman responded in a March 8, 2002 letter that states, in relevant part: "I am bewildered at the timing of your letter, considering one month has passed since the Commission decided the matter at a Special Open Meeting on January 15, 2002. The obvious question comes to mind: Why did you wait so long to raise your concerns regarding the placement of a part of TEP's transmission line running through the Coronado National Forest? [As] you know, the granting of the CEC is contingent upon [TEP] complying with all existing applicable laws, environmental control standards, ordinances, master plans and regulations of the United States....Since May 2001, you have had ample opportunity to voice your concerns about the transmission line....It was incumbent upon you to make your concerns part of the record before the Commission acted on the Line Siting Committee recommendation to grant the CEC." Letter from William A. Mundell to John M. McGee (March 8, 2002).

### 5. U.S. Fish and Wildlife Service Involvement

There are ten plant and animal species listed under the federal Endangered Species Act (ESA) in the areas of the three potential transmission corridors. Critical habitat for one ESA-listed fish specie overlaps with one of the proposed alignments. In response to a recent federal court order, it is likely that some Coronado National Forest lands that would be used by any of the alternative alignments may be designated in coming months as critical habitat for the Mexican spotted owl.

As required by the ESA, the Department of Energy has provided the U.S. Fish and Wildlife Service (FWS) with Biological Assessments (BAs) for each of the three alternative corridors. DOE initiated formal section 7 consultation with the FWS on November 18, 2003 and requested consultation on the proposed western corridor. During the process an issue arose in that when the Forest Service indicated they might not identify the Western Corridor as their preference the FWS could not consider the BA for the Central route because they could only do one section 7 consultation. This extended the timeline for the EIS.

### III. Summary and Conclusion

The residents and businesses of southern Arizona have been waiting since 1999 for key improvements in the transmission system that serves them. The State of Arizona has carefully considered and approved measures to remedy these very real problems—and has ordered TEP to implement them. The ACC held extensive hearings and heard extensive testimony regarding the environmental aspects of this project before making its decision. With the release of the final EIS in February the Forest Service has identified the Central route as its preferred corridor. This is in direct conflict with the direction of the ACC to allow construction on the Western route only. As a result after years of work, federal agencies have yet to grant any of the major approvals or permits that would allow TEP to move forward and in fact have created a road block to further progress by selection of a route in opposition to that selected by the ACC which is the agency with sole authority in the state to determine line siting. The ACC as a result of the position stated by the Forest is in the process of holding new public hearings to try and reconcile the differences between the state mandate and the decision of the Forest Service. Siting Committee reconsideration of their recommendation has not yet begun and it remains to be seen whether the Forest Service will participate in the process to help inform the state.

The cost of the project to date of TEP is over \$10.6 million and TEP has no indication that the project will be able to move forward. In the meantime the residents of Santa Cruz County are subject to diminished reliability due to the lack of a second transmission line. Specifically TEP has expended over \$1 million in its ACC processes, including environmental work required for that process. In its EIS process TEP has spent close to \$3 million strictly for consulting work for the EIS not including underlying costs to TEP in support of the EIS process (such as mapping, preliminary design efforts, etc.). In addition another \$500, 000 has been paid to federal agencies for their review processes. The cost of attempting to permit the project has continued to escalate during the process.

As a result of the process that TEP has been through the following conclusions can be drawn regarding federal NEPA processes:

- cooperation among the various federal agencies involved in evaluating the Sahuarita-Nogales Transmission Line project was very poor throughout the process;
- federal agencies were not equipped to resolve questions or differences of perspective with the Arizona Corporation Commission;
- Participation by the Agencies in the ACC processes was very limited. Even though TEP was paying the Forest Service for the project manager to attend agency meetings such as the ACC hearings, which the project manager did attend. There was no informative dialog from the Forest relative to potential outcomes of their analysis. They did not provide any indication of a preferred route until the final EIS. The draft EIS did not even indicate any potential position of the Forest.
- deadlines for the EIS process, and subsequent issuance of RODs related to applications for special use permits do not exist but are needed;
- If multiple routes are being evaluated by agencies then the FWS should have the ability to consult on multiple routes at the request of the lead agency.

Tucson Electric Power Company greatly appreciates the opportunity to share its experience with the NEPA process.

Attachments

A—Filing letter to the White House Energy Task Force

NOTE: The attachment to Mr. Beck's statement has been retained in the Committee's official files.

[The response to questions submitted for the record by Mr. Beck follows:]

**Response to questions submitted for the record by Ed Beck,  
Superintendent, Planning and Contracts**

1. *Is it safe to say that there was adequate public participation in the Tucson to Nogales transmission line project? What are the effects of this line not being constructed?*

I feel there was more than enough public participation in the process. The State Siting Committee and the Arizona Corporation Commission ("ACC") held public hearings over a period of ten months. The first two days of the hearings were held in Nogales to encourage local public input, and each hearing began with an opportunity for public comment. Also, several members of the public were intervenors in the case and participated directly in all of the hearings, with an opportunity for both cross examination as well as for providing testimony. The strong message that the Siting Committee and Commission heard resulted in the selection of the Western route.

The Federal EIS process received 7298<sup>1</sup> comments from the public. Seventy-seven percent of these comments came in the form of common bulk e-mail comments attributable to special interest groups, but the overall number represented comments from all over the country.

Because TEP was not able to construct this line in accordance with the original order from the ACC mandating a second line to Nogales, Santa Cruz County is facing reliability issues due to the fact that they are served by a single existing 115kV radial transmission line from the Tucson vicinity. With only that single radial line, continuity of service to customers cannot be assured. When there is an outage of the 115kV line, then the lights in Santa Cruz County will go out until backup generators can be started and the system restored to service.

2. *You state that TEP has spent almost \$11 million on this project. Is there any work being done on the project now? Can you give us a sense of the economic loss to Santa Cruz county? Can you give us a sense of the economic impacts to other companies that would have worked on this project?*

TEP continues to work with the ACC on the issue of reliability to Santa Cruz County, and is continuing to pursue the permitting of the project through the ACC. The Commission is currently reviewing the issue of reliability and is expected to re-engage the siting process toward the end of this year. The siting process will likely be a collaborative effort between the State Siting Committee and the various Federal Agencies to try and come up with a route that will satisfy all of the agencies.

The economic loss to Santa Cruz County is difficult to quantify because part of the loss would be business activity that did not locate in Santa Cruz County because of concerns with electricity supply. The one direct impact that can be quantified is an additional infrastructure improvement that is planned to be placed in-service due to the inability to construct the 345kV line. The improvement that is planned in 2006 is the installation of a combustion turbine in Nogales to meet peak load and improve the ability to restore power during an outage of the existing line. This turbine is estimated to cost in the range of \$13 million and would not be needed if the line were in-place. Another cost that results from the delay in the project is the escalation in materials costs. The costs of steel structures and conductor for the project have increased \$7.6 million in the last two years. Additional carrying charges for the project will also be incurred.

The impacts to other companies include the construction entities that would have built the line as well as the suppliers of design services, materials, and environmental services. The project is estimated to cost \$70 million, so approximately \$60 million of additional activity has been foregone.

<sup>1</sup> See table 1-2 on page 1-3 of the Comment Response Document, DOE/EIS-0336 dated January 2005.

3. *Its critical that federal agencies work well state agencies because the state agencies are better equipped to evaluate the impact to the region How would NEPA be fixed to better equip federal agencies to work with state entities such as the Arizona Corporation Commission?*

While the state process was underway the agencies all had representatives who attended the public meetings. The ACC process could have been leveraged as a strong public input to the EIS process, but it seems that the EIS process, for the most part, ignored what occurred in the ten months of state-sponsored public hearings. The few NEPA public scoping meetings fell far short of the specific input to the project that was received in the ACC process.

4. *If there is a process like you described with the ACC and a federal agency doesn't participate, what should be the penalty? Follow up: were you able to recoup the costs you paid for the project manger to attend?*

Ideally, if a federal agency chooses not to participate in the local process, then the agency should not be able to dictate substantive changes after-the-fact to what the local process came up with.

TEP did not recoup any of the costs of the project manager.

5. *Will this project ever come to fruition?*

In order for Santa Cruz County to be provided with fully reliable electric service, a second transmission line into Nogales is required. Unless the ACC and the residents of Santa Cruz County agree to something less than continuous electric service, then a project such as TEP has been pursuing must be built. The project could be of a lesser voltage, but with the great difficulty TEP has been incurring on the proposed project, anything of a lesser capacity will be only short-term in nature and would be sacrificing the long-term growth potential for the region.

Mr. RENZI. Mr. Mackey, you may present your testimony.

**STATEMENT OF BILL MACKEY, GRANITE CONSTRUCTION  
INCORPORATED, TUCSON, ARIZONA**

Mr. MACKEY. Congressman Renzi and Members of the House Task Force, my name is Bill Mackey. I'm a Plant Manager at the Arizona Branch for Granite Constitution Company. I'm not a professional advocate or association representative.

Rather, I am a practitioner, a constituent, a Native Arizonan. I am an employee at my company with responsibilities that include managing through the NEPA process and insuring compliance here in Arizona. I would like to start by thanking you for your leadership and commitment to improving the NEPA process, and am pleased to be here to share my views on where the process could be improved.

The purpose of people is important, and there are many valuable and capable employees administering NEPA. It is my understanding that the intent of this hearing is to discuss improving this process. Based on Granite Construction's experience with the entitlement of both hard rock and sand and gravel operations throughout the western United States, there are five primary concerns with the NEPA review process that I would like to see addressed by this Task Force.

The first is endless data requirements. Often we are asked to provide what seems to be a never-ending amount of data, even after the review of existing data has been deemed complete by the involved agencies. There appears to be little adherence to the timeframes for data submission, little coordination and understanding of policy from office to office and employee to employee which results in needless additional studies, wasteful litigation, and devouring enormous amounts of money. To address this concern, we rec-

ommend that the NEPA process have a clear end point to the level of data review and the studies undertaken.

Second, focus on the purpose of the review. Often there appears to be alternative agendas based on a personal bias of a regulator relative to specific industries, rather than to a proposed project and the purpose and/or intent of the act. We would recommend that the NEPA review remain focused on project purpose, rather than unreasonable alternative analysis. Only those alternatives that are truly practical, feasible and consistent with the project's underlying purpose, should be analyzed.

Third, staff experience. There is just no substitute for experience. Staff understanding of a project site and the environment is crucial to determining what is appropriate and what is not. A lack of understanding and/or continuity on the part of the agency staff leads to a considerable amount of time and energy spent educating the staff onsite-specific issues, in addition to the activities being proposed. We suggest that improving staff retention and expertise would result in less time being spent on education and a more rational analysis of impacts to be implemented.

Fourth, deferral to appropriate state agencies. When a Federal non-lead agency defers the mitigation requirements to a State or local agency, this is concurrent and should be considered adequate for the Federal review. State and local agencies often have the personnel, expertise and experience to address local concerns. Duplicative reviews are unnecessary and reap no benefit to the environment or the process of the review. Unfortunately, the process allows opponents of the process to force these duplicative reviews even after a project has been approved. We suggest that the project opponents not be allowed to derail the process and force concurring non-lead agencies to conduct separate duplicative reviews after a project has been approved.

And, finally, lawsuit participation and settlement agreements. Any settlement discussions and agreements need to include the State and local project owners, as well as the contractors and businesses involved. We propose that the lead Federal agency not be allowed to enter into lawsuit settlements that forbid or severely limit NEPA permitting for businesses that were not part of the initial lawsuit.

In conclusion, the intent of NEPA is to ensure protection of the environment and its resources. Granite Construction Company fully supports this intent. Unfortunately, due the factors I've highlighted today, the process is not working. There will be individuals and organizations that wish to disrupt and cease any activity anywhere, and will use any means necessary to achieve their goal including derailing the NEPA process.

It is my opinion that with focused efforts, the intent of NEPA can be reestablished and industry can proceed forward in a more positive and productive manner, and I thank you for your leadership and commitment to make that happen.

Mr. RENZI. Mr. Mackey, thank you so very much.

I want to thank all of you for taking the time for the substance of your participation and your discussion and your testimony today. A lot of it very, very compelling. We're going to go to a round—a first round here where each of my colleagues and I will have five



minutes to ask questions. We will probably go through a number of rounds to flush some of this out. I hope you will endure with us, and we'll begin with Congressman Pearce.

Mr. PEARCE. Thank you, Mr. Chairman, and thank you all for your testimony. I see the testimony is quite broad and five minutes of time is allowed, and all of that goes into the record and is then presented to the Committee back in Washington. The testimony is to me just indicates the—how we have apply the mantra of the Federal Government in Washington, and the mantra is if it ain't broke, fix it till it is, and it don't get much funnier than that. So we've done that. We've fixed it so it is broke good.

Mr. Chairman, I would like to submit a chart. For the record, that indicates the number of appeals and how they are increasing progressively from the years 1995 to 2001, and how the associated board feet in timber that is cut out of our national forest has decreased and the same chart.

I'm going to just show that larger chart on the board.

Let me explain a little bit about how serious the problem is. We were engaged in a discussion of trying to capture the timber harvest from a fire-burned area in New Mexico, and we had the Forest Service there visiting with us, and these were regional foresters. The two regional foresters were there, and we asked them if we they could cut the timber, and they said, well, they could, and we asked them the value of the timber that was going to be cut, and they him-hawed around and actually said that they did not know the value of that timber.

I got out my calculator and asked them about the cost of a board foot and I asked them about the amount of timber board feet in there, and so I worked my calculator and I said, "It looks to me about 57,000-dollars worth of timber would be cut," and they said, "Well, that is approximately correct," and I said, "What would it take to get that done," meaning what do you need in the way of regulations, and the answer was it will take 13 million dollars. I said, "It will take 13 million dollars in appropriation to cut 57,000-dollars worth of timber," and he verified that was exactly right, and that is where we have gone so wrong in our agencies, and it's not people in the field. These are the mid-level to upper-level supervisors that are driving these kind of processes.

Mr. Lynch, I have noticed that you talked a lot about the delay, and it's a recurring theme through the presentation today. Is there any cost to the litigants who caused the delay if they file an action, or is there any cost to them at all, or is all the cost born by the Federal Government, and that is these people sitting in the audience, our taxes, and the people at the table.

Mr. LYNCH. Generally speaking, Plaintiffs in NEPA actions are not subject to claims for attorneys fees and costs, if that's what you're talking about. There have been some attempts in the past to address that subject, but they have been unsuccessful.

Mr. PEARCE. Maybe you mentioned the cost of the EIS running 20 million and the Government agency you quoted in your paper was something to the effect, first, that the Federal Government thought that was good, that it cost 20 million dollars to get this done, and the other side really doesn't have a cost associated with it, so we can use the law in any way that you would without

having risk, without any accountability. Am I perceiving that correctly?

Mr. LYNCH. On Federal projects, the costs are largely born by the taxpayers, or if there is an applicant, because there is permission involved and often a guarantee. Mr. Beck can tell you about or already told you about the costs of the Tucson Nogales line being built, but those costs are generally born by the permittee, and they are substantial.

I'll give you an example in my testimony. I was personally involved and still personally involved in the studies that are ongoing, studies ongoing on the Glen Canyon Dam criteria for the power operations. That environmental impact statement cost over 100 million dollars. Not my figures. Figures in the community record. They were from the Bureau of Reclamation.

There is no cost accountability in this program. It was never designed that way, and these costs are either born by the applicants because they need permission from the Government to do something, or they are born by the taxpayer.

Mr. PEARCE. Mr. Chairman, I see my light is red. I do the same thing with these lights that I do downtown. When I see a green light, I drive, and when I see a yellow light, I speed up. When I see—the chart there, before you go back to my time as Chairman, shows an increasing level on the top half of the chart the number of appeals that are filed, and then decreasing revenue from production or timber production, and you keep in mind that's not just a decrease of timber production. It is a decrease in jobs, a decrease in tax revenues. It's a decrease all the way around. So many times people complain about the deficits and problems we're having paying bills from the National Government, but if you went from one agency to the next, you will see how those revenues have decreased almost exactly in that same way.

Thank you, Mr. Chairman, and I look forward to the second round of questions, if we get there.

Mr. RENZI. Congresswoman Drake.

Mrs. DRAKE. Thank you. I thank you all for your testimony. You certainly have raised many, many questions in all of our minds, and you probably saw us taking notes. I want you to know that Congressman Pearce's pencil is a nub. He has no lead left. I was going to loan him mine, but I want to keep it.

If we could go back to the other chart, and I would like to thank you, Ms. Struhsacker, for bringing that first chart, and Joanna, if you could, take it down, because I think what that really shows us is what was the original intent of NEPA, and my understand from what I've read and what I've heard is the intent was to make sure that all of the agencies got to look at what was being proposed, make sure there wasn't a better way to do it, look at alternate ways to do something, and now as soon as that comes down, you see all of the new laws that are replaced, and I'm wondering why with NEPA—and I still think there is a need for NEPA to make sure we have that interaction of all of the agencies, but I would agree with something that several of you have said, which is that there should be State and local involvement, not just a Federal agency input into that decision. But with all of these other laws over that 20-year period that are now in place, why would you be

able to sue under NEPA instead of being able to sue under violating the requirements of one those other laws?

Ms. STRUHSACKER. Well, that's a very good question, because often the projects that are appealed under NEPA can demonstrably comply with all of the very substantial requirements to protect the environment that all of the rest of these laws require. So often when a project is appealed under NEPA, it's not because it can't meet the requirements of the Clean Water Act or the Clean Air Act or the law to protect wildlife and Endangered Species Act. It is because there are opportunities within the NEPA process itself, because keep in mind that's a procedure that allows people to kind of go, "Got you," and take advantage of those procedural issues to try to stop the project.

Mrs. DRAKE. When they failed everywhere else, this is the catch all.

Ms. STRUHSACKER. They don't have to fail everywhere else because this is such a powerful tool for them.

Mrs. DRAKE. They just have the ability under one of the other laws.

Ms. STRUHSACKER. Well, all of those other laws have appeal procedures, as well, but those procedures are very much focused on whether or not an activity complies with the environmental protection mandate, and the project does, so there's no low-hanging fruit for somebody who wants to stop a project, to try to go after it under the Clean Water Act, when they can demonstrate that the project will meet the requirements of that Act. But under NEPA, there is a lot of opportunity to try to obstruct the projects and appeal projects.

One of the reasons that Federal land managers are often put in a position of asking for more and more data, we heard of that from a couple of panelists, is, I believe, in an attempt to try to make their documents more bulletproof against appeal, and I think we have to put ourselves in the shoes of some of our Federal land managers and regulators who are charged with doing the NEPA process. I mean, this NEPA process—this porcupine has been dropped in their lap and it's a difficult thing for them to get their arms around, and many of them do the best they can in some really difficult circumstances, and they have to try to accommodate voices from many sectors, and some of those voices are awfully shrill, and they don't like to have their decisions challenged. So it's kind of a defense mechanism from them in trying to gird up the documents, and there's this concept that maybe more is better, and typically that is not the case, because it's the process itself that engenders the appeal and not the substance of the document or the science.

Mrs. DRAKE. Well, another thing, too. In any reform, it should also include something that all of you said, which is we should look at types of impact if we don't do this project, such as with Ms. Craft and the cars sitting there and idling and the air quality, and we should really be looking at the local and State impact.

Because, Ms. Craft, with your situation, weren't the citizens of Las Vegas in support of doing that road construction.

Ms. CRAFT. It is my understanding, yes, that they were.

I believe so, because if you talk to anyone out there, they will tell you, "We need some changes in the lanes that are going on this U.S. 95." It becomes a parking lot, literally.

Mrs. DRAKE. One of the things I've asked the Committee in other hearings is, I don't think if we were building our interstate highway system today instead of the 1950s, we would never be able to build that road under these rules, and thank God President Eisenhower was visionary and we built it then.

But the same thing with you, Mr. Beck, the citizens there wanted this power line in place.

Mr. BECK. Yes.

Mrs. DRAKE. Do you think you will ever get it.

Mr. BECK. Well, what's very interesting is that when we started our State process in siting, there was direct public involvement in the hearings, and the public recognized a need for the project, and they also recognized their interests in pushing the project to the western corridor, and that was in their real interest. So they strongly supported the western corridor to the State Siting Committee.

When we got into the EIS public hearings, the same public that pushed for the western route appears now to have been convinced that, through the EIS process and NEPA, they can prevent that project from being built, period, and because for reliability reasons, their lights have been relatively stable recently, they don't see a big need for it. They don't realize we're on the edge of a cliff in that area.

Mrs. DRAKE. And then it's too late.

Mr. BECK. Yes.

Mrs. DRAKE. Thank you, Mr. Chairman. That's all I've got for this round.

Mr. RENZI. Thank you, Congresswoman. I want to pose my question to Mr. Matson and Mr. Lynch. You remember the time that we voted in compliance with the Forest Health Initiative. We voted and this Committee passed language which says if a judge issues a court injunction which stops a thinning project in the forest, that that judge must hear and review his own injunction within 45 days.

We went to the Senate side and the Senate wanted 90 days, and we compromised on the Forest Health Initiative and we're at 60 days now on the compromise. We talk about the judicial review process. Where within the NEPA process would you like to see a timeframe, or what type of a review process would you suggest so that if there is an injunction put in place, or an extension put in place, that judge himself must review his own holding within a certain amount of time.

Mr. MATSON. I think initially the first place to start is prior to the judicial reviews with regard to the agency review of regulations, and it passes that point in time so it could move far enough along in the lawsuit so the parties that have a stake in the investment process have to pony up, and I would like to see that occurring as rapidly as possible.

Mr. RENZI. When you say pony up, what does that mean.

Mr. MATSON. That means get prepared and get in front of the judge and prove your case.

Mr. RENZI. OK. So the environmental group that is involved—first of all, a lot of you feel that the group has to be involved with the process to be able to litigate, is that correct, so if they're not involved in the meeting and are just sitting on the sidelines waiting for the process to complete itself and throw a bomb in there, a lawsuit, they would be excluded and they wouldn't have jurisdiction in the Court and, second, if they do participate in the NEPA analysis, then go ahead, you're saying.

Mr. MATSON. Then I think timing becomes really quite important, but I think just a step above that, we would be just exactly sideways and backwards, and ultimately we get to the question of how many angels can dance on the head of a pin, and you can never answer that question.

Mr. RENZI. So if they are not willing participate in the process from the beginning where the rancher has been involved, and now they drop the lawsuit, and you're saying we should give a certain amount of time to file that litigation.

Mr. MATSON. To get it filed, and at the same time narrow the field with which the time to which questions and issues can be raised about it.

Mr. RENZI. If it hasn't been brought in review and analysis and in the process, it's moot in Court.

Mr. MATSON. And the analysis is really about disclosure, not about habitat and impact.

Mr. RENZI. Mr. Lynch, any follow-up.

Mr. LYNCH. Yes. Mr. Renzi, I would think that it would be helpful to review some of the laws for this, in addition to the restrictions in the Healthy Forests Act in 2003, the Airport Act, also, and put in place a number of mechanisms that. For instance, to name a Secretary of Transportation to cite what the alternatives were, and to have that be binding and not judicially reviewed, because, frankly, the airports weren't getting built, it was just that simple. This goes back to 1973. I commend the Trans-Alaskan pipeline legislation, which addressed restrictions on judicial review, proved the environmental impact statement that was written for the Trans-Alaskan pipeline which was five volumes—seven volume opinions, and a room full of documents in the Department of Interior. I know it was litigated.

There are mechanisms for doing this, and there are pieces of these mechanisms in the 1973 Act and pieces of them in two Acts that were passed in 2003, but the key elements to cutting down timeframe are putting sideboards on alternatives. One of the greatest facts in all of this is, well, what's the purpose and need for the project. Well, that determines what are, quote, reasonable alternatives, close quote. But you can get sand-bagged by this law, as apparently some of us have, because there is nothing in it that says that you can't bring alternatives up, and everything is done, so there are a number of mechanisms that can work on this, and I commend it, and Congress dealt with this specifically in a few of these instances, and we need to pull it off again.

Mr. RENZI. I appreciate it.

Ms. Struhsacker, I ran for Congress a couple years ago, and I ran with a background in insurance and I used to be bonded, and I know what a financial guarantee bond is, and we went to the Com-

mittee, Steve and I, and Jeff Flake up in the Snowflake area. I introduced an amendment to the Forest Health Initiative that said that an environmental group would have to participate in the process, and that if they brought the lawsuit, they would have to post a bond. Our group—our bond group came back to me and said, “Look we’ve done an analysis on the bond cost in the insurance marketplace and it’s very hard to buy a financial guarantee bond. You have to go to Lloyds of London to get them. They cost millions of dollars, which I thought was a good thing, and, second, the idea would be if they couldn’t get one, it seemed to me that it is unconstitutional to their right to due process, and I would just like to hear your comments on that push-back I got from the environmental community.

Ms. STRUHSACKER. Well, I suspect you would get a push-back if the Task Force were to try to do something similar, but we offer that suggestion as a way to try to underscore the importance of changing this appeal process to a stakeholder process, because we don’t think it makes sense for somebody who, you know, for the cost of a stamp, who perhaps has never been to Arizona, to be able to obstruct a project that a local Arizona community needs and wants, and maybe the bond isn’t the best way, but right now it is a zero-sum game for anybody who wants to try to use the NEPA process to obstruct or stop and delay projects on Federal land.

Mr. RENZI. Thank you.

Congressman Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. We’ll just work our way down the panel again, and these questions would be for Mr. Hutchinson and Mr. Matson, and I’ll start with Mr. Matson. I was in Ruidoso last week talking to rural ranch co-ops, and I had a gentleman from the Rio Arriba area come up and say, “You know, my family used to haul pulp wood out of the forest, and we made a living. For 40 years, we’ve done that, and our culture in the Northern part of the State is just being wiped out because the Forest Service won’t let us go in and cut pulp wood,” and I didn’t know if I believed him.

I see on page 2 of your testimony that we had 800 families basically put out of business, and they were taking the small diameter trees, and that’s the one causing problems today and the ones that burn and providing the mechanism for the fires to get up to the caps and cause the crown fires that kill our big trees, and your testimony is that people are being told that there was no pulp wood left or no pulp wood available.

Why is the Forest Service not allowing people to come in and pay for that? Instead, they’re paying 400 to \$1200.00 an acre for people to cut it, when we used to get paid—the Federal Government was paid for this pulp wood. Have you ever made any sense of why we’re doing this.

Mr. MATSON. I think parts of this go right back to what we’re required to do under the NEPA policy, and let me give you an example just on fuel wood. On personal use, there’s no requirement for NEPA analysis. If it comes to a commercial outfit, which most of this pulp wood was for commercial operators, it has to go through NEPA. And in NEPA, you get caught up in an endless battle ad-

dressing NEPA priorities, so, in essence, we have created this ourselves.

Mr. PEARCE. We've created it ourselves and are doing it to ourselves, and I think that's the reason we're having these hearings. When we can get paid for it, and instead are paying 400 to \$1200.00 an acre, I think most Americans would say that is B.S. There's nothing wrong with B.S., don't get me wrong.

Mr. MATSON. I'll tell you, I have to point out we've thrown away an industry that had the capability and capacity to pay its way, and now have to subsidize it with Treasury dollars.

Mr. PEARCE. Thank you. Back to the B.S. of the day, if it hadn't been for Dan Rather, none of us would have ever known what B.S. and CBS had in common.

Mr. Hutchinson, it has been mentioned that local governments would be excluded out of the process, and anyone wanting to talk about the flaws in the process, both in implementation and accountability. Can you discuss how you would approach solving those problems of accountability? How can we get accountability and implementation in the process.

Mr. HUTCHINSON. The Counties have sought out assistance from the State Universities and private consulting firms,.

Mr. Chairman, and it becomes interesting to see the contrast between the quality of the analysis that is conducted by Ph.D.s at the University level, versus people with maybe Bachelor's degrees at the Federal agency levels. I think that that analysis is higher quality, the data is more readily available to those individuals, and another thing is the time factor. They are able to complete those analyses in much more compressed timeframes, so when I talk about, you know, having some other entity do the analysis, you take that reverse incentive for the agency to decide on an action, and then craft a NEPA document to conform with their bias or preconceived of an idea.

Mr. PEARCE. I see my time is about to expire, Mr. Chairman. I would note that our office last year was the prime sponsor on a Bill that would have done exactly that, and the New Mexico State University left the State in charge of these studies, and with those highly qualified people, we've got a backlog, and many times delays and backlogs.

I would not mind it if you all—if you get a chance to e-mail us a response or your opinions about that, and I'll re-introduce that piece of legislation, and we'll ask for your—if you would e-mail me to the Committee or to my office, and we'll consider that again.

Thank you, Mr. Chairman, and I have no more questions.

Mr. RENZI. Congressman Pearce, thank you.

Congresswoman Drake.

Mrs. DRAKE. Thank you, Congressman Renzi. Ms. Poppie, as someone who has experienced in a different way what you did with the Federal Government and you expressed how you felt you had been stabbed in the back, I certainly have been a victim of some imminent domain, and I know that feeling of fighting your own Government is one the most lonely, disheartening places to be, and I want you to know we heard that very loud and clear how you felt, and I understand how you felt.

But it sounded to me from your testimony that the Forest Service completely discounted the alternative and things that you had done to show that there was an alternative, and I'm wondering from your perspective what you think that type of agency action would have on public participation in the future.

Ms. POPPIE. There were four alternatives, and like the first two would be there would be no cattle on the ranch. The third was sort of a compromise between the permitted number that I paid for, and the fourth was that I would be afforded the permit number. So I'm sorry. So—

Mrs. DRAKE. No, but I thought from what you said, they really didn't listen to all of the things that you had done and your efforts in making their decisions, and it was completely discounted. Maybe I misunderstood. The question deals with why would the public want to go through that in the future, you know, if they feel they are not going to be listened to.

Ms. POPPIE. And that's a good question. Since I purchased the ranch, I am kind of under a microscope there and have been for two years. There are some people in the Forest Service that are listening and are trying to help, but they have to answer to the Fish and Wildlife, that has to answer to NEPA. They have to answer to a lot of other entities, and so at this point we have I think very honest people in our district and in the Forest Service, and I think they are listening and they are trying, but they are spread thin. They're having to go in a lot of different directions. So it's hard for them to go with their feeling about what they think is best.

Mrs. DRAKE. Thank you.

Mr. LYNCH, one of the things I had noticed from reading what we had, there really wasn't a clear direction of who was in charge, and maybe out here it may be forestry, and maybe in our area it may be CEQ, and that was one of your statements, that no one was directly in charge and you suggested that CEQ might be the ones that have to be, but part of my question is do you think that would solve some of the problems and lessen some of the delays, and do you think there should be a process in place to make sure that all the proper agencies are notified in the beginning? I can tell you, on the way here in the airport when someone realized where I was going, they told me about an instance in Louisiana where the whole process was done, the project was started, and then the Army Corps of Engineers came in and stopped the project, saying it was navigable waters, where it's nowhere near navigable waters, but I just wondered from your perspective if you think that would help stop delays, and it would also act as a collector for agencies involved so you don't have an agency coming in later and saying, "We have a stake in this," if they truly don't have a stake in the inception.

Mr. LYNCH. Well, Mrs. Drake, two questions, two answers.

Mrs. DRAKE. Please do.

Ms. LYNCH. First of all, there isn't anybody in charge. NEPA is a command to all agencies, and that's why all the agencies have their separate regulations, and when the CEQ came out with their guidelines in 1971, they made orders to do that, they got bootstrapped with the executive order, but there was enough confusion to go around to fill this room. People just didn't know how to



react to this law, and nothing has changed. The CEQ regulations, if you really believe they are, they've never been given that authority by the Supreme Court of the United States and they can say whatever they want.

The lack of local government, Mr. Hutchinson brought up, local government not being consulted in 1999, CEQ got involved with you guys—I don't know if it was you. It hadn't happened because they're not in charge. They are advisory, even though they have regulations, you know, in the Code of Federal Regulations.

The other question relates to who is the lead agency, who is in charge, and who is making decisions, and can it stick. The Aviation Act I referred to has done the best job I think so far of delegating two officers in the executive branch to making the decisions about alternatives to a proposal and telling the rest of the agencies to get in line.

And if Congress doesn't do that, it won't happen, and you did it just with the Aviation Act, it is an element that is there. I wish it was in the Forest Act, but it isn't. Those are the kinds of constructs you need to look at, and you need to get to a certain entity in the initial decisionmaking.

Mrs. DRAKE. And, Mr. Chairman, just one last question. I know my time is up. But you mention the Supreme Court with regard to CEQ. Don't you think it would be better for Congress to give CEQ—not wait for the Supreme Court. I think we should make the rules.

Mr. LYNCH. Well, somebody needs to be in charge. The way CEQ is currently constructed, I'm not sure how happy I would be about that. I think we have to look at how it functioned as possibly an agency, which it is not. But that is a whole another hearing.

Mrs. DRAKE. Who is in charge is something we need to answer. Thank you, Mr. Chairman.

Mr. RENZI. Mr. Hutchinson, I want to thank you for your written testimony, and I read it, and I want to also thank you for making reference to Mt. Graham, the scopes up there and your knowledge of what they went through. Millions and millions of dollars and years of years of NEPA to the point where we were so bogged down, that Congress and forest managers and everyone involved, didn't even know where we were in the process, and we essentially had to exempt and make a law to set NEPA aside and allow the scopes to be built, which the end result, some of the studies of the light and laser technology have gone to introduce medical breakthroughs in cancer, so I want to thank you for putting that in.

And, also, I also notice you wrote a piece in your written testimony about a rancher down in Southern Arizona who was subject, I think, with litigation between the Center for Biological Diversity, who decided not to come today. Can you tell me about that? Did the Center ever pay up?

Mr. HUTCHINSON. You're referring to Mr. Jim Chilton who filed a suit against the Center for libel and slander.

Mr. RENZI. Correct.

Mr. HUTCHINSON. But they did appeal the decision back to the Judge for the Judge to give oversight to the jury's decision, and the Judge just came back here in the last couple of weeks with his de-

cision, that he was not going to overturn the 100,000-dollar judgment and the 500,000-dollar punitive judgment, as well.

Mr. RENZI. And you've used that story to make a point in your testimony, which you also—I picked up in your public comments, which is you feel there is a real link between the Federal agency personnel and the defendants.

Mr. HUTCHINSON. The testimony at that trial and in the disclosure showed that there were people who were making financial contributions to the Center for Biological Diversity and who were listed in their membership who were also Federal agency personnel doing the environmental review on Mr. Chilton's allotment, so those same individuals had spouses working in a separate Federal agency that would then take the analysis done by the other spouse and write concurrence documents.

Mr. RENZI. What happened to the Federal agency—to those persons.

Mr. HUTCHINSON. Nothing.

Mr. RENZI. Do you think there should have been a penalty where an agency personnel failed to act just like a Congressman or Congresswoman with a conflict.

Mr. HUTCHINSON. Mr. Chairman, the last time I brought this up in testimony before Congress, there was an attempt by a former Representative to have that information disclosed from Federal agencies in the Southwest and was met by severe repercussions out of the press demanding—

Mr. RENZI. We've been able to pass a law that if an IRS agent misuses his power or misuses his authority, that he can now be held personally responsible, given how many Americans in the past were borated, mistreated, and how that power ultimately corrupted the Federal agency personnel, including the IRS.

One of the things we're interested in doing is taking that statute and bringing it over as it relates to some of our agency personnel who maybe have an agenda or misuse their authority in mistreatment of cattle people or timber people, and I believe that we need to look into incorporating that kind of language into NEPA.

Mr. HUTCHINSON. It would be nice to see that.

Mr. RENZI. Congressman Pearce.

Mr. PEARCE. Mr. Chairman, I want to—and I don't know if you're aware, but the last two years, a Federal Judge enacted for the first time a lawsuit to move forward using the RICO Statutes and claims of racketeering between Federal employees and those who were almost exploiting settlements.

One example of that sort of exploitation was here in Arizona.

I was flying a helicopter across the Central Arizona Project a couple years ago, and they showed me one of the areas they wanted to repair the dam, so they let the water down to the next system, and while the lake bed was dry, some bird put a nest out in the middle, and so a lawsuit was filed, and in order to get the lawsuit dropped by one of the extreme groups, the Central Arizona Project, I think, made a contribution in the amount of 25 million into some project, or something, and that is not an unusual thing to hear in testimony, that, "Yes, we know it's not your problem, but if you contribute to this environmental project over here, it would go a lot easier on you in the regulatory phase over there."

So in Wyoming, a Federal Judge for the first time ever is allowing those processes to move forward as racketeering, so there should be judicial relief. I will come back to you, Ms. Poppie, hopefully. I really appreciate your testimony as I listen to the fact that you got a well done good job as a permittee, and by the way, that your cows had this happen, it just tears at my heart, because Catron County has especially been affected.

The AUMs in Catron County have declined something like say 200,000 units. These are one of the sources of taxation that that County had, so what we're doing is putting tremendous pressures on our Counties, as well as the individual ranchers, so that two years ago, we as an office took a lead role in the case with Kit Laney and the fact that the Forest Service wanted to put him in jail for 68 years for grazing violations, and we were addressing that and went into one staff meeting, and one of our staff who was dealing with it just got emotional, and the rest of the staff said, "What—why are you being emotional," and he said, "We're the last—we're the last protection in this family losing everything that they have had for generations, it just—they are losing it and the guy's going to go to jail for 68 years over grazing."

And to see that you bought in good faith a ranch that had approximately 400 units, and then how out of the blue with no science or no nothing, they tell you they're going to change it to 200, what have—what is the status of that today.

What is—and what did they say? What did they say when you told them that, "I might lose my ranch over this".

Ms. POPPIE. The status, Congressman, is at this point I'm still under the microscope and I have no idea. I've heard there's been a change in the District level, and I just put in six months hospital time, so it was my only vacation from this, and so when I come back to the ranch and I'm working it again, and I do not know at this point. I'm sorry about that.

Mr. PEARCE. Have you gotten any rain in the last year?

Ms. POPPIE. Pardon?

Mr. PEARCE. Have you had any rain over the last year?

Ms. POPPIE. I had a lot of rain. The grass is wonderful. I have 43 stock tanks. They are all full, and the ranch is beautiful. It's incredible.

Mr. PEARCE. What's the elk herd doing this season?

Ms. POPPIE. It's—when I first purchased the ranch, I saw like 20 or 30 head of elk, and this year I've seen 100, and the deer increased a lot. During the drought, everything dies. The birds and everything dies, and now everything is coming back stronger than when I purchased the ranch.

Mr. PEARCE. The Forest Service is willing to limit the economic activity that would support the County Government, but they're not willing to limit the wildlife.

Ms. POPPIE. I have no opposition to the wildlife myself. They're not knocking down my fences, and, you know, that's the main thing. I feel like I have plenty of feed to feed the wildlife plus my cattle.

Mr. PEARCE. And you were prohibited from putting out feed sources.

Ms. POPPIE. That was during the drought. They said—I believe their reason for not allowing me to take feed up is you might introduce some seed out of some hay or pellets, or something, that would be foreign to the environment. Protein blocks, there was absolutely no reason for them not allowing that. Finally, they said, “OK, if you hide them behind pushes and they’re not in any containers,” and by that time it was too late and the cattle were too weak to drive down to the deeded land where I could feed them.

Mr. PEARCE. I think that’s going to be the story of our national economy. We’re going to keep fiddling around with things like this, and the communicative effect is going to put us in a position where we’re too weak to make a difference.

Our office will continue to work with you.

This is distressing when we see individuals who have to take a vacation from fighting with their own Governments. Thank you for your testimony.

Mr. RENZI. Thank you, Congressman Pearce.  
Congresswoman Drake.

Mrs. DRAKE. Thank you. Mr. Mackey, in your experience, have you seen any construction projects that have been delayed by NEPA, and if so, what was that specific delay and what was the impact of that delay.

Mr. MACKEY. We’ve seen delays. Like Ms. Craft, we base our business plan on State and local agencies and transportation budgets. Specifically, the city of Tucson had a pavement preservation project that was delayed over a year and a half, and it’s just an overlay of a road within a metropolitan area, because they couldn’t get the EA approved. And so what that translates to, we’ve got poor condition roads. For a material supplier like ourselves, a loss of jobs. It affects our business plan, creates economic hardship, but there’s also increases to the costs of materials, and by the time the project finally comes around, the costs have increased, and if it’s over the engineer’s estimate, it still may not get filled.

Mrs. DRAKE. So do you have specific figures of how many people you haven’t been employing that you could be employing on some of these projects.

Mr. MACKEY. I don’t have those specific numbers, but I would be happy to follow-up with you on that.

Mrs. DRAKE. Because one of the goals of this Task Force is to see how NEPA is impacting our business community, and so the same question, of course, would go to Ms. Craft, what those specific impacts have been on their business, that here you thought you were building a road, and then four years down the road, there’s a lawsuit and you’ve already started, and you must have paid for materials. Were you compensated for what you’ve done so far, or has that just been a big loss to your company, as well as a loss to your community because of the loss of jobs.

Mrs. CRAFT. I would not be able to answer that at this point, but I could get back to you on that because I do not have specifics as to what was lost. I do know the materials were being on hold. I do know that. And the costs of just maintaining that, you know, so having to lay off people for—who were already hired for positions, and that has an impact on us.

Mrs. DRAKE. The same thing with you, Mr. Beck. First of all, is there any work being done on this project now, even though your company has spent 11 million dollars on this particular project.

Mr. BECK. We're in the process of doing some more work with the State Commission. The State Commission would be reopening their siting hearing process, probably around the first of the year, and the hope is that the Forest Service will actually show up and participate and give their input, but I know the staff of the commission at this point feels that they did the local public input process, and in the best interest of the State of Arizona, the project was put in the right place, and the State's Siting Committee is vested with the obligation weighing public need versus environmental impact.

Mrs. DRAKE. And, sir, is there any evidence or any figures as to what the loss is to the County by not having this project moving forward? Have they stopped economic development on the project because they can't provide utilities, or are there other impacts to other companies that would have been working on this project, as well, not just you.

Mr. BECK. Again, we can follow-up with some figures, but as far as the local area, recently we did have extended outages for five hours to some customers that occurred over the recent holiday. The Border Patrol has a jail facility right at the border, and they were without power for an hour, and we were very concerned about that issue. Communications within the city of Nogales were out for about an hour.

Mrs. DRAKE. And those outages aren't storm-related; they are simply you can't provide the power.

Mr. BECK. No. This specific outage was storm-related because there was one line serving them.

Mrs. DRAKE. Thank you.

Thank you, Mr. Chairman.

Mr. RENZI. Mr. Matson, if you don't mind, you were kind enough to give testimony when you talk about the Rodeo-Chediski, and you also mention how the White River Apaches were able to get in there and salvage a lot of their wood, particularly before the core of the tree was rotted out and it was a blue dye effect. We were worried about the timing issue. We were worried about burnt trees and bark beetle at the time.

I was with President Bush when we flew over the Tucson fire and we were talking about this, and I said, "Look, you just got to go in and do a categorical exclusion on this Rodeo-Chediski and let us get in there and do the salvage operation." We were getting categorical exclusions along the roadways, the campgrounds, and I think along some of the corridors, the utility corridors, where we got categorical exclusions, and here we are years afterwards, and it rotted and it went to waste.

There is a doctor down in Payson who thinks there's a possibility that we need to be careful with the airborne particles of these rotting trees, that mass of the rotting trees, what kind of respiratory effects it may have, which is down-wind to my neighbors in New Mexico.

All that said, what specifically could be done to NEPA, looking at the lessons learned from Rodeo-Chediski? What should we

change specifically in NEPA to say if we have catastrophic landscape-size fire, which obviously is what is going to occur, to get in there and salvage.

Mr. MATSON. Well, we don't have within the Federal Government an extensive type of process for restoration, particularly from an erosion standpoint. The thing that is missing is the point you just mentioned; what to do about the treatable values within a time-frame and take advantage of that and also get some of this work done.

The industry must provide restoration back on the ground, but I think it really gets down to dealing with the environmental perception that people seem to have, that if it is burned, why go ahead and damage it further by logging it, which is completely absurd. As far as being able to utilize the materials, I think if we get into a fire or insect-killed area within a year of the event, it has enough commercial value to bear its own cost to take care the restoration part of it.

Mr. RENZI. A post Rodeo-Chediski, what is the mechanism? You say you have to do an EA? Can you go full-blown CE? How do you get the guys in the woods.

Mr. MATSON. I think full-blown CE is probably the more appropriate thing to do. What is more devastating than a damn fire.

Mr. MATSON. I couldn't have said it better.

Mr. HUTCHINSON. Mr. Chairman, may I address that issue.

Mr. RENZI. You may.

Mr. HUTCHINSON. When a local government or a State makes a declaration of emergency, there should be serious consideration for suspension of NEPA requirements, and that would be a situation that you're talking about. Under a declaration of emergency, the Counties and the State Government should be able to go in there and take care of it.

Mr. RENZI. This country—there has been so many NEPA studies that are already done, we already know where some of the real sensitive prehistoric sites are, some of the archeological sites are. In those areas, I understand you—maybe you don't automatically go in there, and when you take a tree, you don't take it all out. You cut it so it can help with erosion, and leave some in the canyon walls so it can hold it together and put nutrients back in the soil. All of that could be done with a comprehensive, stable, holistic approach to the environment, but not allowing us in there, as you said, Mr. Matson, within a year, it turned out to be sad. It really is.

Mr. Lynch, you had a follow-up?

Mr. LYNCH. If I might just briefly. I would take this in a different direction. Categorical exclusions are there to say this action is not going to have a level of environmental impact that requires scrutiny through the NEPA process. What you're talking about here are emergencies, and the only place where that subject is addressed at all is in this little tiny section CEQ has, CFR Section 1506.11, and it doesn't say much. It hasn't been litigated much, and the real problem is that it doesn't say much.

Now, if the President declares an emergency, the Stafford Act is kicked in for relief or other similar things are allowed. Those are thought to be handled under a provision in NEPA for emergencies,

not categorical exclusions, because they are going to have environmental impacts.

There needs to be a policy cut, in my view, that you have to make, that when there is a true emergency, we will get things done, and if you want to involve NEPA, you can do it as a programmatic environmental impact statement before the emergency that says—

Mr. RENZI. Does that entity already exist?

Mr. LYNCH. No. You have to do it. This is something you have to do.

Mr. RENZI. Thank you.

Congressman Pearce.

Mr. PEARCE. Thank you.

Ms. Craft, you had mentioned that in 2002—in your testimony, that the Sierra Club filed a lawsuit to stop the Highway 95, and that was dismissed, and then was it dismissed because you all complied with certain actions that were required, or tell me a little bit about the dismissal.

Ms. CRAFT. Mr. Pearce, I would not be able to answer that question at this point because I don't have enough information, but I can get that for you.

Mr. PEARCE. OK. Any time we ask questions, you could always submit a written answer, and that would be useful information.

Ms. Struhsacker, first of all, I appreciate you being one of our women miners. You describe the NEPA process as one of conflict and confrontation. Have you thought about how we can achieve those objectives that the process was intended to achieve without this conflict of confrontation.

Ms. STRUHSACKER. Well, we would offer a couple of suggestions, and one goes back to who are the participants in this dialog and who should have most say in what happens, and we feel that people who are directly affected stake-holders, people who live in and near the community or area where a proposed action is going to take place, their voices should carry more weight in the process, because these people know best what is good for their environment and what is good for their community, and if the NEPA process could have more of a spirit—which I believe Congress very much intended in 1969, but things have gone awry since then, but if there was this concept of what is the greater good here, I do believe we would have a much more civil and constructive dialog in the NEPA process.

Unfortunately, there are those who use the NEPA process just as a tool, a categorical tool to say, "We don't like logging, we don't like ranching, we don't like mining, we don't like transmission lines, we don't like roads," and the list is nearly endless, and their ability, which is almost unfettered at this point in time, to have equal standing in the process as local affected communities, is, we think, the crux of the problem.

There are really no standing criteria in NEPA. Anybody, again for the price of a 37-cent stamp, has NEPA standing. We think if there were a mechanism to place more emphasis on local issues, then the real social and economic impact and benefits of the project could be more properly weighed.

Mr. PEARCE. I believe in your discussion you were describing people who don't want power lines and don't want highways and don't want logging. Can you get a sense for why they would be anti-government, anti-job? I mean, I think it's important for us to understand, and I really don't have a clear idea myself.

Ms. STRUHSACKER. You know, it's probably not appropriate for me to put words in anybody's mouth. I think sometimes people who participate in this process, the postcard type comments that the agencies are sometimes inundated with. Now that there's internet communication capabilities, people almost look at NEPA like a vote, and so you get interest groups that have a campaign out there, and they're trying to get their membership to send online comments to an agency opposing a project, and sometimes a lot of people—maybe it is what we need. They don't understand that these projects can be done in environmentally responsible ways and there are benefits and real needs that these projects address, and some have an ideological predisposition and think that public land should be used for nothing but looking at.

Mr. PEARCE. And I think your comments, along together with Ms. Poppie's comments, that we have really good public servants in the agencies, that they are out trying to do the best thing, but sometimes they run out of time and sometimes they are covered up with comments only from one perspective that makes them think that the whole world is lined up, and so sometimes we are responsible for some of our own problems, that we don't defend our own turf quite as strongly as the other side that would take our turf away from us.

Mr. Chairman, I will yield back and continue working my way down the line.

Mr. RENZI. OK. Thank you, Congressman.  
Congresswoman Drake.

Mrs. DRAKE. Thank you, Mr. Chairman.

Ms. Struhsacker, when we were talking about that before, and certainly we know that NEPA is evaluating a lot of different things, what would happen if their decision—NEPA's decision was not in compliance with any of those other laws? Does that ever happen?

Ms. STRUHSACKER. It can't happen. No. In order for any project to go forward, you have to run the gauntlet of the process that NEPA creates, and you also have to meet all of the environmental protection mandates that apply to your project that are the result of all of these other laws.

Mrs. DRAKE. So who does what first.

Ms. STRUHSACKER. Well, that is sometimes a big problem—a big part of the problem, because there are a number of agencies—let me just speak to what I am most knowledgeable about which is mining projects. If you are trying to develop a mining project on Federal land, you're either dealing with the Bureau of Land Management or the U.S. Forest Service.

They have the principal—typically most mining projects would have principal jurisdiction for doing the NEPA document for the project, but you might also need a permit from the U.S. Army Corps of Engineers under the Clean Water Act. You might also need a permit under the Clean Air Act, or even the EPA, or if you



were in a State that has primacy for the Clean Air Act, you would need a permit from the State. You would need to go through—the Federal land managers would need to do consultation with other Federal agencies like U.S. Fish and Wildlife Service to determine compliance with the Endangered Species Act.

They would have to do consultation with the law that require protection of archeological resources. So they're looking at the Advisory Council on Historic Preservation. So there are a myriad of agencies involved, many of them Federal, and sometimes there are State agencies that have primacy for Federal environmental protection regulations, and then typically the States also have their own mining regulations. They may not participate directly in the NEPA process, but they are around peripherally. So it's a very complex process.

Mrs. DRAKE. But when you're doing a mine, does everything kind of happen overlapping, or do you have to meet all the requirements of each of the other laws before you get that final analysis by NEPA.

Ms. STRUHSACKER. Typically you try to make it dove-tail. You have to be able—again, in the case of a mining project, because we have to meet that litmus standard of we want to prevent unnecessary or undue degradation, our demonstrating that compliance with that standard, is we must demonstrate that we meet the substantive on-the-ground protection standard of the Clean Water Act, the Clean Air Act, Endangered Species Act, and the list goes on, and you try to make it dove-tail, but it's never that simple.

Mrs. DRAKE. I guess I ask if anyone has had an experience where one of these other laws didn't conflict with NEPA, because we had some other testimony in our committees that the Magnuson-Stevens Act about fish. I know you wouldn't know about fish because you do mines, but there seems to be some things that conflict between the two. So has anyone else seen or encountered that.

Mr. Hutchinson.

Mr. HUTCHINSON. Yes. Mr. Chairman, Mrs. Drake, the—in my written testimony I pointed out a situation where a NEPA document actually identified a County-produced alternative as the environmentally preferable alternative and, yet, the Endangered Species Act recovery plan for the Mexican spotted owl trumped that environmentally preferable alternative, so we got through all of the process, the expense of crafting an alternative, having it selected as being the environmentally preferable alternative, and the Endangered Species Act through the recovery plan trumps it.

Mrs. DRAKE. Is there any timeframe that all of these—I'm just wondering, like you just said, you get all the way through and something else trumps it. How far down the road would you be before someone else shows you that after you spent all this money, it is not going to work?

Mr. HUTCHINSON. That particular example was two years down the road.

Mrs. DRAKE. Thank you.

Thank you, Mr. Chairman.

Mr. RENZI. Thank you, Congresswoman.

Ms. Poppie, I was going to ask you about the experience you had with NEPA and the Mexican wolf. If you could briefly describe that

in your testimony. I think you referred to it in your written testimony.

Ms. POPPIE. I've had no direct involvement with the Mexican wolf, except that I've looked out my bedroom window and seen three of them looking at me twice.

Mr. RENZI. Do the cattle growers in New Mexico have a position on NEPA and the Mexican wolf that you would like to present?

Ms. POPPIE. I don't know how much connection there is between NEPA and the cattle growers. I'm sure it's quite vast, but just north of me 30 miles, there have been several cattle killed recently by Mexican wolves. To my knowledge, I have not lost cattle, but when you ranch a big ranch like that, a lot of times you don't know.

Mr. RENZI. Thank you.

Mr. Lynch, I want to go back to the discussion we had earlier about the reforms that I think we should be looking at as far as the initial review process goes. I think you were kind enough to mention in your testimony that NEPA possibly could benefit from a 60-day notice of a lawsuit.

Mr. LYNCH. Yes. That mechanism occurs in the Endangered Species Act. If someone wants to sue the Federal Government, the idea is that the Government is given a warning, if you will, and told what is wrong, and the 60-day letter is not only a warning, but a box, and the lawsuit that follows, if it does follow, can only have things in it that were in the box. So it's a show and tell program, if you will, and you can't sand-bag and come back in with other things.

The idea is to warn the Government at an appropriate time that you believe that they are not complying with this law. I haven't seen a reason why that mechanism wouldn't work with NEPA, and it should come in my view before the record of decision if there's an environmental impact statement that is followed by that decision, before the finding of no significant impact, and just like the people who sue, ought to have been part of the process. We don't very vigorously apply the Administrative Procedure Act, and we should. We should build a record and we should live with it, and so should the people who aren't happy.

I think the mechanism that the Endangered Species Act has for warning people that there are people who are unhappy, and specifically what they're unhappy about, would be a useful tool in this context.

Mr. RENZI. Mr. Matson, do you want to follow-up on the timing of when the trigger of the 60 days would be or any kind of reforms in the process for allowing this.

Mr. MATSON. The timing of that should start early on so the decisionmaker has an idea of what it is that is at issue. I think what was set out to try to accomplish in the first place was identification of public issues, and that's a good place to start.

Mr. RENZI. Almost like a mediation. If you were given enough notice up front, this issue would be litigated, then you take it into mediation.

Mr. MATSON. Not only in relation to that plaintiff, but in relation to other affected parties, as well. If the typical decision has a dispute associated with it, there are other entities that would have a

stake in it, and they need to know without waiting for these lawsuits to blow it up.

Mr. RENZI. I get you. They need to be involved in the process early on. I'm going to go to the last round. I appreciate you hanging in here, and we'll let Congressman Pearce go as long as he wants.

Mr. PEARCE. Thank you, Congressman.

One of my staffers came up and mentioned that the Clean Water Act—and in follow-up to Howard's comments, the Clean Water Act, actually in a flood, the requirements of the Clean Water Act go away, and that's similar to what we were talking about, and it also explains, I guess, why there's no regulation or no upset about rebuilding or repopulating the earth, and is kind of where I got started, and then it goes through the NEPA process.

Mr. Beck, on this one project, who ultimately pays the cost for this delay? Is that something that you can take out of your taxes and get reimbursed by Federal Government?

Mr. BECK. No. It was eventually the customers of the company, it is the company's hope would pay for those costs. There's no guarantee of that. We have to go through a State rate-setting process to determine just and reasonable costs, and so there's the potential that the State could say it wasn't justifiable that you spent 10 million dollars on an EIS process.

Mr. PEARCE. You mention the trimming of trees along the lines and the fact that you were kind of complimented and held up as an example, and all of a sudden, the policy changed. Is this a Federal policy to clear-cut or—

Mr. BECK. As far as utility is concerned, yes. You have to clear-cut underneath your line to eliminate the potential for trees to grow up in the line, causing outages or fires, and it reduces the ability of a fire, if it does come through the area, to damage the lines. That line happens to be about 75 miles east of here.

Mr. PEARCE. We had a similar circumstance. We had a circumstance like that in New Mexico. A tree had fallen over against a line, and the co-op wanted to take it down, and they were not given permission by the Forest Service to take it down. They were not given permission by the Forest Service to take it down, and it sat there and sat there and eventually caused a spark, and it burned almost into Cloudcroft. But, again, it—just sometimes things don't exactly make sense, and I think it goes back to what we were saying, that no one is really in charge.

Anyone at any level can cause anything to occur. That is there's no priorities. There's no system of presenting these suggested actions. It is just that anybody can obstruct or stop, whether they are on the inside, even if they don't have standing, or they do have standing, whether they are at the very bottom of the organizational structure and can't be overruled by anyone in the system, no matter how well thought out the suggestions are, and it has left us in quite a mess.

Mr. Mackey, you brought up a fascinating point, and I had not thought of it as one of the costs of doing business, but the education time for staff is extremely important. How often do we get turnover in the agency where you would be dealing with the—what sort of turnover—do people have three-year careers at a spot, or ten, or two, or what.

Mr. MACKEY. We've had a number of experiences where in going through a permitting process, that we will see more than one, sometimes more than two regulators that we're dealing with in regard to air quality environmental studies. I couldn't tell you—it would be pretty much speculation of what the turnover rate is, but it's pretty high.

Mr. PEARCE. So it would be like Mr. Beck where we invest 10.6 million dollars in getting to a certain point, and they change out the person and you could go all the way back to square one. Is that a fair statement of the process?

Mr. MACKEY. There's a lack of continuity, and the person that comes on board isn't up to speed with where you're at, and so you do go back to square one to educate them, and maybe you've already gotten over some of the hurdles and now you need to cross them again.

Mr. PEARCE. Mr. Chairman, I note that my five minutes is already long since gone. I would like to just wrap up by saying, you've seen us referring to people sitting behind us and on the side. These are staff members who generally have questions, but also present some out of the District offices, and they are helping us do our job, and I will tell you that the staff members are the most under-recognized and under-appreciated—they're not underpaid, but—so if I said that, they would be gone and would go work for the co-ops, but I think that I would like to say this about the staff and give them a round of applause because they do a great job.

Mr. RENZI. How much time did you consume?

Mr. PEARCE. OK. I'm getting started. I would like to say thanks to Chairman Renzi. There is going to be six of these hearing nationwide, and I'm appreciative. No one ever comes to New Mexico to listen to anything except for me. So Chairman Renzi had this hearing brought here, and there are five other like it in the nation, and I will guarantee we need to give Chairman Renzi a hand of applause.

The written documentation by our panel is absolutely stunning, every single one of them. This testimony I think will be posted on the Resources Committee, going to the U.S. House. It'll be on the Resources Committee, or if you don't find it there, I think I can get our staff to post it on our website, also, ushouse.gov, and it will appear under New Mexico. I think you will be really, really surprised with the high quality of presentation that we received here, and that's what I tell people, that we are sufficient.

We are sufficient in our own local area to solve our problems. We don't need people from Europe telling us what to do. We don't need the Supreme Court telling us what to do. There are good honest, decent, common sense people out here that will not spoil the environment. They will make suggestions that will help us protect our environment, help us create jobs, and help us protect the property rights and the values we all have built up. I think we ought to give the panel a round of applause, too.

Mr. Chairman, one last comment for the day. My last comment, we sat in a hearing about the NEPA and its process. Toward the end of last year, very long hearing, about a six or eight-hour hearing, I sat there until the last presenter, and she was a woman from California. She had been very patient, and she said, "I want you

to know I'm the greenest of the green." She said, "I'm a council member from"—I think it was Santa Barbara, California. "California is the greenest state. Santa Barbara is the greenest city in the greenest state, and for me to get elected as commissioner, I would say that I am the greenest of the green," and she said, "We cannot build bedrooms on our houses, we cannot pave our streets, we can't dig lines to put water mains down through the town, we can't get new sewer lines, all because of NEPA." She said, "The NEPA process is broken and needs to be fixed," and she said, "That's from the greenest of the green."

Mr. Chairman, I think that that is a compelling statement for me to end my comments on. Thank you again for having this great hearing, and thanks to this great crew.

Mr. RENZI. Thank you, Congressman Pearce. I don't know that this hearing would have been as electric without you today. You are our neighbor, and we thank you for your friendship.

Congresswoman Drake, as much time as you need.

Mrs. DRAKE. Thank you, Mr. Chairman.

I think this will be for Mrs. Poppie and Mr. Hutchinson, but it just seems to me, one of our goals also is to look at duplication, and when you talk about forest management level and NEPA being done at the forest management level, and then NEPA also being done for you to have a grazing permit, don't you think that should just be done one time and not duplicate that it's OK to graze on this land, it's OK to graze and you personally shouldn't have to go back in?

Ms. POPPIE. I personally think that—I asked them before when I purchased the ranch that the permit for the 400 animal units was to be good for 10 years, and now having the NEPA process going on. I think they picked on me because I was a woman and a new kid on the block. I was—there are a lot of old family ranchers in Catron County, and they've been there for ever, and I think they just thought I was going to be a soft spot and they wanted to get NEPA out of the way, but it has hurt our community to the degree that it is my understanding they're probably going to have to close a school.

Mr. DRAKE. That is tragedy.

Mr. HUTCHINSON. Mr. Chairman, Mrs. Drake, our perspective in this has been to look at the science, and science tells us that we should be looking at these things in a system-wide approach, looking at multiple, large-scale watershed levels, rather than trying to nitpick every single particular action that we're going through.

I've got mixed feelings about the new forest planning regulations. However, they're looking like we're heading in a direction where we're going to be looking at whole systems, and hopefully with that type of a look, we're going to be able to say, like Aldo Leopold said about natural resource management, when you have all of the parts there, and you have all of those parts functioning, you don't have to worry about the individual species. Everything will take care of itself. And so we—you know, we've got all of these laws, and Northern Arizona University did a study on this, looking at the individual regulations, and found that individually they were really weren't that onerous, but when you put them together in this

spider web and this layering effect, they pretty much have brought the management process to halt.

And so, yes, if we could get to a point where we could be taking a programmatic look across large landscapes and have that suffice as the environmental analysis under the NEPA, then we should be able to proceed forward with common sense approaches that allows us to take an active management or true active management type position.

Ms. STRUHSACKER. May I make a suggestion as it relates to mining, and I think perhaps as it relates to ranching, as well. I very much support the concept of a programmatic approach to looking at these types of broad and rather routine activities, especially in the case where there is a land-use management plan or there's been extensive NEPA analysis of that plan, that has designated certain areas to hold the mining and grazing, then much more streamline permitting such as a categorical exclusion is appropriate, especially if the mining—let's take an example I have in my testimony of building exploration roads.

These are temporary roads that are reclaimed at the end of the exploration project. The impacts associated with them are well understood. There are very temporary impacts. It's appropriate to develop a set of best management practices for those types of activities. I would think you had a number of best management practices that you used on your ranch. It sounds like it's in wonderful condition. And if we can agree that the land use management plan is it's OK for grazers, it's OK to mine here, then projects that comply with those sets of best management practices, should receive a very streamline approval such as the categorical exclusion.

Mrs. DRAKE. Thank you. I also wanted to ask Mr. Lynch or Mr. Matson, or for that fact, any of you, that we certainly understand NEPA is for analysis, but what it seems like it's doing is just creating paperwork. Do you think it's possible for anybody to read hundreds or thousands of pages of information and to really grasp it? Do you think that's practical.

Mr. LYNCH. Well, since it's something I do for a living, I'm not going to tell you.

Mrs. DRAKE. Wrong person.

Mr. LYNCH. Well, some people live in real life, and some people read environmental impact statements. As a practical matter, very long things are by definition boring, and I don't care how informative people think they are, you seldom get through them unless you're paid to, and I think—I think the growth in size of environmental impact statements is parallel to the growth in costs and growth in time, and all of those have ended up making these documents things that people like me play with and the general public doesn't have a clue.

Mrs. DRAKE. Thank you.

Mr. MATSON. I agree with Mr. Lynch, and if you can also take a look at the final results after you've weighed the 44 pounds of that stuff, I doubt if it makes much difference.

Mrs. DRAKE. Thank you, and last we go to Ms. Struhsacker. I was so intrigued by your comment on how much are we paying to fight these cases where other people just have a 37-cent stamp involved in it, and also the extra work that is put on an agency so

it bulletproofs itself much like a medical profession where they have to order all of the tests to make sure they're not in some sort of a liability case, and we know what that's done to the cost of medicine. So as far as what we could do with that, we'll get that information as much we can. But what are we paying for all of that, and what could we do with that. I thought that was very intriguing.

Ms. STRUHSACKER. I appreciate that. We've come a long way since NEPA was enacted. In 1969, it was enacted in almost a vacuum when there were no other environment laws to protect the environment. We're not there now. We have a comprehensive and sometimes very complex set of regulations to protect the environment, so we need to take the next step. NEPA needs to mature so that we can unshackle ourselves from this drag of a process and take the resources and put them on the ground.

We have the best environment here in the world, and it is a result of these regulations, but just think what more we could do if we could all free ourselves of this paper chase and really put our efforts on the ground.

Mrs. DRAKE. Thank you very much. I also would like to thank all of you for being here, and our staff, and for the town for hosting us. Thank you, Congressman Renzi.

Mr. RENZI. Thank you very much. That will wrap us up.

I want to take the time also to thank the panel, and especially for the time that you each put into the context of your testimony and your participation, and many of you traveled a long ways to be here, and I feel like the contributions that each of you have made today are contributions to the evolution of America's laws, and the modernization and reform, and it takes Americans to reform American law, and each of you are true Americans, and I'm grateful.

This hearing is a continuation of a process. It will now take the form of four more hearings around the country. We have learned today from these witnesses and they've shared a host of perspectives, and we've also received several e-mails and faxes that have laid a real foundation for us. Members of the Full Committee, as well as Members of the Task Force, may have written questions they may submit to you, and the record will remain open for some time, and we'd ask please if you do receive any written questions, that you respond to them in writing, and that would post them on the site, and I also want to thank the people of the White Mountains and the people of Show Low, the whole region, for the hospitality, for the participation in helping to turn out on a Saturday afternoon to begin the process of reforming NEPA. I certainly know that you all have seen your burden and how it's affected your lives here, and I want to thank you all for taking the time to participate and being true patriots and being part of the American Government. Be safe in your travels. Thank you for your patriotism. God bless you all. The hearing is concluded.

[Whereupon, the Task Force was adjourned.]

[Additional information submitted for the record follows:]

[A letter submitted for the record by Robert Dugan, Legislative and Public Affairs Manager, Granite Construction Incorporated, follows:]



June 16, 2005

The Honorable Cathy McMorris  
Chairwoman, Taskforce on Improving NEPA  
U.S. House Resources Committee  
1324 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Tom Udall  
Ranking Member, Taskforce on Improving NEPA  
U.S. House Resources Committee  
1324 Longworth House Office Building  
Washington, D.C. 20515

Re: Testimony for Task Force on Improving the National Environmental Policy Act (NEPA)

Dear Chairwoman McMorris:

Based on Granite's experience with the entitlement of quarry operations throughout the western United States, we have the following concerns with NEPA and its application:

1. Endless data requirements. Very often we are asked to provide ever increasing amounts of data. Often times this occurs after review of existing data has been deemed complete by the involved agencies. There seems to be little adherence to timeframes for data submission. Additionally, as staff turnover occurs within departments, new staff requests additional data to update their lack of knowledge with projects. Additionally, there appears to be a lack of coordination and understanding of policy from office to office. We propose that the NEPA process be improved by having a clear end point to the level of data reviewed and the studies undertaken.
2. Lack of focus on purpose of review. Often there appears to be alternative agendas based on personal bias pertaining to specific industries rather than to a proposed project and the purpose/intent of the Act. We would prefer that NEPA review remain focused on project purpose rather than unreasonable alternatives analysis.
3. Staff experience. Staff understanding of the project site and the environment is crucial in determining what is appropriate and what is not. A lack of understanding leads to a considerable amount of "education" time for staff not only on specific site issues, but also on the activity being proposed. We would ask that a more rational analysis of impacts be implemented.

Sacramento Office  
8950 Cal Center Drive, Suite 201  
Sacramento, CA 95826  
Phone (916) 362-8844  
Fax (916) 362-7515

Corporate Administrative Office  
Box 50085  
Watsonville, CA 95077-5085  
Phone 831/794-1011  
FAX 831/792-9657

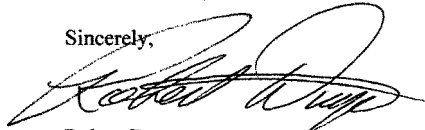


4. Deferral to appropriate state agencies. When a federal non-lead agency defers to the mitigation requirements of a state or local agency, this concurrence should be considered adequate review for the federal agency. For example, due to available resources, the U.S. Fish and Wildlife Service may defer the EIS/EA review and mitigation requirements to the California Department of Fish and Game, rather than undertake its own extensive analysis, which would be largely duplicative. Project opponents should not be allowed to hijack the process and force concurring non-lead agencies to conduct separate duplicative reviews after a project has been approved.
5. Lawsuit participation and settlement agreements. A lead federal agency should not be allowed to enter into lawsuit settlement agreements that forbid or severely limit NEPA permitting for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff project opponent and defendant federal agency should include the business(es) that are affected by the settlement.

The intent of NEPA was to ensure protection of the environment and its resources. Unfortunately, lack of focus on process, staff turnover and lack of experience, lack of consistency among offices, lack of staff, and a lack of desire to make a decision for fear of legal retribution have marred the process. Regrettably, there will always be organizations that wish to disrupt and cease any activity, anywhere it is proposed and will use any means necessary to achieve their goal including the NEPA review process. However, it is Granite's opinion that with focused efforts, the intent of NEPA can be reestablished and industry can proceed forward in a more positive and focused manner.

Thank you for the opportunity to comment on this matter. Should you have any questions or require further information from me, please call me at 831/768-4099.

Sincerely,



Robert Dugan  
Legislative and Public Affairs Manager  
Granite Construction Incorporated

Cc: Honorable Richard Pombo  
2411 Rayburn HOB  
Washington D.C. 20515

[A letter submitted for the record by Dr. Kenneth Langton,  
Chair, Sierra Club—Grand Canyon Chapter, follows:]



**SIERRA  
CLUB**  
FOUNDED 1892

Grand Canyon Chapter • 202 E. McDowell Rd, Ste 277 • Phoenix, AZ 85004  
Phone: (602) 253-8633 Fax: (602) 258-6533 Email: grand.canyon.chapter@sierraclub.org

June 16, 2005

Rep. Cathy McMorris, Chairwoman  
Task Force on Improving the National Environmental Policy Act  
Committee on Resources  
U.S. House of Representatives  
Washington, DC 20515  
VIA FACSIMILE (202) 225-0185

Dear Chairwoman McMorris:

Thank you for faxing the request to testify at the Task Force hearing in Lakeside, AZ this coming Saturday. Due to the short notice and a previously scheduled National Environmental Policy Act (NEPA) assisted event, we will not be able to attend this hearing, although we will submit written comments for the hearing record. It was also initially discouraging to volunteer-based groups such as ours to hear that the hearing was closed to public witnesses and that speakers would be by invitation only.

We regret that the Task Force announced this hearing for a time which overlaps with a celebration of the restoration of Fossil Creek. The restoration is the result of public involvement and an alternative assessment process driven by NEPA. The result of those NEPA studies was a broadly supported plan to abandon an outmoded hydropower plant in favor of restoring stream flows, bringing back rare native fish, and recreating beautiful and unusual travertine pools along 14 miles of river course for all the public to enjoy.

The celebration at Fossil Creek on Saturday brings together the Arizona Public Service, the Yavapai-Apache Tribe, conservationists and wildlife experts all in common support of bringing back a diminished natural resource. We believe this is an example of the opportunity which NEPA offers by requiring alternatives to be assessed and the public to be involved, all with the goal of making better decisions. We hope that the Task Force recognizes the value of this law and the public involvement it provides when you consider NEPA in your deliberations.

Sincerely,

A handwritten signature in black ink that reads "Dr. Kenneth Langton". The signature is written in a cursive style.

Dr. Kenneth Langton, Chair  
Sierra Club - Grand Canyon Chapter

[A letter submitted for the record by Brian Nowicki, Conservation Biologist, Center for Biological Diversity, follows:]



## CENTER FOR BIOLOGICAL DIVERSITY

BECAUSE LIFE IS GOOD

The Honorable Cathy McMorris  
Chairwoman, Task Force on Improving NEPA  
Committee on Resources  
U.S. House of Representatives

Dear Representative McMorris,

On behalf of Kieran Suckling and the Center for Biological Diversity I must decline the invitation to testify at the upcoming field hearing of the Task Force on Improving the National Environmental Policy Act as we were given such exceedingly short notice.

Unfortunately, we were not invited until this week, only a few days before the hearing and with extremely little time before the deadline to submit written testimony. Also, we had been given no warning prior to the written invitation, and in fact we were under the impression that the witness list was closed as of last week. As you know, witnesses are required to submit an electronic copy of written testimony by the close of business on Wednesday and deliver 40 hard copies of that testimony to Representative Renzi's office in Show Low by the close of business on Thursday. Two days is extremely short notice to respond, especially when it requires preparation of written and oral testimony, and two trips of over 8 hours roundtrip in a single week.

I can not help but think that the lateness of the invitation was deliberate in order to make it extremely difficult for us to comply with the deadlines, and unlikely to attend, while at the same time allowing you to state publicly that you had invited us but we declined. To be clear, I very much wish we could have been given adequate notice as I think it is very important that the Task Force understands the great value and success of the National Environmental Policy Act.

That said, I am deeply concerned that many members on the Task Force are not so much concerned with improving the National Environmental Policy Act as they are with providing a forum for the political posturing of ideological opponents of environmental protections. In fact, the National Environmental Policy Act is the bedrock environmental law that ensures that the American public is included in the decision-making process of how our public lands are managed. I hope that the Task Force makes a better effort in the future to ensure that they hear about the numerous successes of the National Environmental Policy Act.

The Center for Biological Diversity is pleased to submit written testimony for your consideration.

Sincerely,

Brian Nowicki  
Conservation Biologist  
(520) 623-5252 x311

Tucson • Silver City • San Francisco • San Diego • Portland • Phoenix • Idyllwild • Denver  
Main Office P.O. Box 710 • Tucson, AZ • 85702-0710 • Phone: (520) 623-5252 • Fax: (520) 623-9797  
www.biologicaldiversity.org

The following information submitted for the record has been retained in the Committee's official files:

- Bennett, Jean M., Ridgecrest, CA, Written Comments dated June 18, 2005
- Benson, Cameron, Environmental Defense Center, Written Comments dated June 23, 2005
- Block, Stephan, Cottonwood, AZ, Written Comments dated June 16, 2005
- Flynn, Roger and Smith, Patrick L., Western Mining Action Project and Smith, Doherty & Belcourt, Written Comments dated June 28, 2005
- Gaffin, John M., Myers Flat, CA, Written Comments dated May 11, 2005

- Greacen, Scott, Environmental Protection Information Center, Written Comments dated June 23, 2005
- Hollis, John, Topanga, CA, Written Comments dated June 22, 2005
- Jeckell, Robert, Sunnyvale, CA, Written Comments dated June 16, 2005
- Jordan, Laura L., Belmont, CA, Written Comments dated June 22, 2005
- Lane, C.B. "Doc", Cave Creek, AZ, Written Comments dated June 18, 2005
- Langton, Dr. Kenneth, Sierra Club, Letter dated June 22, 2005
- Lien, David A., Colorado Springs, CO, Written Comments dated June 18, 2005
- Mackey, Megan, Pacific Marine Conservation Council, Written Comments dated June 22, 2005
- Magruder, Marshall, Tubac, AZ, Written Comments dated June 16, 2005
- Marderosian, Ara, Sequoia ForestKeeper, Written Comments dated June 21, 2005
- Marlette, Jackie, Pacific Rivers Council, Written Comments dated June 22, 2005
- Matthews, Thomas, Soquel, CA, Written Comments dated June 22, 2005
- Miller, Jessica R., Camino, CA, Written Comments dated June 15, 2005
- Myers, Tom, Hydrologic Consultant, Written Comments dated June 20, 2005
- Notthoff, Ann, Orinda, CA, Written Comments dated June 28, 2005
- Oaklander, Martha, Los Angeles, CA, Written Comments dated June 16, 2005
- Paley, Jan, Los Angeles, CA, Written Comments dated June 15, 2005
- Rose, David S., South Fork Trinity River Land Conservancy, Written Comments dated June 16, 2005
- Ryberg, Erik, Center for Biological Diversity, Written Comments dated June 18, 2005
- Silver, Dan, Endangered Habitats League, Written Comments dated June 19, 2005
- Smith, Steve, The Wilderness Society, Written Comments dated June 24, 2005
- Torrence, Paul F., Flagstaff, AZ, Written Comments dated June 15, 2005
- Weisz, Russell, Santa Cruz, CA, Written Comments dated June 18, 2005
- Wheeler, Terence, Gila County Cattle Growers Association, Letter dated June 18, 2005
- White, Al, Flagstaff, AZ, Written Comments dated June 18, 2005
- Worthy, Crista, Pacific Palisades, CA, Written Comments dated June 15, 2005

