

# NEPA: LESSONS LEARNED AND NEXT STEPS

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## OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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Thursday, November 17, 2005

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## **OVERSIGHT HEARING ON NEPA: LESSONS LEARNED AND NEXT STEPS**

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**Thursday, November 17, 2005  
U.S. House of Representatives  
NEPA Task Force  
Committee on Resources  
Washington, D.C.**

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The Task Force met, pursuant to call, at 10:37 a.m., in Room 1324 Longworth House Office Building, Hon. Cathy McMorris presiding.

Present: Representatives McMorris, Tom Udall, Gibbons, Renzi, Brown, Drake, Gohmert, Inslee, and Grijalva.

### **STATEMENT OF HON. CATHY McMORRIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Miss McMORRIS. The hearing will come to order.

This is the second and final hearing of the Task Force on Updating the National Environmental Policy Act. As I stated previously, this Task Force will build upon the work of the prior NEPA Task Force and put forth recommendations for updating and improving NEPA.

Through the course of five field hearings and one hearing here in Washington, the Task Force has conducted an unprecedented examination of NEPA and its impact. Witnesses have represented nearly every sector of industry; national and regional environmental groups; tribal interests; as well as Federal, State, and local governments. We have heard countless times and in countless ways that NEPA is a good law born of good intentions. I completely agree.

However, the Task Force has also heard that NEPA needs some measure of reform. The reform ideas have not been to eliminate or gut the law. On the contrary, there have been reasonable proposals aimed at providing certainty and clarity to the NEPA process.

Despite what those who fear change would suggest, Congress has a burden to ensure that the laws we create, like NEPA, continue to meet their intent. Sometimes that means the laws need to be reviewed and revisited no matter how controversial that might be. It has been the mission of this and the previous NEPA Task Force to gather information and take a measured approach before embarking on the task of reforming NEPA.

This hearing will serve two purposes. The first is to understand what lessons can be learned from previous hearings. The second is to explore the possible effects of implementing the recommendations put forth by the Task Force.

One of the key elements of NEPA is public participation. In keeping with that practice, even though we only have six witnesses here today, we want to hear from everyone; and I encourage anyone who is interested to submit comments to the Resources Committee so that we can take all thoughts and recommendations into consideration.

Do you have any opening remarks you would like to make?

Miss MCMORRIS. OK, at this time, I would like to introduce our first panelist. To give us CEQ's perspective on NEPA is James Connaughton, Chairman of the Council on Environmental Quality. I thank you for joining us here today.

It is the policy of the Resources Committee to swear in witnesses, so if you would stand and raise your right hand.

[Witness sworn.]

Miss MCMORRIS. Let the record reflect that the witness answered in the affirmative.

Miss MCMORRIS. So at this time—if or when Congressman Udall arrives, we are going to give him the chance to make some opening remarks, but at this point we are going to go ahead. So if you would share with us your thoughts, we really appreciate you taking the time to be here.

**STATEMENT OF JAMES L. CONNAUGHTON,  
CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY**

Mr. CONNAUGHTON. Great. Thank you very much, Chairwoman McMorris, Congressman and distinguished members of the Committee. I am pleased to be here today to discuss the implementation and improvement of the National Environmental Policy Act.

I think I need to begin, Madam Chairman, Chairwoman McMorris, reflecting on the time I spent in Walla Walla, in your home district, where they are working on a project of national resource restoration that is a testament to the local involvement and collaboration and broad interest group activity that leads to solutions rather than obstacles. So I think you have in your own backyard an example of the kind of process we want to replicate over and over again in the implementation of NEPA.

That is why I was pleased to spend some time with you as you launched your effort, and I am really delighted to be here as we get to the back end of your public hearing process and look forward as we move toward taking into account everything that you have learned, and hopefully we can continue to provide you the strong assistance that we have thus far.

Now, as the first modern environmental statute, NEPA is remarkable for its simplicity. Its foundational objectives, especially those found in Section 101, are as relevant today as when Congress passed it. As I am sure you are discovering in your review, the implementation and management of NEPA is a story of innovation and success and one of challenges, hurdles, and barriers.

At CEQ, we are working to replicate the successes and address the challenges through practical steps to increase the efficiency, the

effectiveness, and the timeliness of NEPA implementation. Let me highlight a few examples.

First, CEQ now requires as a matter of policy that Federal agencies offer affirmatively tribal, State, and local agencies formal cooperating agency status when appropriate. Through increased training, we are increasing the positive benefits of intergovernmental dialog.

Second, CEQ is working systematically to increase the internal capacity of our Federal agencies to engage interested parties earlier in the process and to use alternative dispute resolution techniques to seek common ground.

I think it should be mentioned that the Morris K. Udall Foundation is working closely with us to help advance that capacity in our agencies.

Third, in response to concerns from the field about judicial decisions that have created uncertainties about cumulative effects analysis, CEQ recently issued guidance that reemphasized our focus on using relevant, useful, available information about the potential effects of proposed actions.

And, again, bringing things back home, Chairwoman McMorris, Federal District Judge Shay in your home district recently cited the CEQ guidance in upholding the adequacy of an environmental assessment prepared by the Forest Service for salvage sales.

Fourth, on May 18th, 2001, President Bush established the Energy Project Streamlining Task Force, which has been available to facilitate particularly challenging energy projects and to develop more effective processes for NEPA analysis for certain categories of energy-related projects such as liquefied natural gas terminal siting and pipeline infrastructure. A memorandum of understanding we developed for pipelines was recently codified in the energy bill that President Bush was proud to sign a few short months ago.

Finally, CEQ established a NEPA Task Force of experienced senior career agency NEPA practitioners who produced the report modernizing NEPA implementation. The Task Force and CEQ held public roundtables around the country over the course of about 2 years, which generated a significant level of consensus and common ground about important next steps to improve NEPA implementation.

With the Chairwoman's permission, I would like to introduce the report into your record as well as the stack of public materials, which is—this is just a portion of them. In keeping with our goal of using modern information techniques, we actually will simplify it through the provision of digital versions of the very voluminous record that we compiled that I think would be a strong contribution to the record that you yourself compiled.

Miss McMORRIS. Wonderful.

[NOTE: The information submitted for the record has been retained in the Committee's official files.]

Mr. CONNAUGHTON. About a dozen interagency work groups have now been established to develop guidance for implementing the key recommendations from the Task Force report. For example, they are working on a proposal to implement a GIS—Global Information System—enabled mapping of past and ongoing NEPA analyses in

order to provide a rich and publicly accessible data base of information. We have 35 years of information sitting on a shelf, and we need to make that available and find efficiencies in its future use.

Another example from the Task Force is recent guidance that is grounded in the CEQ regulations calling for concise environmental assessments. By concise, we mean short. The original 15 environmental assessments that implemented this guidance involve timber harvests. Interestingly, only two ended up being administratively challenged, and none were litigated. So we have found a template that has achieved some measure of confidence and consensus.

Another innovative effort—and this is a modern tool that is not familiar to many even up here in Congress—is the increased use of environmental management systems as a mechanism to help meet NEPA objectives and assure compliance with the substantive statutes. An agency can effectively implement and use an environmental management system to retool its NEPA program and better integrate it into their day-to-day management and policy and provisions, rather than have the NEPA process run forward as a stand-alone sort of a silo-based process.

Now based on the experience of 35 years and based on our recent effort in the last several years working with the Congress, we know that we can and we must do better when it comes to the implementation of NEPA. While the statute has not changed in 35 years, the statute itself requires that its implementation continually evolve and improve; and that is why we look forward to this fresh look that the Committee and the Task Force is bringing to NEPA in the spirit of making sure we take advantage of what works really well and replicate it massively and we begin to untie the knots of what is not working well.

So, to that end, Madam Chairwoman and distinguished members of the Committee, I look forward to a very constructive dialog.

Miss MCMORRIS. Thank you. I really appreciate you being here this morning.

[The prepared statement of Mr. Connaughton follows:]

**Statement of James L. Connaughton, Chairman,  
Council on Environmental Quality**

Madame Chairman and distinguished Members, I am pleased to be here today to discuss the implementation of the National Environmental Policy Act (NEPA), and the lessons we have learned over the past 35 years. I appreciate the Task Force's efforts to take a hard look at NEPA, and I welcome the opportunity to review the Task Force's findings and recommendations as a result of this process.

Today I want to reflect on the basic principles of NEPA, describe several steps we are taking today to improve NEPA practice, and share some thoughts on NEPA's future and our goals at CEQ.

**Basic Principles**

As the first modern environmental statute, NEPA is remarkable for its simplicity. It does not set forth overly detailed procedural requirements or regulations, but instead provides the foundation for a process intended to deliver better performance. NEPA is a landmark statute that is as relevant today as when Congress passed it in 1969. At its core, Section 101 of NEPA lays out a clear bipartisan vision of sustainable development:

“(...) it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic,

and other requirements of present and future generations of Americans. [42 USC 4331]

President Bush is committed to making consideration of the environment an integral part of how we conduct the people's business. He continues to challenge us to find new ways to improve our cooperative efforts to achieve our goals of enhanced quality of life, environmental quality, and stewardship.

In my capacity as Chairman of the President's Council on Environmental Quality, one of my main responsibilities is to oversee implementation of NEPA. By focusing on modernizing agency NEPA implementation, the President's goal is to ensure that federal decision-making is more effective, efficient and timely and that the goals and objectives of NEPA are better aligned with that decision-making.

At CEQ, we have translated the President's charge into five goals by which we can measure our success in modernizing NEPA implementation:

1. **Stewardship:** We must empower ground level resource managers to be responsible and accountable for our nation's natural, cultural and historic resources. NEPA processes should empower local federal employees and their tribal, state and local counterparts to identify and address all environmental aspects, and provide for the future management of those resources. The NEPA process must provide opportunities for public involvement early in the process and throughout.
2. **Science based decision-making:** NEPA analyses and documents must continue to provide a solid scientific basis for managing environmental risks. Modern technology can reduce duplicative efforts, by enabling agencies to use existing datasets and analyses as a basis for future efforts.
3. **Public involvement:** Local involvement is the key. We emphasize efforts to engage state, tribal and local agencies as cooperating agencies to extend and expand public involvement.

Cooperating Agency status is the most formal way to provide opportunities for tribal, state and local involvement. CEQ has required as a matter of policy that federal agencies offer tribal, state and local government formal cooperating agency status. I would like to attach to my testimony a copy of CEQ's Memorandum to the Heads of All Federal Agencies on Cooperating Agencies in Implementing the Procedural Provisions of NEPA (January 30, 2002).

In addition, we have increased our training for tribal, state and local government officials that have an interest in formal cooperating agency status. Our efforts have had the effect of increasing the intergovernmental dialogue with tribal, state and local governments. Indeed, even agencies that would rather not assume the responsibility for a formal role have taken the opportunity to enhance effective and timely participation.

4. **Innovation:** Market forces, incentives and research and development are three ways to refocus our thinking about how future actions can protect our resources. NEPA analyses should include innovative mitigation and protection measures that can take evolving technologies and practices into account.
5. **Compliance:** NEPA's goal to enhance and protect the human environment includes the need to comply with environmental laws, regulations, and directives. As directed in CEQ's implementing regulations for NEPA, we must, to the fullest extent possible, integrate compliance with all environmental requirements into a single set of directives and then translate that into our resource management operations and activities.

NEPA has been the subject of a comprehensive review in this and almost every prior administration. One fact stands clear, the challenges, hurdles, or barriers to effective NEPA implementation typically are not with the Act. In fact, it is how NEPA regulations are implemented that most needs improving and modernization.

The efficiency and effectiveness of NEPA implementation has been and is the focus of numerous practical steps CEQ has undertaken to modernize NEPA practice. We are now implementing recommendations made by the CEQ NEPA Task Force in its 2003 report to CEQ, *Modernizing NEPA Implementation*. Let me highlight several consequential examples.

#### **Public Involvement**

The NEPA process brings together interested parties with various perspectives and views. NEPA provides all interested parties a voice and a role in framing our decisions. This aspect of NEPA has proven successful in avoiding, resolving, or at least lowering the temperature of the conflicts that can complicate environmental and natural resource management and policy.

CEQ regulations call for public involvement in all NEPA analyses, and we continue to encourage agencies to be proactive in engaging the public in NEPA

activities at all levels. Early involvement by a better informed public narrows potential conflicts—we know this from 35 years of practice and experience.

#### **Conflict Resolution**

To further minimize potential conflicts, we must also ensure that interested parties participate in the ongoing dialogue and are closely associated with our decisions. In doing so, we ensure that interested parties have a sense of ownership of the outcome, even if the outcome is not exactly as they want.

While litigation is one subset of the ways conflicts can be addressed, it can be costly and time consuming, and is not the only way in which conflicts can be resolved. CEQ is working with the Institute for Environmental Conflict Resolution at the Morris K. Udall Foundation to systematically increase the internal capacity of federal agencies to use alternative dispute resolution techniques early in the process, bringing parties together to seek common ground and accept compromise. We have referred specific matters to the Institute for assessment and mediation, and I would commend the Institute's work to this Committee.

We are now in the process of implementing changes designed to improve and focus the NEPA process. I especially want to highlight today the work of the CEQ NEPA Task Force, and thank them for more than three years of efforts on this important topic. The task force included seasoned, experienced agency NEPA practitioners who sought input and advice from every sector.

Their report, *Modernizing NEPA Implementation*, was issued in September 2003. Subsequently, public roundtables were held around the country to review the report and its more than 50 recommendations. I ask that the full report, public comment records, and reports from the public roundtables be entered into the hearing record along with my testimony.

#### **Cumulative Effects**

Recently, there has been concern at the ground level over the increasing scope of cumulative effects analysis being required by the courts. In response, CEQ recently issued guidance on consideration of past actions in agencies' cumulative effects analysis. That guidance re-emphasized our focus on using relevant, useful, available information about the potential effects of proposed actions. Judge Shea in the Federal District Court for the Eastern District of Washington recently cited CEQ's guidance in upholding the adequacy of an environmental assessment prepared by the Forest Service for salvage sales in the *Conservation Northwest v. Forest Service* (Case 2:05-cv-002200-EFS, filed 08/26/2005).

#### **Energy Projects**

On May 18, 2001, pursuant to a recommendation contained in the Administration's National Energy Policy, the President signed Executive Order 13212, establishing an interagency Task Force on Energy Project Streamlining ("Energy Project Task Force") to monitor and assist federal agencies in their efforts to expedite their review of permits and actions. The Task Force sought to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy. Operating under direction from CEQ, the Energy Project Task Force originally focused on both specific proposed projects and broader management issues. The Energy Project Task Force is still active today with responsibility for specific proposed projects now lying with the lead agencies, and CEQ focused on providing guidance and developing processes to address the effective, efficient and timely preparation of NEPA analyses and documents for energy-related projects.

Liquified natural gas (LNG) terminals and pipeline infrastructure are two areas where, as a result of the work of the Energy Project Task Force, we have taken great strides in developing a timely, collaborative NEPA framework. We developed Memoranda of Understanding (MOU) that call for early coordination among all federal agencies with a role in making and implementing the proposed actions involving pipelines and LNG ports and terminals. This process calls for developing and adhering to timelines as well as providing opportunities for tribal, state and local involvement.

#### **Healthy Forests**

In carrying out the President's Healthy Forest Initiative, a large part of the administrative response to the threat of increased devastation from wildfires involved categorical exclusions and environmental assessments. Categorical exclusion is a term that I find implies an exemption or exclusion from NEPA. In fact, a categorical exclusion is based on the administrative record that demonstrates through reasoned analysis and consideration of past activities that certain classes of actions typically

do not individually or cumulatively have significant effects on the human environment.

This application of NEPA requires that the analysis be done up front to identify those forest hazardous fuel reduction activities that merit exclusion from further analysis in an environmental assessment or environmental impact. Of course, under CEQ's NEPA regulations, agencies must allow for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect" when applying a categorical exclusion to a specific proposal. Use of categorical exclusions allows agencies to focus on activities that do have the potential for significant environmental impacts.

Similarly, CEQ provided guidance grounded in our regulations that called for focused, concise and timely environmental assessments. Although 15 environmental assessments were originally prepared for the first hazardous fuels reduction forest thinning projects that involved timber harvests, only two were administratively challenged, unsuccessfully, and none were litigated.

#### **Information Technology**

Another set of recommendations is focused on improving our use of information technology. My alma mater, Northwestern University, houses the most complete library of Environmental Impact Statements (EIS) in the country. We are working with partners to develop a proposal to implement interagency GIS-enabled mapping of past and ongoing analyses to provide a rich database of existing information, facilitate timely access to information by decision makers and the public, and provide perspective on the number, extent and cumulative effects of proposed actions nationwide. It is now time to use today's technologies to make the wealth of information in NEPA documents more readily available.

The Task Force report also calls for guidance that empowers agencies to prepare concise, focused environmental assessments. Implementing these recommendations will help focus decision-makers on analyzing and documenting the types of proposed actions likely to have significant environmental impacts and merit documentation in an EIS.

#### **Environmental Management Systems**

The Task Force also recommended increased use of environmental management systems as a tool to help meet our objectives under NEPA. An Environmental Management System (EMS) is a set of processes and practices that enable an organization (like a federal agency) to reduce its environmental impacts and increase its operating efficiency. Building on EMS concepts, an agency can retool its entire NEPA program to include:

- Procedures to identify an agency or facility's environmental impacts and set objectives and targets for improved environmental performance;
- NEPA implementation and operation systems that set responsibilities, require training and awareness from everyone according to their responsibilities, and use NEPA for documentation and operational controls;
- Practical programs for checking and corrective actions, including monitoring and measuring performance towards continual improvement targets; and
- Management review requirement, not just for the signature on a decision document, but also to ensure that the NEPA program is suited and continually adapted to changing conditions and information

This process can help translate the general concepts of NEPA into day-to-day management and policy decisions that reflect our commitment to continual improvement, pollution prevention, compliance with relevant environmental laws, and additional requirements that an agency has voluntarily adopted.

We encourage federal agencies to look at EMS as their main tool to implement NEPA. Agencies must still apply the statutes and regulations because EMS requires agencies to assess all environmental aspects including compliance obligations. It therefore does not avoid elements of NEPA; it actually embraces and amplifies the philosophy of NEPA.

#### **Conclusion**

It is a testament to the vitality of NEPA that the statute has not been changed in 35 years in any substantial measure. CEQ regulations themselves have stood the test of time. NEPA has however undergone comprehensive review in this and almost every prior administration. To put the Act in perspective, federal agencies prepare annually approximately 50,000 Environmental Assessments and 350 Environmental Impact Statements. Between 2001 and 2004, approximately 140 cases were filed annually involving a NEPA-based challenge, and approximately 13 injunctions were issued each year.

We take great pride at the federal level that 20 states have adopted a State-level environmental planning process that is similar to NEPA. Furthermore, many countries around the world have taken NEPA as a model for their own environmental review practices.

But we can and we must do better. We must renew our efforts to provide decision makers and the public with relevant and timely environmental analyses that add value to the way federal agencies go about their business. By returning to the core principles of NEPA practice as it was intended and learning from the past 35 years of implementation activities, we can modernize NEPA practices for the new millennium.

I am committed to working with you and all interested parties involved to continue a living NEPA process. Senator John Chafee, one of the greatest environmental statesmen of the Senate, described NEPA as a "tall order, but an important one." I agree and look forward to the Committee's report and recommendations.

Thank you very much.

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Miss MCMORRIS. If you would just take a moment, I would like to hear a little bit more about CEQ's Task Force; and if you would just share some of what have been some of the successes and then also some of the challenges in implementing the recommendations that you were able to gather in your efforts around the country with the Task Force.

Mr. CONNAUGHTON. Thank you very much.

When I came into my job in June, I inherited a couple of decades of NEPA problem statements. So NEPA is constantly being under review, there is constant questions and concerns about its implementation, and we have a fairly good and long record of a lot of the challenges in its implementation.

Sitting down with my senior career staff, who have collectively probably a century's worth of NEPA experience—maybe I'm dating them too much—that they strongly recommended that we pull over to the White House some of the most seasoned NEPA experts from the agencies. Some of these professionals have been working on NEPA since its inception, so a few of them have been at it for 35 years.

We brought them to the White House; and we said, we don't want to tell you what needs to work best. We would like you to do a process, canvassing your agencies, canvassing outside parties, and tell us what we think can help you do your job better.

It was a wonderful process. We had open houses for the public to come in. Everything we did is posted on the—was posted on the Web site. In fact, I think we innovated anything FOIA-ble we put on the Web site. So there was no—we didn't need the statute FOIA. We just made the information available as it came in to us so everybody could see what was coming in. And then we received a whole series, 50—more than 50 groupings of recommendations from the Task Force.

Now we didn't stop there. We then went out and had about I think it was six public hearings about the recommendations from the Task Force to be sure that we—you know, did we get it right? Did we not get it right? All for the purpose of then coming back into CEQ to say, all right, we have the senior officials, we have the public, they have commented on the recommendations. Now how can we go forward? So we now have a blueprint for action in this Task Force evidence.

What is great is the Task Force members are now back at their agencies, and they own their work product. So they are very

excited about carrying forward what they have achieved, and that has led to these subinteragency groups that I mentioned.

A few items just to give you an example. We are pushing environmental management systems throughout the Federal Government. We are on target to the implementation of 1,800 environmental management systems at Federal facilities and Federal lands operations. We have a very specific focus on collaboration and cooperative conservation as an ethic to the agencies that will assure earlier public engagement and involvement in the NEPA process, which tends to minimize disputes.

Then we also have very specific, good old-fashioned roll-up-your-sleeve type stuff, which is a lot of the greater use of information technology, how to use Web-based resources, how we share information technology. These are the kinds of things that—you know, what happens within the NEPA process if you do a big EIS, you sort of wipe your brow and say, thank goodness, I'm done with that; and it sits on the shelf. Well, we want to translate this historical record into a living record, and we want to translate future processes into a living process of adaptation as we've learned from our experience in carrying out the Federal activities that give rise to NEPA to begin with.

So it's a—you know, I have given you just a quick snapshot. But we have strong consensus on the recommendations. In fact, I am pleased that I can only report a few naysayers on just a few issues. I mean, that's how strong this foundation is.

I think it's the kind of record that we hope the Committee will look closely at, because I think there are a number of areas, whether it's in the context of NEPA itself or the context of the statutes that govern agency activities, a lot of these recommendations could use the force of congressional approval.

Miss MCMORRIS. From my perspective, the effort by this Task Force is to complement what you have already started and just to take a look at where we can even maybe do some more work to encourage further improvement of the process.

Mr. CONNAUGHTON. Well, and the example I would give is the pipeline memorandum of understanding which now found its way into the energy bill. So we now have—it's statutory, which is fabulous. Also, in the healthy forest context, we made a number of very effective improvements to the NEPA process for forest restoration work, and that found its way in with additional concepts and ideas from the Congress in the Healthy Forest Act which earned tremendous bipartisan support.

Miss MCMORRIS. Would you just—while you are on those two subjects, because there were NEPA-related provisions in both the Healthy Forest Restoration Act and the energy bill, would you comment on those who suggest that this is death by a thousand cuts to NEPA?

Mr. CONNAUGHTON. Actually, it's improvements by many measures to NEPA. We have 35 years of experience, and you are supposed to learn from your experience. And when you learn from your experience about something that works better—you know, it's the job of the Administration and it's the job of the Congress to make things better. And I think when you look at the breadth of support for the healthy forest provisions on NEPA, the bipartisan support

in the Senate was 81 votes, for example. I think that gives you a good sign that this is a net improvement to environmental protection and a net improvement to good government.

So I can talk about this highly qualitatively. You know, if you want, I can get into the wonky weeds as well.

Miss MCMORRIS. No, that is good, very good.

Congressman Gohmert, do you have any questions?

Mr. GOHMERT. Yes, thank you, Madam Chairwoman.

I appreciate your testimony here today, Mr. Connaughton.

Following up on the last line of questioning, you had mentioned that some of the regulations had found their way in the energy bill and the healthy forest bill, and you had said that was fabulous. There are, of course, some commentators that believe the CEQ regulations and guidance are somewhat ignored by agencies and courts. Since you felt that was fabulous that those were included, why not amend the NEPA Act itself or NEPA itself to put more teeth into the CEQ regulations?

Mr. CONNAUGHTON. Well, there are two categories of potential statutory improvements. So one is what we talked about, which is where the overall framework of NEPA and the flexibility of the CEQ regulations, which are just 20 pages long, they are not very intensive, where what is needed is how you tailor that broad guidance to a specific subject matter, such as forest management or energy projects, for example. Or, for that matter, we just had a recent highway bill that had some very useful NEPA provisions in it.

So there is a category where what is actually not at issue—NEPA is not at issue, the statute; and the CEQ regs aren't at issue. What's at issue are implementing mechanisms which it's helpful to codify the statute so we don't have litigation that delays our ability to put them into effect. You know, people fear change, although NEPA compels change, the statute itself. It's—the whole implication of it is we have change and improvement.

Now there is the category of are there places where you can improve or enhance the CEQ regulations? Are there places where you can add to the NEPA statute? And I think that's what the subject of this Task Force activity has been.

I have seen a number of very interesting ideas coming out of the public process that you have engaged in on subjects such as timelines, on subjects such as cooperating agencies, on some of these what I would call horizontal subjects that would apply across the government; and I think that would be a place where we would want to look.

I would want to be careful about using a NEPA statutory amendment process to deal with what really are subject matter implementation issues, because we should focus this broader NEPA effort on these things that will have horizontal benefit to all these.

Mr. GOHMERT. You yourself indicated that litigation was a problem; and if you have seen the chart showing the rise in litigation over the years since NEPA has been in effect, clearly something needs to be addressed. And, yes, NEPA does have a lot of overall flexibility.

The problem with that is that not all judges had the philosophy that I did that I believed was part of the Constitution, that you shouldn't legislate from the bench. So flexibility to some judges is

seen with great glee, meaning I'm going to do the legislating myself from the bench. Some of us left the bench and ran for the legislature to get to do that; others just go ahead and take their robe as a right to do that. That is why I'm concerned that we need to take some of the flexibility out and make it more rigid so even the more ignorant judges—of the Constitution, that is—would understand what the law says when it's in black and white.

But there have been some recommendations that CEQ itself might be an arbitrator in helping resolve some disputes. What are your thoughts on that?

Mr. CONNAUGHTON. That is an activity that we engage in frequently. Usually, it tends to focus on the higher-profile and highly complex issues; and the NEPA statute and the regulations itself has a process built in for bringing issues of interagency conflict to the Council for resolution.

What we found is the built-in process is a bit formalistic when we can achieve mediated or arbitrary outcomes in a more collaborative fashion, and so that would be a very good area for us to talk about.

But I would also underline, even more importantly, building capacity in the agencies to engage in dispute resolution is probably a bigger long-term benefit than putting a huge focus on bringing all of those to the White House. Because what happens is if you get agencies in disagreement or they are in disagreement with the States, people stake their ground waiting for the judge and the White House, and it ups the stakes. When what we really want is local accountability and local responsibility for reaching reasonable outcomes. So I would look at both.

Mr. GOHMERT. Thank you.

Miss MCMORRIS. Representative Grijalva.

Mr. GRIJALVA. Thank you very much, Madam Chair. If I could, for the Chairman, let me go into your written testimony; and I apologize for not being here for your oral testimony.

In part of your written testimony, you make the statement: NEPA has been the subject of a comprehensive review in this and almost every other prior administration. One fact stands clear, the challenges, hurdles, or barriers to effective NEPA implementation typically are not with the Act. In fact, it is how NEPA regulations are implemented that most needs improving and modernization.

Could you elaborate on that point?

Mr. CONNAUGHTON. Yeah, I could.

If you take the NEPA as it was enacted, which has broad general guidance and then a number of administrative provisions, the general guidance in the statute itself, I haven't seen any recommendations to change what's there, OK, what's in the statute. So that's stood the test of time.

What we do see is, on implementation, which is things that are either, one, missing from the statute or things that are the subject of how the agencies implement what the guidance that comes from the statute and from the CEQ regs.

So, to give you a concrete example, an issue that's emerged has been the issue of timelines for statutes of limitations, for example, or the need for setting clear timelines and management plans for when you do a NEPA. That is an issue of horizontal interests. You

know, it would fall under the broad umbrella of the statute, and that could be a useful addition to the NEPA statute.

Then there's other categories that are best addressed as they were in the energy bill and the highway bill and in the healthy forest legislation.

Mr. GRIJALVA. But the substance of the Act, based on your writing that the Act is not the problem, and so—and as I understand your testimony, you don't really have any concrete, specific recommendations from your office as to the kinds of discussions that we're having about NEPA and what needs to be changed there. Am I correct in that assumption?

Mr. CONNAUGHTON. Well, actually, our office has identified, through the Task Force report, which I mentioned in my oral testimony which I would encourage you to—

Mr. GRIJALVA. For Congress to adopt.

Mr. CONNAUGHTON. There are elements in this that could be useful if codified, because it would assure that this is not just something being advanced by the executive branch but is something that the Congress has wholly endorsed and supports and would get behind in terms of moving the agencies forward. This activity deals with the issues of NEPA implementation that cut across agencies. So therefore—

Mr. GRIJALVA. But not specific to an action that Congress needs to take in terms of the Act.

Mr. CONNAUGHTON. I think it's a useful foundation for areas that Congress—we would welcome congressional—a hard look by Congress.

Mr. GRIJALVA. In the conclusion of your written testimony—and that will be my last point—and we have heard a lot of discussion about how NEPA is burdened some in terms of its regulation, how it slows things down, how the challenges occurred legally and how that has been—that is the central problem that theoretically this Task Force is looking at. In your written testimony, you say: To put the Act in perspective, Federal agencies prepare annually approximately 50,000 environmental assessments, 350 environmental impact statements. Between 2001 and 2004, approximately 140 cases were filed annually involving a NEPA-based challenge, and approximately 13 injunctions were issued each year.

It begs the question about, is this really theoretically the kind of burden that we have been hearing from some of the witnesses during this Task Force hearing?

Mr. CONNAUGHTON. Well, actually—so let me amplify on the point in my testimony. I emphasize in my oral testimony that we have a rich experience of highly successful and innovative NEPA implementation. It doesn't produce conflict. Agencies go about their business. The local communities are well satisfied. We need to take those successes and figure out how to apply them in the places where we do hit train wrecks, and we've had some big train wrecks under NEPA.

If you think of the way litigation works, 140 cases a year, you know, over 20 to 30 years, and then behind that are all the cases that didn't get filed or the NEPA processes that got unduly delayed or were just dropped, you know, that's a pretty sizable effort of conflict in government.

Now—so we can look to this area that works really well and say, hey, so what's going on there that's working well and how do we apply it in the situation where we do hit some pretty big road-blocks?

You know, if you have highway projects delayed for 10 years because of NEPA, that's a real burden to that community. And, by the way, NEPA applies on the community level, and so I wouldn't want to discount the challenges and obstacles that this process can create. So our goal is how do we make it more effective, more timely, reduce the potential for conflict? That's the kind of thing that presumably everyone should be able to get behind, and we've got some good ideas for how to do that.

Mr. GRIJALVA. Thank you, Madam Chairwoman. I don't think you eliminate controversy by undoing public process—

Mr. CONNAUGHTON. Not at all.

Mr. GRIJALVA.—and I would hope that's not the intent of the testimony.

Mr. CONNAUGHTON. No.

I would note, in the Task Force recommendations and guidance that CEQ has done in the last several years, we have actually worked to amplify public involvement by cooperating agency status by—and also by specific direction of earlier public involvement in planning and decisionmaking and through integrating the NEPA process into those planning efforts, rather than have it occur in some separate process. So our goal has actually been to amplify and bring public involvement sooner as a way of reducing conflict.

Mr. GRIJALVA. Thank you, sir. Thank you.

Miss MCMORRIS. Mr. Renzi.

Mr. RENZI. Thank you very much.

Thank you for your testimony. I want to continue along this line of questioning just with a little maybe clarification and teaching from you to me so I can understand a little bit better.

I can remember back when we voted out of this Committee the Forest Health Initiative, the new standard that would be put in place that a judge who issues an injunction would have 45 days to then have to take up that injunction. It was meant to be a resource and an asset to the communities that were affected, particularly like in my district the wildfires that we had, or those that were of the opinion that sometimes the litigation process was being used as a delay tactic more than anything else.

It is interesting to hear you talk about arbitration, maybe binding arbitration, before a person goes to court. Is there any recommendations or thoughts that you have on having a new NEPA reform policy that would include some sort of a factor or a day limit or an ability for a judge, if he does issue an injunction, for him to have to take it up in his own court within a certain time frame? Now I know the 45 days was eventually compromised in the Senate version, but do you have any thoughts on that?

Mr. CONNAUGHTON. Yes. Let me speak specifically to the example you have raised, Congressman. In that instance, the process was designed such that, if there was a conflict, we would get to court faster. Because in that case a decision delayed would be a decision denied because you would lose the environmental benefit of the forest restoration. So by delaying the process it would no longer

become viable or valuable to do the forest restoration work if you had to wait a year until the next season.

So that's one of those examples where we encouraged early public involvement and then very early—if there's going to be a conflict, very early judicial review and then very prompt judicial decisionmaking. Because our concern was we would lose the environmental benefit of the restoration project.

So that's a clear example where a tighter process and a more clearly defined process would produce a significantly greater environmental benefit on a long-term scale. So this is an area that is very worthy of looking at.

What we would want to be cautious about is the question of: Could you do it on a one-size-fits-all basis? A forest restoration project to remove some dead wood and restore the ecological foundation is one set of activities. A major highway project is something different entirely. So there are some areas where we could I think shape a horizontal approach. There are others where we would have to figure out how to tailor it to meet differing needs.

Mr. RENZI. I had a major highway project, and the cost of concrete was skyrocketing daily. Do we have a time element there?

Mr. CONNAUGHTON. To me, it's not whether you would do it. It is how you structure the time element. You know, 45 days for a forest project may be different in a highway context. That's the only caution I would raise.

I would note, though, under another executive order we have a Highway Task Force to streamline the NEPA process there, and we've actually been able to cut years off the planning and implementation process. That goes directly to the point you raise. We can save the taxpayer millions of dollars in costs to achieve a desired project if we do this process more effectively. And we have some very good examples now—we've been at it for a couple of years. We've got some very interesting examples that would be a model for how to do it in other highway projects. And I think, you know, if you're interested in that, we have a pretty good record that relates to that as well.

Mr. RENZI. Excellent. Thank you for your comments.

Thank you, Chairwoman.

Miss MCMORRIS. At this time, I would like to welcome Mr. Udall to make any comments, opening statements you would like to make, and then proceed with questions.

Mr. TOM UDALL. Thank you very much, Madam Chair; and let me apologize for being late. We had a caucus meeting with Congressman Jack Murtha, who is one of our major leaders on policy in Iraq. He is making a major statement today to the press as to how we should proceed, and I just came from there. So I apologize for the lateness.

Madam Chair, we join you in welcoming our panel of witnesses and thank them for their time and effort to be with us today. In particular, we are pleased to be joined by James Connaughton, Chairman of the Council on Environmental Quality; and we look forward to hearing from him regarding the Bush Administration's—on some of the allegations that have come up during previous hearings.

Let me also say I have enjoyed working with you and other members of the Task Force. It has become apparent that the lessons we will take away from this process may be very different, but I have appreciated your cordial and fair approach to our work together, and I thank you for that.

As I indicated, it now seems clear that my view of NEPA differs significantly from the views of those who have come before the Task Force to criticize the statute. Where they see delay, I see deliberation. Where they see postponed profits, I see public input. Where they see frivolous litigation, I see citizens requiring their government to live up to its responsibilities. And where they see a barrier to development, I see a shield that protects average Americans from the short-sightedness of a massive Federal bureaucracy.

The characterization of NEPA put forth by critics is at odds not only by the record developed by this Task Force but also with the history of the statute. NEPA is the brain child of environmental moderates, many of them westerners like the great Scoop Jackson of Washington who championed the deliberative public process included in NEPA. The law operates as an antidote to the arrogance of big government and thus should be embraced by anyone who trusts the American people to take part in managing their public resources.

We look forward to hearing from our witnesses today during this wrap-up hearing and await a final report of this Task Force. And if I may proceed to a question at this point, Madam Chair, since I still have some of my time left, with your permission.

Miss MCMORRIS. If you would just give him 5 minutes of time.

Mr. TOM UDALL. Thank you.

Mr. Connaughton, I notice in your testimony—and this is at page 4—you talk about NEPA has been the subject of a comprehensive review in this and almost every prior administration. And you say: One fact stands clear. The challenges, hurdles, or barriers to effective NEPA implementation are typically not with the Act. In fact, it is now NEPA regulations—in fact, it is how NEPA regulations are implemented that most needs improving and modernization.

Could you talk to us a little bit about the thrust of that statement, that it's the NEPA regulations and what you're intending to do and how you're moving on that?

And can you tell us in a definitive way that you don't want changes to the statute, as I'm sure your staff and others have heard from our hearings that we have had that some have called for outright repeal of NEPA, others have called for various changes in the statute. Is the Administration position that this is a good statute and it should be left in place and that what we want to see—what you, as the Administration, want to see is a movement to make it a more effective statute rather than repeal? Please.

Mr. CONNAUGHTON. I will expand a little bit on some remarks I gave to an earlier question, Congressman.

The record—first of all, I talk about reviews over time. I indicated in my oral testimony that we have a lot of problem statements that have been produced over time and some movement on solving the problems. But in all of those episodes—and I think it's true of the record of this Task Force, that there is a broad core of

activity under NEPA that is working great, OK? And I think, in my conversation with Members from both sides and from east and west, there's a recognition of where it's doing really good work and working well. And then there is a subset—

Mr. TOM UDALL. Your report—your Administration report basically said that, did it not?

Mr. CONNAUGHTON. That's correct. So what we are really focusing on here, Congressman, are the areas where we are facing challenges and some hurdles and maybe some inconsistencies. So from, you know, where I sit, I'm actually very pleased at how well the statute's working because it allows us to take then a much more deliberate and focused look at the places where we do have big challenges. And we do have big challenges. We've encountered them in the energy area, we've encountered them in the forest area. And the nice thing, though, is the bundle that we need to look at is small in relation to the overall operation of the program and its successes.

Now, in terms of the statute, also from what I have seen, including from the record of this Task Force, is the current text of the statute, nobody is taking issue with it. I mean—and so in that sense the original goal—but as you know, Congressman, it's broad aspirational text, and that has stood the test of time. In fact, it is my view we actually need to go back to the future on that text, because it calls for a level of adaptation of thinking and flexibility and public involvement that we still do not realize in its implementation.

So when I go over the record of our Task Force activity, which was done by senior career officials from across the government, and when I look at what this Task Force has conveyed, what I see are some opportunities for additions to the NEPA statute that would provide very helpful guidance and, by the way, some additional inspiration to the government actors who are charged with the very mission that you described so eloquently in your opening statement. And we shouldn't be afraid of that.

If we found the ability to provide some more specific direction on timelines, to provide some more specific direction on the nature of public involvement, and we know from experience that these processes are very good, we shouldn't be afraid to then take something that could be more ambiguous or subject to litigation in the administrative context and clarifying it and solidifying it in the legislative context. Which is why we did it in the energy bill. We did it in the highway bill, again, with strong bipartisan support. We did it in the healthy forest bill with strong bipartisan support.

I think there should be bipartisan interest in these very specific—and these are good-government type of recommendations we're looking at. There should be strong bipartisan interest in continuing that improvement cycle.

Mr. TOM UDALL. There is—and I see my time is out. But are there any specifics that you can share with us today on additions to the statutes, as you put it, or the—I don't see anything in your testimony that—where you talk about specific changes or additions to the statute. Are you prepared to do that today?

Mr. CONNAUGHTON. This hearing is in the information collection mode, and we are waiting for the report of the Task Force itself to comment on what they've zeroed in on.

I would just note that in preparing this process through our Task Force, which deals with these issues I described as horizontal, that would apply across all agencies, we have 54 categories of recommendations. And we've commended this to the Task Force for consideration as we look at ways of improving the direction that comes from the statute. So I wouldn't want to cherry-pick at this moment.

I would be—we are making progress administratively to carry this forward. Some of this will go forward without any problem, some of this may be subject to processes that would delay it, and, therefore, to get a legislative lift to it would be highly welcome. But I don't want to prejudge that right now. I think we are in a good, constructive dialog mode, and I don't want to leave things out, I don't want to say things must be in, because I see some good consensus around some themes, and I wouldn't want to prejudge that.

Mr. TOM UDALL. Thank you.

And, Madam Chair, I thank you for your courtesies; and I would just ask unanimous consent to put the opening statement of Representative Nick Rahall, our Ranking Member on the Resources Committee, into the record.

Miss MCMORRIS. Without objection.

[The prepared statement of Mr. Rahall follows:]

**Statement of The Honorable Nick J. Rahall, a Representative in Congress from the State of West Virginia**

Madame Chairwoman, thank you.

Let me thank the Ranking Democrat on this Task Force for his excellent work. Tom Udall understands that most Americans whose lives and livelihoods are directly impacted by federal land management decisions want more information about those decisions and more public input into them, not less. Congressman Udall has been an advocate for NEPA and, therefore, an advocate for open, responsible and representative government and we thank him for his efforts.

In addition, I would like to thank the other Members of the Task Force from our side of the aisle for their work, in particular Representatives Jay Inslee and Raul Grijalva, both of whom provided leadership, as well as insight and energy to this process.

Madame Chairwoman, the record developed by this Task Force is extensive, but it is not sufficient. To the extent this Task Force was designed to provide a body evidence for the need to amend NEPA, it has failed.

Perhaps this is because this Task Force plowed very little new ground. Both the Clinton and current Bush Administrations conducted comprehensive reviews of the law and made specific recommendations for improving implementation without amending the statute.

Or perhaps it is because the argument put forth by industry witnesses—that federal agencies should act less deliberately and enable more rapid public lands profiteering—failed to resonate with an American public stung in the wallet by huge energy conglomerates, likely the greatest beneficiaries of NEPA changes, that are now enjoying the largest profits in American history.

Or perhaps it is because the credibility of this Task Force was repeatedly undercut by this Committee when it made sweeping changes to NEPA in the energy and budget reconciliation bills despite the fact that this Task Force had not completed its work.

Regardless, the burden of proof rested squarely on those proposing to change NEPA and that burden has not been met.

Now we fully expect those proponents to pursue legislation to amend NEPA despite the lack of justification. That is their prerogative.

But any such legislation must be seen for what it is—an attempt to limit public input into federal decision-making and to weaken judicial enforcement of the law—

rather than as the solution to some poorly defined problem with NEPA this Task Force was unable to uncover.

And we would caution our colleagues that such legislation will almost certainly defeat its stated purpose. Through collaboration and good planning, NEPA avoids more litigation and delay than it causes. We face the ironic probability that "fixing" NEPA will create the very problems proponents of change claim to want to resolve.

Madame Chairwoman, this Task Force set out to reveal problems with NEPA, but in the end, the record it developed simply proves what we have argued all along: NEPA is not broken and does not need fixing, particularly not the kind of "fix" we fear proponents have in mind.

Thank you.

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Miss MCMORRIS. Mr. Brown.

Mr. BROWN. Madam Chair, thank you very much. I notice that we have a vote coming up at 11:30 to 12:00, so I just want to ask these questions. But I do welcome and certainly enjoy the dialog. Thank you, Madam Chairman.

Miss MCMORRIS. Would you just—there has been some conversation about codifying some of these NEPA recommendations, some of the Task Force recommendations. Would you just—as I'm hearing you speak, you do believe that there is opportunities—I like the idea of additional inspiration, that there may be opportunities where we could actually strengthen and improve by clarifying, adding to the statute when it comes to NEPA in such a way that would improve the process. Is that what I'm hearing you saying?

Mr. CONNAUGHTON. That's correct.

I think, Chairwoman, you use the words clarity and certainty. You know, certainly some of the timeline issues that have emerged are issues that have created hesitancy out in the field, some of these issues related to dispute resolution.

I would note, Congressman Udall, the institute that bears your name is doing leading work with the Federal agencies to teach them how to engage in broader public involvement processes earlier and then to teach them how to access dispute resolution processes before we find our way into courts. You know, that is something that was not even considered in 1969. But certainly the institute has done landmark work not just nationally but globally in how to expand that capacity. And it's not something our agencies budget for as much as they could, it's not something that the State and local actors are used to participating in, and so these are the places that I think about in terms of improvement.

And it's also the case on this integration issue it's very important. Because when NEPA was created we didn't have all of our modern environmental statutes. You know, we didn't have the Clean Air Act yet, we didn't have the Clean Water Act, we didn't have RCRA, we didn't have some of the more recent improvements to our natural resource management laws, all of which have added new processes to deal with the substantive elements of those statutes that then run in parallel with the NEPA process.

Really what we need to find is to find a way to converge those processes. Because that's really what NEPA intended. You know, NEPA was ahead of time. I use the phrase we need to go back to the future, take its central mission and figure out now how to bring in a better coordinated and a more efficient process. Because by fundamental is: If we are using up taxpayer resources on process and not producing a good environmental outcome, those are

resources that are not being utilized in other places. So the more we can take off the shelf things that aren't creating impacts and streamline those processes and dedicate our resources to the areas that require real deliberation and, in fact, a higher investment in information collection and information dissemination, then as a Nation we are better off.

You know, this is efficiency, this is productivity, and—but we cannot lose sight of the original mission of NEPA, which is productive harmony. Productive harmony is a very important phrase from that statute.

Miss MCMORRIS. One of the concerns that has been raised is that there is a difference in implementation among the agencies, and I'm interested in your efforts with the environmental management systems. And you mentioned that there's 1,800, I think you said in your testimony.

Mr. CONNAUGHTON. We are on our way.

Miss MCMORRIS. OK.

Mr. CONNAUGHTON. We have a lot of work to do, but we're on our way.

Miss MCMORRIS. Would you just elaborate a little bit more on how many agencies have these systems in place and how would these systems be affected by changes to NEPA or its regulations?

Mr. CONNAUGHTON. More than—it's probably about two dozen agencies are working on one or more EMSs. Obviously, the Department of Defense is working on many of them, environmental management systems. Where the environmental management system approach has its greatest application in NEPA context is for ongoing Federal operations, you know, the operation of a base, a forest plan. You know, these are ongoing operations. Where, if we could enhance their capacity to do an environmental management system, which is a plan—it's a planning by objective, and then it has a management review cycle to it and has ongoing improvement, that whole philosophy and approach is actually broader and more effective than the NEPA process. So it can be used to harness the NEPA process and also then harness in all of these other substantive statutory requirements into a more orderly system of management. It also gives you the confidence that there will be ongoing management review.

One of the issues with NEPA that makes the litigation such high stakes is the sense that this is your last shot at it, you know. And so everybody says, boy, if this NEPA goes down, then the whole project's over. But the environmental management system can turn the NEPA process into a living process, which is where you could actually agree that, you know what, this is an issue that warrants further study, and we have an agreed process to get the information we need and adapt our decisions in keeping with the decision without waiting for 5 years for the next big plan or the next big EIS.

So the adaptability and the breadth of the EMS for ongoing operations could be a very, very powerful future outcome that again, in my view, would expand on what NEPA was trying to achieve and make it more certain for the public and also then minimize the concern of courts about the accountability of government. So I hope we can spend some time on that one.

Miss MCMORRIS. Very good.

We should probably head over to the Floor. We have a couple of votes. Thank you again for being here. I really appreciate you taking the time.

We have a 15-minute vote and a 5-minute vote, and then we will be returning. I would ask the next panel, if you can just wait. We appreciate your patience. And everyone else, please return. We will see you in a few minutes.

Mr. CONNAUGHTON. Thank you.

[Recess.]

Ms. MCMORRIS. I will call the hearing back to order. Thank you very much for waiting for us. I need to ask you to stand and raise your right hand to be sworn in.

[Witnesses sworn.]

Miss MCMORRIS. Let the record reflect that the witnesses answered in the affirmative.

So we have a timer. We have asked each of these folks to present for 5 minutes and then we'll open it up for questions. And in the interests of time, we will just get started. So, Mr. Yost, if you would begin.

**STATEMENT OF NICHOLAS YOST,  
SONNENSCHN, NATH & ROSENTHAL, LLP**

Mr. YOST. Thank you, Madam Chairwoman, for inviting me here, and thanks to you and to the other members of the Committee.

As you know, I am Nicholas Yost from Sonnenschein Nath & Rosenthal in San Francisco. I was, during the Carter Administration, the general counsel for CEQ, and was the lead drafts person of the CEQ and NEPA regulations which remain in effect today, with only—after some 25 years, with only one amendment to one section, they have stood the test of time.

Madam Chairwoman, you said earlier that if we can make the NEPA process more timely and more efficient, that would be a win. I agree. And in order to streamline NEPA, to reduce delay while preserving the benefits of the law, there are steps that can legitimately be taken which I will address today.

Now, I will try and speak on four different issues, briefly: one, the question whether there is, at times, unwarranted delay in the NEPA process; two, the causes of that delay; three, and elaborating on this, measures that can be taken to reduce delay and otherwise streamline the NEPA process; and four, discussion of measures that should not be adopted in the name of streamlining NEPA, measures which would instead undercut the action to the detriment of the Nation's environmental protection.

I strongly believe that NEPA and its basic message, look before you leap environmentally, serves the American people immensely well. This statute has been an environmental success story. It's been replicated in about half of our States, and it has served as a model for environmental impact assessment laws in more than 100 countries and may be the most imitated law in American history. Also I should point out that I have spent much of the last 20 years assisting clients through the NEPA process and have had my own share of frustration with unneeded delay in that process.

The goal should be to cut the fat but not the muscle.

Is there a problem with delay under NEPA? My impression is that, on occasion, there is such delay. And it is most often associated with applicant sponsored projects.

I think also that Chairman Connaughton was very sensible today in stressing that in the vast number of projects that go through NEPA review, there is no enormous controversy. NEPA is doing its job. The project is becoming more sensitive as a result of what is done.

What is responsible for delays in the NEPA process? Lack of deadlines. And I will come back to that. But the absence of deadlines, milestones and schedules in many NEPA processes enables delay. I think this is the single most important deficiency to be addressed.

Second, lack of determination, lack of drive within agencies to do what is necessary to complete the process in a reasonable amount of time.

Three, lack of resources. Quite simply, if agency personnel aren't there, they can't do the job properly.

Four, fear of litigation leads to an overcaution which I think can lead to delay.

And I should emphasize that the fear is more a matter of perception than of reality. In the last year, for which CEQ has public statistics last year, there were 156 NEPA cases filed, and in only 11 of those did a judge grant injunction. By way of larger comparison, in that same year, 281,338 civil cases were filed in U.S. District courts.

In brief, NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, is a 99.97 percent rate of NEPA actions successfully completed without injunctions.

Now, I don't think that that provides a factual basis to prompt excessive caution on the part of agency personnel.

Next, lack of cooperation by other agencies can contribute to delay. And there are difficult substantive areas, wetlands, clean air, some having nothing to do with NEPA and some NEPA related. What can be done to reduce delay?

I make two suggestions in the statement which you have in both its long form and its short form. But I think this is the single most important area to address. One, by simply adopting limits which can insert deadlines on the NEPA process. And I make two suggestions: one for a series of presumptive limits; and the other for Congress to repeat what it recently adopted in its Safe, Accountable, Flexible, Efficient Transportation Equity Act, or SAFETEA, which was addressed in the transportation area at the same issue.

Next, implementing NEPA earlier in the process. Concurrent reviews, getting cooperating agencies to cooperate, ensuring adequate resources. Simply, if somebody doesn't have the resources, they can't do the job. Making sure that they are a well-trained agency and decisive agency personnel, those with the capacity to make decisions.

Early assurance of legal compliance. And I suggested in my presentation, in the written presentation, that the Justice Department be involved as a means of getting an outside look before the

document becomes final, which helps bulletproof it and, therefore, makes judicial review less probable and less probable of success.

Miss MCMORRIS. Mr. Yost, would you summarize, and then—just because we are going to run out of time. And then we'll get to the rest of the panelists and we can come back for questions.

Mr. YOST. I will not go through the other recommendations that I have there, but at the same time, it is important while making those delay-removing recommendations to keep in mind that the basics of NEPA, not having—not exempting things from NEPA, not cutting down on the review of alternatives, not cutting the public out of the process, and not cutting back on judicial review, which is the only reason why NEPA is—how NEPA is enforced and why people pay attention to NEPA are important for this Task Force to consider.

Thank you for the opportunity.

Miss MCMORRIS. Good. Thank you.

[The prepared statement of Mr. Yost follows:]

**Statement of Nicholas C. Yost, Partner, Sonnenschein Nath & Rosenthal LLP, San Francisco, and Former General Counsel, Council on Environmental Quality**

**Introduction.**

Rep. Cathy McMorris (R-Wash.), the Chairwoman of the House NEPA Task Force, said, "If we can make [the NEPA] process more timely and more efficient, I think that would be a win." I agree. In order to streamline NEPA—to reduce delay while preserving the benefits of the law—there are steps that can legitimately be taken. As you will see, I make specific proposals to reduce delay, which include:

- time limits on the NEPA process—two potential mechanisms
- implementing NEPA early in the approval process
- concurrent agency reviews
- getting cooperating agencies to cooperate
- adequate resources
- well-trained and decisive agency personnel
- top down direction to expedite
- early assurance of legal compliance
- availability of agency headquarters personnel to expedite NEPA process
- regular meetings among those responsible for the NEPA process
- getting the right level of NEPA documentation
- maximum coordination with State mini-NEPAs, and
- expediting judicial review, including:
  - > statutes of limitations,
  - > expediting preparation of the administrative record,
  - > priority for NEPA suits, and
  - > the joinder of NEPA and comparable state claims.

There are also other measures which it would be a mistake to adopt, which would gut NEPA rather than streamline it. Specifically:

- Congress should not exempt actions from NEPA.
- Congress should not eliminate or reduce the obligation to consider alternatives.
- Congress should not squeeze the public out of the NEPA process.
- Congress should not curtail judicial review.

Throughout I respectfully suggest that we keep in mind the original intent of the drafters. The Senate's lead author, Henry Jackson of Washington, characterized NEPA as "the most important and far-reaching environmental and conservation measure ever enacted." The ranking Republican, Gordon Allott of Colorado, called it "truly landmark legislation." The lead House author, Congressman John Dingell of Michigan, stressed that "we must consider the natural environment as a whole and assess its quality continuously if we really wish to make strides in improving and preserving it." President Nixon chose January 1, 1970, to sign NEPA into law—as his first official act of the new decade. In Senator Jackson's words,

The basic principle of the [national environmental] policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings. If there are to be departures from this standard of excellence, they should be exceptions to the rule and the

policy. And as exceptions they will have to be justified in light of the public scrutiny required by section 102.

I would respectfully suggest that we would do well to continue to be guided by the framers' words.

In this presentation I will address the issues confronting the Task Force as follows:

- (1) the question whether there is unwarranted delay in the NEPA process;
- (2) the causes of that delay;
- (3) measures that can be taken to reduce delay and otherwise streamline the NEPA process, and;
- (4) discussion of the measures that should not be adopted in the name of streamlining NEPA, measures which would instead undercut the act to the detriment of the nation's environmental protection.

Throughout I should emphasize that as General Counsel of the Council on Environmental Quality I was the lead author of the Federal Government's CEQ NEPA Regulations, which remain in effect a quarter century later after five Presidents with only one amendment to one section. I strongly believe that NEPA and its basic message—look before you leap environmentally—serves the American people immensely well. This statute has been an environmental success story. It has been replicated in about half our states, and having served as the model for environmental impact assessment legislation in more than 100 countries, it may be the most imitated American law in history. However, I should also add that I have spent much of the last twenty years assisting clients through the NEPA process and have had my own share of frustrations with unneeded delay in that process. The goal should be to cut the fat but not the muscle.

**1. Is there a problem with delay under NEPA? In many cases there is for the reasons I set out below. My impression is that such delay is most often associated with applicant-sponsored projects (when timeliness may be critical) as distinct from agency-sponsored ones, where timeliness is often less urgent, such as with respect to long-term actions involving planning.**

- By way of anecdotal example, a principal in a highly regarded consulting firm told me of a draft EIS he had prepared for an agency within the Interior Department that had been sitting on an agency official's desk for 3 months awaiting review and that the official had said it would be another 3 months before she could get to it. I happen to know the agency official, and she is a highly competent, responsible professional, but her workload is overwhelming. It is, however, the applicant to the government whose project is the subject of the EIS who suffers.
- By way of a more pervasive illustration of delay, a couple of years ago the Federal Highway Administration set a goal of reducing its median Environmental Impact Statement (EIS) preparation time from 4 1/2 years to 3 years, and its Environmental Assessment (EA) preparation time from 1 1/2 years to 1 year. While admirably intentioned and while the FHWA has been a leader in addressing issues of delay under NEPA, even the goals appear to me to assume excessive time. The President's Council on Environmental Quality (CEQ), the agency charged with overseeing NEPA's implementation throughout the government, has issued guidance saying that agencies' EISs should not take over one year to prepare and process and EAs not more than three months. These are far shorter times than the goals the FHWA has set for itself.

**2. What is responsible for delays in the NEPA process? I would suggest several answers:**

- Lack of deadlines. The absence of time deadlines, milestones, and schedules in many NEPA processes enables delay. As I will discuss, I think this the single most important deficiency to be addressed.
- Lack of determination. The simple lack of drive within agencies to do what is necessary to complete the process in a reasonable amount of time. I will return to this subject later, but the lack of command direction to move the process rapidly is critical.
- Lack of resources. Quite simply, if the agency personnel aren't there, they can't do the job in a timely fashion. A 2002 study (Smythe and Isber, NEPA in the Agencies-2002) stated that the Army Corps of Engineers cut its Headquarters environmental staff from 12 to 3; the Department of Energy cut its comparable staff from 26 to 14; and the Environmental Protection Agency reduced its headquarters NEPA staff by 20% over a 10 year period. Fewer staff members to do the work—any work—will mean that it takes longer to do it. The ones who

suffer from the Federal staff shortages are the private businesses or the State or local governments or Indian Tribes which are trying to move projects through the Federal process.

- Fear of litigation can lead to an overcaution which can lead to delay. I should emphasize that this fear is more a matter of perception than of reality. In fact only a small proportion of NEPA actions result in judicial challenges, and experienced agency NEPA counsel can make informed judgments as to which actions are potentially vulnerable and which are not, thereby eliminating needless delay associated with excessive time on non-problematic matters. Each year approximately 450 EISs and 45,000 EAs are prepared on Federal actions. (The EIS numbers cover both Draft and Final EISs, so the number of actions represented is approximately half the total number.) In the last year for which CEQ has made public statistics on NEPA litigation dispositions (which it assembles in collaboration with the Justice Department)—2004—156 NEPA cases were filed, and in only 11 of those cases did the judge grant an injunction. In 2002 150 NEPA cases were filed, and injunctions were issued in 27 of them. In 2003 128 NEPA cases were filed, of which 6 resulted in injunctions. By way of larger comparison, in that same year, 2004, 281,338 civil cases were filed in the U.S. District Courts. During the same year 998 cases were filed in District Courts involving environmental matters. Of these, 548 involved private parties only (i.e., not the U.S. Government), and of the balance, which involved suits to which the United States was a party, the government was the plaintiff in 171 cases and defendant in 279.

Environmental cases therefore represent a minuscule portion of the Federal court caseload, and NEPA cases a modest part of even that small fraction. In summary, with respect to NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, a 99.97% rate of NEPA actions successfully completed without injunctions does not provide a factual basis to prompt an excessive caution on the part of agency personnel. Even looking at the relatively modest number of NEPA cases filed, in 2004 in 93% of them the judge did not issue an injunction. Federal judges on the whole use good judgment and do not act in unwarranted manner.

- Lack of cooperation by other agencies can contribute to delay. In NEPA's early days the agencies charged with safeguarding natural resources and environmental protection (typically the Environmental Protection Agency, the Fish and Wildlife Service, and what was then the National Marine Fisheries Service (now NOAA Fisheries)) were sometimes perceived as withholding their contribution while an EIS was being prepared and then, when the time came for public comments, castigating the lead agency for an inadequate job and requesting that the document be redone. In an effort to turn this adversarial—and time consuming—interaction into a more constructive approach, CEQ in its 1978 NEPA Regulations devised the concept of “cooperating agency,” requiring agencies not to withhold their input until the comment stage, but to get involved early on when the EIS was being prepared, contributing their expertise to it and even taking the lead on the portions on which they had a special knowledge. Everybody benefited—the lead agencies and project proponents saw a constructive collaboration instead of an adversarial comment process. Project proponents also saw objections to their proposals being surfaced early in the process, so they could be evaluated and the project adapted to reflect meritorious objections, ultimately saving time. Those concerned with the environment saw their concerns being interjected into the NEPA process early on, with an EIS reflecting a fuller range of environmental inputs and values, rather than being treated as an add-on at the end.

However, it is fair to say that this emphasis on cooperation needs constant oversight and consistent reinforcement. The natural tendency of agencies to hold off their involvement and husband their resources must be resisted. Top down direction from the highest levels of the Executive Branch to participate in working through the NEPA process—not avoiding environmental allegiances and responsibilities, but embracing them by insistence on the early involvement of the resource agencies—is vital. To emphasize—the purpose is not to silence those agencies—quite the opposite, it is to ensure their meaningful contribution by insisting on their early involvement.

- Difficult substantive areas. Some environmental problems are complex and—often quite apart from NEPA—take time to figure out how wisely to deal with them. Examples include:
  - > Air quality conformity. Under the Clean Air Act Congress has provided that EPA adopt national air quality standards which stand as healthy air goals

for all Americans. States are then charged with devising State Implementation Plans (SIPs) setting out the steps to be taken in that state to attain those goals. In an appropriate effort to ensure that Federal agencies do not by their own actions within a given state subvert that state's planning, Congress has also provided that Federal agencies' actions must "conform" to the state's SIP. Such conformity often leads to hard choices, such as how to offset an increase in air emissions—which may be time-consuming.

- > Wetlands. Congress has provided that permits must be obtained to dredge or fill "waters of the United States." More particularly, wetlands are safeguarded in part by requiring that there can be no fill when there is an upland (i.e., non-wetland) alternative available. This is an "alternatives" requirement independent of NEPA, and it is one which imposes a substantive requirement—you must avoid the wetland if there is another, upland alternative available. Additionally, both Presidents Bush and President Clinton have followed a policy of "no net loss" of wetlands—if you fill a wetland, you must create or foster a wetland elsewhere. This leads to a hunt for suitable sites, sometimes using a so-called "mitigation bank," which can also take time.
- > Section 4(f). Similarly in section 4(f) of the Transportation Act, which applies to transportation facilities—most commonly highways and airports—Congress has provided that the agency must pursue alternatives which avoid parks and historic structures. Again—Congress had created an alternatives requirement independent of NEPA, and one with real bite.
- > Indirect impacts. Sometimes the most consequential environmental impacts are not the most immediate ones. For instance, when a new highway is built in an undeveloped area, there will be immediate impacts as part of the construction, typically involving noise and dust. Then there will be the impacts of operating the highway once it is built—again noise and the air emissions of the vehicles using the road. And, in an undeveloped area, there will be still further impacts as the highway opens a new area to development. These so-called "growth-inducing" impacts may be a good thing—that may be precisely why the highway was built—or they may not be—the inadvertent consequences of a highway built for other purposes. But NEPA at minimum requires that these impacts be examined such that the public can be aware of and responsible authorities can plan for what is to come. The analytical work of Federal agencies is made available to the affected local government.
- > Cumulative impacts encompass another set of effects that NEPA examines. For instance, if the Department of Veterans Affairs were building a hospital for the nation's veterans on a road that could just accommodate the traffic of the patients coming to the hospital, and simultaneously the local government was approving a Home Depot across the street, which would also generate considerable traffic, NEPA's cumulative effects analysis will alert everybody concerned that there is a problem. NEPA does not solve the problem, but it provides the occasion and the traffic data which will lead the Federal agency and the local government and perhaps the state highway agency to sit down together and figure out what is necessary to deal with the problem of the cumulative impacts of the combined effects of the new hospital and the new megastore. Future traffic jams are averted.

Cumulative impacts consist of past, present, and reasonably foreseeable future impacts of the same type. (40 CFR 1508.7). For instance, the FHWA in preparing an EIS on a highway into a newly developing valley (with its attendant air and noise impacts) in analyzing the capacity of the highway will need to analyze the past impacts (e.g., the number of people and destinations already in the valley), the present proposals (e.g., any new projects which are the immediate occasion for building the highway), and the "reasonably foreseeable" future projects (e.g., other developments which are known to be planned for the valley). Only through an accurate analysis of cumulative impacts will the agency be able to get a complete picture of what is in store for the valley in terms of traffic, air, and noise and so that the highway can be appropriately sized.

- > Often an agency simply does not follow the law, creating problems for itself. I know you have heard testimony—often conflicting—about a NEPA case in the 1970s against the Corps of Engineers in New Orleans involving flood control issues. I have no personal familiarity with that case, but in the 1980s I was privileged to represent the State of Louisiana in NEPA litigation against the Corps of Engineers over the dredging of oyster shell reefs—which act as a natural barrier to coastal erosion—off the Louisiana coast. The Corps, having found that the impacts of the dredging were "significant," still

refused to prepare an Environmental Impact Statement analyzing the impact. In order to safeguard its coast, the State of Louisiana had to go to court to prevent the Corps from flaunting the Congressional command. The State was successful in the U.S. Court of Appeals for the 5th Circuit in New Orleans in enforcing NEPA. *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985). In brief, agency recalcitrance in following the law can be and is itself often a cause of delay.

- > I set out these examples—some of which arise under NEPA and some under other Congressional enactments—as only that—examples chosen from among many to illustrate that there may be complex environmental issues to resolve and what takes time is not necessarily NEPA but the reality of people working together to solve complex problems. ( See the excellent testimony presented before the Task Force by Thomas C. Jensen, Chairman, National Environmental Conflict Resolution Advisory Committee, on the importance of collaborative decision-making.)

### 3. What can be done to reduce delay?

- Time limits. Agencies must be encouraged—perhaps directed—to set time limits on the NEPA process (and on individual aspects of the process). If delay is the issue—and it often is—then time limits are the one answer that directly addresses and reduces the problem.
  - > With precisely that in mind, when CEQ adopted its NEPA Regulations it provided that an agency must, when requested by an applicant, adopt time limits. 40 CFR §1501.8. (“The agency shall set time limits if an applicant for the proposed action requests them...”) (The full text of §1508.8 is set out as Attachment A to the presentation.) At the same time CEQ did not impose a single universal time limit because the various actions to be evaluated differ so much in their magnitudes. For instance, it simply takes more effort and time to evaluate a trans-Alaska pipeline than it does to examine a single Interstate highway interchange.
  - > That said, the provision has been grossly underutilized, largely, I believe, because applicants are reluctant to antagonize agencies by exercising their right to demand that time limits be set.
  - > As one trade association from the aviation industry put it in urging reform in agency implementation of NEPA, the agency procedures could “instill greater urgency in the process if it integrated words such as “schedule,” and “milestones” and “deadlines” into the process....” (Comments submitted by Airports Council International -- North America to FAA (2004).)
  - > By way of constructive example, the FHWA, as part of its “Vital Few Environmental Goal,” has adopted a policy of “negotiated timeframes” to expedite the NEPA process. The new Safe, Accountable, Flexible, Efficient Transportation Equity Act will accelerate that process.
  - > I believe that new innovations are needed to emphasize time limits. Let me make two suggestions for dealing with the very real problem of delay (which are not mutually exclusive):
- (a) The most direct solution would be to require the adoption of presumptive time limits, through CEQ or legislatively, such that EISs are required to be completed in a discrete period of time absent special circumstances warranting lesser or greater time periods. For instance, either CEQ could impose by Regulation or Congress could impose by law a set of 3 or 4 presumptive time limits for the NEPA process (for EISs; same could be done for EAs). (Or, either CEQ or Congress could require each agency to prescribe such categories). Category A might involve 10 months for an EIS process (running from the Notice of Intent (NOI) through the Record of Decision (ROD)); Category B 15 months, and so on. At the outset of the process, perhaps as part of scoping, the lead agency would (in consultation with the applicant (if any) and with agencies with jurisdiction by law or special expertise, and in the case of actions with the potential for controversy, the public), assign the action to one of the time limit categories. Some sort of flexibility for unforeseen circumstances or unusual situations would be needed, but as a general rule those affected by the NEPA process will have a predictable schedule for the completion of the process. The fact of having a time limit will drive the process. This is the single most important measure needed to reduce delay.
- (b) Alternatively or additionally Congress could repeat the approach it has recently adopted in the newly enacted “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” (SAFETEA). This year Congress enacted and the President signed legislation which contains detailed and well-considered provisions for expediting the NEPA process for transportation

- projects. 23 U.S.C. §6002. There is no reason why those provision—already considered and adopted by Congress—could not be adapted to non-transportation projects. (It should be noted that there are some provisions in the SAFETEA which do not lend themselves to replication for all other activities subject to NEPA. For instance, the Act allows the lead agency to develop the preferred alternative to a higher level of detail than other projects (23 U.S.C. §6002(8)(4)(D)), which is generally not a good idea because it tilts the decisionmaking prematurely in favor of the particular, preferred alternative.) In general those provisions, under the statutory title, “Efficient Environmental Reviews for Project Decisionmaking” (Id.) direct the Secretary (of Transportation, but that can be adapted to other agencies) to take charge of an inter-agency NEPA process and establish a schedule for the completion of the environmental review process for the project under consideration. 23 U.S.C. §6002(g)(1)(B). To ensure that other laws and the agencies charged with their implementation do not take time beyond the NEPA schedule, the law provides that the Secretary is to deliver a progress report to the relevant Congressional Committee (in the SAFETEA the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure) on the occasion of the later of 180 days after the application was submitted or the date on which the Secretary made all final decisions on the project. Additional reports are due every 60 days.
- Implementing NEPA earlier in the approval process. Insofar as NEPA’s consideration of environmental matters is integrated early in an approval process—as distinct from being an add-on at the end—NEPA takes less time, and the values it represents are better integrated into the action being taken.
    - > CEQ has long emphasized this goal (40 CFR §§1500.5(a), 1501.2), but the mandate needs constant reinforcement.
  - Concurrent reviews. Often many Federal agencies have a say in a project’s approval process. It is essential that these agencies undertake their environmental responsibilities concurrently rather than sequentially. That cuts down on delay.
    - > CEQ has also tried to make this happen (40 CFR §§1502.25, 1500.5), but consistent insistence is needed.
  - Getting cooperating agencies to cooperate. Insofar as agencies other than the lead agency have either special expertise or jurisdiction by law, they too have a role to play in the NEPA process (NEPA, §102(2)(C); 40 CFR §§1501.6 and 1508.5). Any tardiness in their taking action has the potential to delay the whole process.
    - > CEQ has recently and quite laudably spent considerable effort in making the cooperating agency concept work well.
    - > In many cases, resource shortages (discussed below) play a role in cooperating agency contributions to delay (which can be alleviated if the lead agency augments the resources available to the cooperating agency). SAFETEA specifically provides for transportation funds to be made available to State agencies and Indian Tribes which are participating in the environmental review process for activities which contribute to expediting and improving transportation planning and project delivery.
    - > That said, facilitating and expediting the cooperating agency role has promise for accelerating the whole process.
  - Adequate resources. As I noted above, no job can be performed if there are not adequate personnel assigned to do it.
    - > The expedition with which an agency undertakes its NEPA responsibilities is often directly proportional to the availability of experienced staff to undertake and complete the job promptly.
    - > By way of illustration of action to reduce delay, the Federal Aviation Administration (FAA), an agency with an exceptionally high success rate in defending its NEPA documents in court, acting in response to the Department of Transportation FY 2003 Appropriations Act and to the requests of affected airports brought on 44 more personnel—31 environmental specialists and 13 lawyers—with the avowed purpose of cutting delay. That was a constructive step.
    - > I am fully aware that resources are in short supply these days—that the many demands on the Nation’s exchequer, both foreign and domestic, from Iraq to Katrina, diminish the prospect of additional resources. But that recognition does not make the problem go away. If there is nobody there to do the job, the job doesn’t get done, whether the job is NEPA implementation or any other function. In some measure, particularly with projects for which there is a project sponsor, this lack of resources can be addressed by having the project sponsor pay the cost of environmental review. For the

sponsor that additional cost may well be dwarfed by the cost of delay. It is to everybody's advantage to allow sponsors to advance the cost of evaluating these applications, understanding, of course, that expedited analysis does not guarantee approval but rather only rapid evaluation. Congressional authorization would make clear that agencies can accept funds for this purpose.

- > By way of example, some agencies choose to rely in part on outside private contractors to prepare NEPA documents under the supervision of core agency staff. (40 CFR § 1506.5). Under so-called "third party contracts" the agency may select and supervise the consultant, but the applicant—whose interests are furthered by prompt action—foots the bill. This works to mobilize the resources necessary to do the job promptly, especially when the agency lacks sufficient experienced personnel. It internalizes within the project cost the external cost of environmental evaluation.
- Well-trained and decisive agency personnel. The FAA, an agency with a particularly high record of success in court with its NEPA documents, says quite simply: "A highly skilled FAA EIS project manager is the greatest asset for a successful EIS." FAA, Best Practices Guide (in my experience the single best guidance put out by any Federal agency on expediting the NEPA process.) I would suggest several attributes that are needed for agency personnel to deal effectively with and appropriately expedite the NEPA process:
  - > They must be trained such that they produce or review NEPA documents that fully implement the law's intent, that protect the public, and that will withstand legal challenge.
  - > They must—and this is difficult to legislate or to mandate, but is exceedingly important—have the capacity to make decisions, to say "yes" as well as "no" (or "I need more information"). There must be agency incentives built in for agency officials to move quickly and decisively.
  - > There must, as I said earlier, not only be qualified, decisive personnel, but there must be enough of them. (Generally see CEQ, The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (Sept. 2003) for detailed recommendations prepared by experienced practitioners within the Federal government concerning how better to make the internal process work more smoothly.)
- Top-down direction to expedite. There must be command direction from above—within both the lead and cooperating agencies—to move the NEPA process expeditiously. Wholehearted implementation of NEPA's mandates is essential, but timelines are also a vital ingredient of a successful process. (The newly-enacted SAFETEA, President Bush's Executive Order 13274 (Sept. 18, 2002), and guidance promulgated by DOT, the FAA, and the FHWA provides worthwhile examples of such top-down direction to expedite.)
- Early assurance of legal compliance. Delay can come from either an over-reaction due to fear of litigation, which stymies decisive action, or from sloppy environmental analysis which results in having to go back and do the job over. Doing it right—and legally—saves time. A stitch in time does save nine. As the NEPA process progresses, an agency should be having its legal staff, which must be experienced with NEPA litigation and associated other environmental requirements, consistently giving prompt advice on what is needed for an adequate NEPA document—neither too much nor too little. Again to quote an aviation industry reform proposal, what is needed by the agency are "procedures for very fast decisions by experienced litigators on legal risk associated with time-consuming elements of NEPA analysis,...." (Airports Council International comments.) Quite simply, it is possible accurately to forecast the litigation vulnerabilities of a NEPA document and remedy the deficiencies to reduce those vulnerabilities (and at the same time to see that useless time and effort is not devoted to detailed study of issues not critical to the decision). I have participated in the preparation of many NEPA documents representing applicants (including among others energy companies, highway builders, land developers, airports, and Indian Tribes), and no document on which I have worked has ever been overturned by a court. It can be done. There is no trick. The message is to follow the law and the regulations faithfully. That will serve the law in the manner that Congress intended. Experienced NEPA litigators sometimes get the feeling that much of the carping about NEPA comes from those who have done inadequate jobs in preparing NEPA documents and would like to blame somebody else—or the statute itself—when their work is found unacceptable.
  - > To the extent that agencies do not have qualified NEPA lawyers with litigation expertise available in house, the agencies could be required to consult with the U.S. Justice Department prior to finalization of NEPA documents

in potentially controversial cases. It is, after all, the lawyers of Justice's Environment and Natural Resources Division who will ultimately be defending these NEPA documents in court. If they are afforded the opportunity to review the documents before their finalization (rather than after a potentially inadequate document has been finalized and becomes the subject of a lawsuit), much aggravation and delay can be headed off. Of course, time limits would be needed for DOJ review (as for every other part of the NEPA process).

By way of analogy, in the Carter Administration all Justice Department NEPA pleadings were reviewed by CEQ's legal staff to ensure consistency throughout the government and to ensure the views of the client agency responsible for interpreting NEPA were brought to bear as Justice crafted its pleadings (rather than simply reflecting the views of the agency being sued). CEQ was given a 48 hour turnaround to transmit its views to Justice. This salutary practice has not been followed, unwisely, I believe, by subsequent administrations.

- Headquarters personnel available to step in to expedite. Different agencies have different organizational means of doing their business, which is totally appropriate. But to the extent that an agency relies on a regional or district office to do its NEPA work, having somebody—informed, empowered, and decisive—at the headquarters level to whom recourse can be had to break logjams and get a project moving is extraordinarily helpful.
- Regular meetings. With complex projects no mechanism works more effectively to move the project along and to involve all the agencies which will ultimately be involved in the permitting than regular meetings—usually led by the lead agency—to set and achieve milestones and to evaluate progress.
  - > I have personally been involved in such sets of meetings in projects ranging from a successfully completed expansion of the Philadelphia International Airport to a land development on the Potomac River in Maryland. This system can and does work.
  - > The dynamics of every agency having to show progress every month—to show what it has done, to state what further information it needs—function to make projects move at a rapid clip.
  - > That said, such meetings are resource-consumptive and are best used for complex projects with the potential for controversy. Needless to say, assigning a high priority to such projects—which may be most appropriate given their importance—does result in less priority for the other projects.
- Get the right level of NEPA documentation. As you know, there are three possible levels of NEPA documentation—(1) a Categorical Exclusion (which, for a qualifying project—one of a type found by the agency (with the approval of CEQ) not to have significant environmental impacts either individually or cumulatively—simply says no more NEPA documentation is needed); (2) an Environmental Assessment (EA) (which is supposed to be a brief study to see if a more extensive EIS is needed and which also functions, in the vast majority of cases, as the mini-analysis which is the only NEPA document and which builds environmental factors into decision making; and (3) an Environmental Impact Statement (EIS) (which is the most thorough analysis required under NEPA—reserved by Congress for those proposals which may significantly impact the human environment). Getting the appropriate level of NEPA documentation right is important—both to avoid a more complex, lengthier process than the action warrants, and, conversely, to be sure there is adequate analysis such that it will not be necessary to come back and start over.
  - > Current agency practices are widely disparate. For instance, in one year the Federal Highway Administration categorically excluded 90% of its projects, prepared Environmental Assessments /Findings of No Significant Impact (EA/FONSI) on 7%, and EISs on 3%, while the Corps of Engineers prepares 75 to 100 EISs each year and 4,400 EAs, and the Department of Energy prepared 11 Final EISs and 49 EAs over a 2 year period.
  - > Opportunities exist for improvement. For instance, the Food and Drug Administration used to require an Environmental Assessment for each new drug before it came on the market. This involved several hundred thousands of expenditure and several months delay in making the drug available to the public. The primary purpose of an EA, of course, is to determine whether an EIS is needed. Over many years in only one case did the FDA decide such an EIS was warranted (and adopted one prepared by another agency). That record established a firm basis on which the FDA was able to broaden its categorical exclusions to most new drugs. In brief, actual

experience over a period of years showed a lack of significant environmental impact and therefore supported broader categorical exclusions.

- Insure maximum coordination with State NEPA analogues. About half of the states have some sort of statute or order based on NEPA, and a smaller number of these states have analogous laws whose reach is more pervasive than NEPA, including Chairwoman McMorris' home State of Washington and Chairman Pombo's and my home State of California. Many actions will be subject to both laws. Duplication can be avoided if the Federal and State (or local) agencies collaborate to prepare one document to comply with both laws. The CEQ NEPA Regulations require exactly that on behalf of Federal agencies. 40 CFR §1506.2. And, indeed, I drafted a comparable state provision for the Council of State Governments which became part of the Council's suggested model legislation and which was adopted by a number of states. Still—agencies often avoid such cooperation. A firmer push to make them collaborate would be helpful.
  - > I should note that some of the State enactments are considerably more demanding than NEPA. For instance, the California Environmental Quality Act (CEQA) requires not only identifying potential mitigation, but substantively adopting it to remove all significant impacts as a condition of project approval. California's "little NEPA" includes the provision that:
 

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, ....

Cal. Public Resources Code §21002. Also see the provisions from Massachusetts (Mass. Gen. Laws ch. 30, §61, requiring "a finding that all feasible measures have been taken to avoid or minimize said impact.") and New York (N.Y. Evtl. Conserv. Law §8-0109(8), requiring a finding that "adverse environmental effects identified in the environmental impact statement will be minimized or avoided"). These State requirements go well beyond NEPA in their requirements for the protection of the environment, but with flexibility Federal managers and their State and local counterparts can work successfully to meld the processes under both Federal and State laws. From the point of view of an applicant who must comply with both acts anyway, one process and one document is more efficient than two.
- Expediting judicial review. As I discuss later, judicial review is essential to NEPA's effectiveness and should not be curtailed. That said, there are good reasons for expediting that judicial review. Potential measures include:
  - > Statute of Limitations. NEPA has no statute of limitations—no period within which judicial challenges must be filed. Many courts look to the general statute of limitations for civil suits against the United States, which is six years. The vast majority of NEPA actions are completed well before that time. Some agencies, however, have in their own authorizing legislation statutes of limitations for any challenge against the agency's action which then function as NEPA statutes of limitation. For instance, all actions challenging an Order by the FAA must be brought within 60 days. An action to challenge the decision of the Secretary of the Interior to take land into trust for an Indian Tribe must be brought within 30 days, which similarly equates to a NEPA statute of limitations. The newly enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act provides a 180 day statute of limitations for transportation projects. My own State, California, has a 30-day statute of limitations for its NEPA analogue, the California Environmental Quality Act (CEQA). My own impression is that this relatively short statute does not imperil the opportunity for judicial review in that litigation under CEQA is both more frequent and more successful than that litigation under NEPA. I should note, however, that those experienced in working with citizens' groups in litigation make the valid point that it often can take such groups more than 30 days to get their acts together to bring a lawsuit. Finally—a note of practicality. Judicial review under NEPA is "administrative record review," which is to say the judge usually does not take testimony or receive evidence but rather reviews the administrative record that was before the agency to see that it took a "hard look" at the environmental consequences of its proposal. That means there can be no judicial review until the administrative record (discussed below)—often many thousands of pages—is compiled by the agency. That usually is not completed within 30 days, so a statute that short is probably not practically effective in reducing delay. A statute in the 90 to 180 day range would be more realistic.

- > Administrative Record. I should add that expediting that compilation of the administrative record—which is within the authority of the preparing agency, working with the Justice Department—is an essential part of expediting judicial review. Specifically enabling the agencies to call upon applicants for assistance in expediting compilation of the administrative record would be a useful step (perhaps coupled with a provision ensuring that applicants can participate in the litigation affecting the future of their projects).
- > Priority to NEPA suits. Both District Courts and Courts of Appeal have dockets to manage and must assign priorities. Congressional direction to give priority to NEPA cases will expedite the disposition of those cases. California has such a legislative requirement for priority to CEQA cases. (It is worth noting, however, that the judiciary can be expected to oppose such a measure, preferring to control its own dockets.)
- > Joinder of NEPA and comparable State claims. In those states which have their own environmental impact assessment laws, the possibility exists for two judicial reviews—in Federal court and in State court—of what may be one document prepared to comply with both laws. There is no reason for a plaintiff to have two judicial bites at the apple. One makes sense. Two does not. While a State court lacks jurisdiction to apply a Federal law, such as NEPA, against a Federal agency, a Federal court can, using the concept of pendant jurisdiction, hear both the NEPA claim and the related State claim. While I am convinced this can happen under existing law, a Congressional clarification—even encouragement—would be useful.

#### 4. Measures that should not be adopted to reduce delay.

I have discussed at length measures that can and perhaps should be adopted to reduce delay in the NEPA process. There are also other measures—some embodied in legislative proposals—which should not be adopted to deal with issues of delay. These proposals cut not fat but muscle. They imperil NEPA and all the good that it does.

- Congress should not exempt actions from NEPA. A proposed action either does or does not significantly impact the environment. If it does not, under existing law no lengthy studies are needed. If the action does significantly impact the environment, that is what NEPA is there for. There is no reason to exempt actions from the scrutiny Congress has so wisely otherwise ordered.
- Congress should not eliminate or reduce the requirement to examine alternatives. The alternatives analysis is what NEPA is about—looking for better ways of doing things, usually both enabling a project proponent to pursue its goal, but at the same time forcing a search for reasonable alternative means of accomplishing it. “Reasonable alternatives” is existing law—no more and no less. To look at no alternatives or to look at fewer than “reasonable alternatives” or to focus on one alternative and skimp on others is to negate what NEPA is all about—the search for better, less environmentally intrusive ways of doing things. For instance, you can build a highway, but look for the alternate route that avoids an endangered species habitat. You can meet an energy need, but find the least polluting alternative means of doing so. Alternatives are the heart of NEPA and should not be curtailed.
- Congress should not squeeze the public out of the NEPA process. The public plays a major role in the NEPA process—commenting and suggesting and otherwise exercising its opportunity to make the Federal government more responsive to citizen concerns. NEPA, after all, provides the most conspicuous example of when the Federal government must explain the consequences of its actions to its citizens before undertaking those actions. And—those citizens, often closer to the on-the-ground impacts that are to be evaluated than a geographically remote official or consultant, can have real-world observations to make which can beneficially influence the decision. Measures which are designed to exclude the public or to create time schedules which do not allow for meaningful public involvement further estrange the American public from those in Washington who are its servants. The public’s role should not be curtailed.
- Congress should not curtail judicial review. Currently the courts—as commanded by the U.S. Supreme Court—review Federal agency actions under NEPA under the highly deferential “arbitrary or capricious standard,” which gives the agency the benefit of the doubt. This opportunity for judicial review should not be curtailed. Congress, after all, provided no alternate enforcement mechanism for NEPA. Only judicial review under the Administrative Procedure Act (the same statute under which most Federal agency action is reviewable) insures the enforcement of NEPA. If judicial review were not there—and in the absence of creating some gargantuan independent Federal bureaucracy to

oversee the adequacy of other agencies' NEPA documents—NEPA would be unenforced and would wither away. To remove or curtail judicial review would be to remove or curtail NEPA itself.

#### **Conclusion and Summary**

In conclusion, I suspect some of NEPA's critics treat the statute as the proverbial bearer of bad news with the "shoot the messenger" syndrome. Some are unhappy when a NEPA document shows significant adverse environmental impacts and their reaction is "shoot the messenger—kill NEPA." But making public the bad news—the adverse environmental impacts—is NEPA's job. That is what it is supposed to do. The solution is not to shoot the messenger or to kill NEPA. The appropriate solution is to address the environmental problem.

In summary, NEPA is a statute which works well and which serves the American people immensely well. Sometimes, and often in cases involving applicants to the Federal government, its processes take too long. There are measures that could and should be taken to correct that. There are also measures which should not be adopted—measures which would gut NEPA. It is time to adopt the former but not the latter.

Thank you for the opportunity to appear before the Task Force. I hope and trust my suggestions for improving but not undermining the NEPA process have been helpful, and I stand ready to be of assistance to the Task Force in any other way that might be useful.

#### ATTACHMENT A

(EXCERPTED FROM THE EXISTING CEQ NEPA REGULATIONS)

#### 40 CFR § 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: Provided, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

- (1) Consider the following factors in determining time limits:
  - (i) Potential for environmental harm.
  - (ii) Size of the proposed action.
  - (iii) State of the art of analytic techniques.
  - (iv) Degree of public need for the proposed action, including the consequences of delay.
  - (v) Number of persons and agencies affected.
  - (vi) Degree to which relevant information is known and if not known the time required for obtaining it.
  - (vii) Degree to which the action is controversial.
  - (viii) Other time limits imposed on the agency by law, regulations, or executive order.
- (2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:
  - (i) Decision on whether to prepare an environmental impact statement (if not already decided).
  - (ii) Determination of the scope of the environmental impact statement.
  - (iii) Preparation of the draft environmental impact statement.
  - (iv) Review of any comments on the draft environmental impact statement from the public and agencies.
  - (v) Preparation of the final environmental impact statement.
  - (vi) Review of any comments on the final environmental impact statement.
  - (vii) Decision on the action based in part on the environmental impact statement.
- (3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

[Response to questions submitted for the record by Mr. Yost follows:]

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DECEMBER 2, 2005

VIA FEDERAL EXPRESS and e-mail

Honorable Cathy McMorris  
 Chairwoman, Task Force on Updating NEPA  
 Committee on Resources  
 House of Representatives  
 Washington, DC 20515

Re: Response to Your Letter of November 22, 2005Dear Chairwoman McMorris:

I write in response to your letter of November 22 in which you pose two questions to which you invited my responses.

The questions and responses follow:

**Q.1. Can you give us a sense of what would be “adequate resources”? How much funding, how many people, what kind of skills should these people have?**

I will respond in two ways—by reference to agencies generally and with respect to the Council on Environmental Quality specifically.

*a. Agencies generally.*

The personnel should be trained in the range of environmental disciplines, in Congress’ own words in NEPA itself, “a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences, and the environmental design arts....” § 102(2)(A), 42 USC § 4332(2)(A). That says it well.

- In brief, the scientific, technical, and sometimes aesthetic bases for decisions must be there.
- Capable managers are needed. As I noted in my testimony, a well-trained and decisive project leader is critical to making the NEPA process move, both comprehensively and promptly. As I urged in my testimony, the capacity for decision—to be unafraid to make decisions and to impose deadlines—is critical. Good managers should be rewarded.
- There must be somebody involved who can write (or edit) clearly such that lay decisionmakers and members of the public can understand what is being said. In the words of the CEQ NEPA Regulations, “Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences of the environmental design arts.” 40 CFR § 1502.8.
- As I also noted in my testimony, insofar as potential litigation is a concern (and it often is, especially on controversial actions), good legal advice on what is necessary to “bulletproof” (or come as close as one can) a NEPA document is the best guarantee of either deterring litigation (because potential plaintiffs will realize they have little prospect of success) or prevailing should a lawsuit be filed. Such legal reviewers (who ideally should have litigation experience), can be (a) staff lawyers at the agency, (b) outside counsel retained by the agency (or in the case of applicants, outside counsel retained by the applicant to cooperate with the agency in helping bulletproof a document), or (c) as I suggested in my testimony, involving the Justice Department lawyers who would be defending the decision in court in an earlier, predecisional capacity to review and assist in bulletproofing the NEPA documents.<sup>1</sup>
- With respect to numbers of personnel and funding, the answers are really highly specific to the agency. You will recall from my testimony that the Federal Aviation Administration, with the support of the regulated aviation industry, brought on 44 more personnel—31 environmental specialists and 13 lawyers—with the avowed purpose of cutting delay. (The FAA has what is perhaps the

<sup>1</sup>This will have implications for staffing within the Environment and Natural Resources Division of the Justice Department.

highest success rate within the Federal government of successfully defending its very thorough and professional NEPA documents).

- In addition to the staffing and budgeting needs of the lead agency which is in charge of preparing a NEPA document, there are requirements on other Federal agencies (typically the so-called "resource agencies" in the Interior and Commerce (NOAA) Departments and at EPA) to act as cooperating agencies (40 CFR §§1501.6 and 1508.5) or commenting agencies (40 CFR Part 1503) whereby they lend their expertise to assist the lead agency. Similarly State agencies and Indian Tribes may play such a role. By way of constructive approach, in my testimony I invited the Task Force's attention to the newly enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), which specifically provides for transportation funds to be made available to State agencies and Indian Tribes which are participating in the environmental review process for activities which contribute to expediting and improving transportation planning and project delivery.
- Let me suggest three means of getting a handle on numbers and budgets specific to each agency:<sup>2</sup>
  1. The Task Force (or the Resources Committee) writes the head of each agency and requests information on the number of personnel deemed necessary to fulfill its NEPA obligations in an efficient but thorough manner.
  2. The Task Force directs CEQ to make such an inquiry.
  3. The Congress statutorily directs the agencies to report back by a date certain.<sup>3</sup>
- Environmental Protection Agency staffing presents a unique problem. In addition to its own direct NEPA responsibilities (e.g., EPA EISs for sewage treatment plants funded by EPA), Congress has imposed upon EPA the duty of reviewing and commenting on other agencies' EISs.<sup>4</sup> Clean Air Act § 309, 42 USC § 4609.<sup>5</sup> I understand that today—despite the Congressional command—EPA lacks the resources to perform the required reviews in all cases.
- CEQ. CEQ, created by NEPA, oversees the implementation of the Act. Without appropriate resources, it cannot do a rigorous job of ensuring compliance with the CEQ NEPA Regulations. It is my recollection that during the Nixon, Ford, and Carter Administrations CEQ had a staff (including detailees from other agencies) in the 60 to 70 person range. I believe that it is now about 20. When I was General Counsel, about 5 people spent most of their time on NEPA oversight and another 6 to 8 (who were responsible for liaison with individual agen-

<sup>2</sup>Please bear in mind that an agency can (1) prepare all NEPA documents in-house with its own staff (which assures reliability and build the environment into agency decisionmaking, but involves personnel costs), (2) use a third-part contract whereby the agency selects and supervises a consultant, but the applicant pays, or (3) in the case of the Environmental Assessment (but for conflict of interest reasons not an Environmental Impact Statement) allow an applicant to prepare the document subject to scrutiny and revision by agency personnel. See 40 CFR §1506.5.

<sup>3</sup>By way of analogy, in NEPA as it was originally enacted, Congress directed each agency to review its authority and policies to determine whether any hindered full compliance with NEPA and to report to the President within 1 1/2 years. That section, NEPA §103, 42 USC §4333, reads as follows:

All agencies of the Federal government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President no later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Given the more discrete subject of this inquiry, a considerably shorter reporting-back date would be warranted for personnel and funding estimates.

<sup>4</sup>This was part of an historic compromise between Senators Jackson and Muskie whereby the latter was acting to link the scientific resources of EPA to the implementation of NEPA governmentwide. This function is largely implemented by EPA's 10 regional offices.

<sup>5</sup>CAA § 309, 42 USC § 4609, reads as follows:

(a) The Administrator [of EPA] shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

cies on behalf of the White House) spent a good portion of their time on NEPA issues (with respect to the agencies for which they were responsible). I understand that today CEQ has one person dedicated to NEPA oversight and that two others each spend about half their time on NEPA. Despite a high level of professional capability, that is insufficient capacity effectively to oversee the implementation of the law nationwide.

**Q.2. Your comments about Federal and State cooperation provide another example of CEQ regulations not being followed. You suggest that Federal and State agencies “avoid such cooperation” that could reduce duplication. /Two-part question: Why is cooperation avoided and can cooperation be encouraged by changes to NEPA?**

I think the Federal-State cooperation is avoided for a number of reasons, most of them having to do with a reluctance to do things differently from the way people are used to doing them.

- For instance, some of the state acts (as I noted in my testimony) impose more far-reaching obligations than does NEPA, such as the duty to mitigate adverse environmental impacts found in the California, Massachusetts, and New York laws. Similarly, Montana’s NEPA analogue is linked to that State’s Sunshine law, which imposes obligations to do business in a more open manner than Federal officials are accustomed. NEPA’s regulations require that growth-inducing impacts be evaluated, while California’s CEQA does the same thing by legislative enactment, and I understand some Federal officials think (wrongly, I believe) that therefore the California requirement imposes something additional to the Federal requirement. Federal officials are sometimes reluctant to participate in a cooperative Federal-State process which adds any requirement to or departs from the accustomed NEPA process.

Sometimes there are simply different ways of doing things. On one occasion I dealt with two Federal agencies, in one of which it was the practice for the agency to sign a Draft EA before it went out for public review, and in the other it was the practice to sign it only after it had been revised to reflect public input. It took a certain degree of pushing to get them to compromise. Sometime there are local political considerations which a Federal official is reluctant to acknowledge. I know of one instance in which a California city was proposing an expansion of its airport, which needed both CEQA and NEPA compliance. A majority of the City Council was in favor of the new runway, but was unsure what would happen in the next election and wanted the expansion approved in time so that it would not be an issue in the election (and the runway potentially scuttled). The election drove the local timetable, but the Federal agency refused to commit itself to the same timetable, with the result that duplicative CEQA and NEPA documents were prepared under two separate processes with the CEQA document being completed before the election and the nearly identical NEPA document being completed after it.

All these problems should be non-issues. It is quite possible with goodwill to deal with and solve them. There is no reason why both Federal and State officials cannot be flexible and mutually respectful of each other’s sovereignty and statutory obligations and collaborate to prepare one document to satisfy both laws (even if it has to contain extra sections or chapters that might not be needed if only one law was governing). From the point of view of an applicant to the two governments, it is going to have to comply with both laws anyway, and one process and one document is more efficient, more rapid, and less costly than two.

In response to the second part of your question—yes, cooperation can be encouraged by changes to NEPA. While I believe that the existing CEQ Regulation mandating cooperation (40 CFR § 1506.2<sup>6</sup>) provides what ought to be the necessary

<sup>6</sup>§ 1502.2, Elimination of duplication with State and local procedures, reads as follows:

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to sections 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statutes).
- (4) Joint environmental assessments.

direction, a still firmer Congressional directive can reinforce that direction, specifying that Federal officials participating in joint NEPA-State mini-NEPA documents shall so draft the documents to satisfy the requirements of both Federal and State laws (even if that requires some analysis additional to what would be done if the State was not participating) and similarly requiring a sensitivity to the time constraints under which the State or local agency is operating.<sup>7</sup>

I trust this is useful to the Task Force and stand ready to be of further assistance should you so desire.

RESPECTFULLY SUBMITTED,  
NICHOLAS C. YOST

cc: Vince Sampson

Miss MCMORRIS. Mr. Dreher.

**STATEMENT OF ROBERT G. DREHER,  
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. DREHER. Good morning, Madam Chairwoman and members of the Committee. The National Environmental Policy Act is this Nation's basic charter for protection of the environment. It is also this Nation's environmental conscience. It is the model for laws enacted around the world because it establishes the basic principle that governments must consider the effects of their actions on the human environment and consult with the people affected by those actions. It is properly regarded as one of America's great public policy successes.

NEPA is, first and foremost, a government accountability statute. It is a law that empowers people—conservationists, yes, but also businessmen, ranchers, State and local governments, and ordinary citizens and gives them a voice in Federal decisions that affect their lives in their communities. And it has been broadly successful in integrating environmental values into the Federal Government's decisionmaking.

My written testimony offers compelling examples of NEPA success, including the survival of the ivory billed woodpecker, whose habitat was protected by a citizen's lawsuit under the act. NEPA thus functions as Congress intended: as a critical tool for democratic diagnosis making.

Unfortunately, NEPA has been besieged in recent years by piecemeal proposals in Congress and in the Federal agencies to exempt Federal activities, to limit environmental reviews, or to restrict public participation. The Task Force's review, undertaken on

(c) Agencies shall cooperate with State and local agencies the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements in State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

As may be evident, paragraph (a) applies essentially to State transportation agencies; (b) applies to all State and local agencies; (c) applies to State and local agencies when the State has a "mini-NEPA" (about half the states); and (d) applies generally.

<sup>7</sup>Of course Congress can direct the behavior of the Federal officials and not that of State and local officials, but doing so would solve half the problem and provide an incentive for States to take comparable action.

NEPA's 35th anniversary, presented a critical opportunity to recall the core values that the act serves and to assess how the act serves those values today.

The Task Force received a letter signed by every former chair of the Council on Environmental Quality, outlining three principles central in NEPA: consideration of environmental impact is essential to responsible government decisionmaking; alternatives analysis is the heart of such review; and public involvement is indispensable.

The Task Force should embrace those principles and use them to measure the act's success and to assess whether changes like those being proposed here today truly serve the act's goals.

Regrettably, the Task Force is focused almost exclusively on complaints about the alleged burden that NEPA imposes on the business communities. It has shown little apparent interest in how well the act protects the environmental values in fulfillment of Congress' mandate. The complaints that the Task Force has heard about NEPA do not remotely warrant legislative changes. The original objective of NEPA, after all, was precisely to make agency decisionmaking more deliberate, more careful, and more open to public debate.

Federal agencies have already gone to great lengths to streamline the NEPA process. Thousands of minor governmental functions are categorically exempted or considered in short environmental assessments every year. Studies by the Federal Highway Administration and others disprove the claim that the need for review process causes inordinate delays in decisionmaking. That is not to say that NEPA's implementation cannot be improved. But there is no evidence that NEPA generally imposes burdens and delays beyond what is necessary to accomplish Congress' goal of responsible Federal decisionmaking.

Critics of litigation overlook the essential role that the independent Federal judiciary plays under NEPA. When Federal agencies fall short, citizen suits are the only mechanism that enforce the act's commands for environmental review and public consultation. Critics often complain that the risks of litigation creates pressure on agencies to create bulletproof EISs. I think it might be more illuminating to ask what these EISs would look like if there were no citizen enforcement. If citizens did not have the right to go to court to enforce NEPA, the law would quickly become a dead letter.

In any event, NEPA's critics greatly exaggerate the volume of litigation under NEPA. As Mr. Yost has pointed out, plaintiffs bring around 100 NEPA lawsuits per year, representing only two-tenths of 1 percent of the 50,000 or so actions that Federal agencies document each year under NEPA. Only a few of those cases result in court orders blocking government action. And those cases invariably involve serious failures by Federal agencies to assess environmental impacts responsibly or to listen to public concerns.

Business interests often characterize environmental plaintiffs as improperly seeking near delay in Federal projects they oppose. There is no basis for such ad hominem attacks. No court has ever sanctioned a NEPA plaintiff for bringing a frivolous complaint or for filing suit for improper purpose, such as mere delay.

Litigation is expensive and time-consuming. It is generally the last resort citizens and conservation groups invoke after serious problems in the agency's environmental review have gone unaddressed.

For these reasons, the procedural barriers some have suggested to limit the public's right to enforce NEPA are unwarranted. Such barriers would serve only to insulate Federal agencies from accountability, for mistakes in their environmental reviews, contrary to the basic principles of the rule of law. A bond requirement, for example, like a poll tax or a literacy test, would effectively exclude the poor, minorities, and ordinary citizens from vindicating their rights.

Now, the NEPA process can be improved in important ways to better protect environmental values without legislative change. First, promises to mitigate the adverse effects of Federal actions should be recognized as binding commitments.

Second, agencies should monitor the environmental effects of projects after they are completed. And, finally, Federal agencies need increased training, staff and guidance to fulfill their NEPA duties effectively and efficiently. Unfortunately, virtually every Federal agency, including CEQ, faces a mounting shortfall in its NEPA resources.

NEPA is a simple but profound guarantee of good government, government that cares about the effects of its actions on the human environment, on its citizens and on future generations. Each of your constituents depends on NEPA for information about what the Federal Government is doing that will affect their lives and communities. NEPA should be celebrated, in my view, on its 30th anniversary, not undermined. Thank you.

Miss MCMORRIS. Thank you very much.

[The prepared statement of Mr. Dreher follows:]

**Statement of Robert Dreher, Deputy Executive Director,  
Georgetown Environmental Law & Policy Institute**

**I. INTRODUCTION**

Good morning. My name is Robert Dreher. I am Deputy Executive Director of the Georgetown Environmental Law & Policy Institute, a component of Georgetown University Law Center that conducts research and education on legal and policy issues relating to the protection of the environment and conservation of natural resources. Thank you for the opportunity to testify about the National Environmental Policy Act ("NEPA").

The National Environmental Policy Act is this Nation's basic national charter for protection of the environment. It is also this Nation's environmental conscience. It is the model for laws enacted in states and nations around the world, because it establishes the basic principle that governments must consider the effects of their actions on the quality of the human environment, and consult with the people who will be affected by those actions.

It is first and foremost a government accountability statute, and a public disclosure law. It is the primary law that requires public involvement, and public participation, and public disclosure of the effects of government actions on ordinary people. It is a law that empowers little people. It empowers business people. It empowers individuals. It empowers Native Americans. It empowers minorities. It empowers all of your constituents. And every case that has been brought to enforce this law has been brought by your constituents against the Federal government, to try to ensure that the Federal government looks carefully at the consequences of its actions on those people. In that sense, it is, indeed, the nation's environmental conscience.

My testimony today will address the broad questions facing this Task Force as it completes its review of the Act's implementation:

1. What values does NEPA serve?

2. Is there persuasive evidence that the Act as implemented today does not appropriately serve the purposes Congress envisioned?
3. How can the Act's implementation be improved?

My testimony draws upon my experience in litigation, in counseling clients, and in academic research and teaching regarding environmental impact analysis under NEPA. As a staff attorney for the Sierra Club Legal Defense Fund (now Earthjustice), I represented citizens and environmental organizations in litigation under that statute and other environmental laws for more than 10 years. From 1996-2000, I served as Deputy General Counsel to the U.S. Environmental Protection Agency; in that capacity I advised agency officials on matters related to NEPA and represented EPA in interagency discussions concerning the federal government's compliance with the Act. After my service at EPA, I counseled companies and government agencies on NEPA compliance in private practice with the firm Troutman Sanders. At the Georgetown Environmental Law & Policy Institute, I authored a report that identifies the many current legislative and administrative threats to NEPA's integrity and survival, offers a critical evaluation of the rationales advanced by NEPA's opponents for these attacks on the law, and suggests several meaningful improvements in how NEPA functions. NEPA Under Siege (available at [www.law.georgetown.edu/gelpi/news/documents/NEPAUnderSiegeFinal-000.pdf](http://www.law.georgetown.edu/gelpi/news/documents/NEPAUnderSiegeFinal-000.pdf)). I have taught Federal Natural Resources Law, including NEPA compliance, at the George Washington University Law School for 13 years, and also at the Georgetown University Law Center this year. I would note that my testimony expresses my views; it does not necessarily reflect the views of the Institute's board of advisors or Georgetown University.

## II. THE NARROW SCOPE OF THE TASK FORCE'S REVIEW OF NEPA

I would note at the outset that the Task Force has compiled an oddly limited record to approach these important questions. Indeed, the Task Force's review may be notable as much for voices not listened to and questions not asked as for the concerns it in fact has focused on regarding NEPA's implementation. The Task Force's review, undertaken on NEPA's 35th anniversary, presented the opportunity to re-examine the core values that the Act serves, and to assess the extent to which the Act as implemented today effectively serves those principles. To understand whether NEPA continues to serve the public well, the Task Force must ask what values it serves and how well it serves them.

The Task Force received a letter this fall from every living former chair of the Council on Environmental Quality, respected environmental leaders who served Presidents Nixon, Ford, Carter, George H.W. Bush, and Clinton. That letter identified three basic principles underlying NEPA:

- (1) "consideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making,"
- (2) "analysis of alternatives to an agency's proposed course of action is the heart of meaningful environmental review," and
- (3) "the public plays an indispensable role in the NEPA process."

Letter from Russell E. Train, Russell W. Peterson, John Busterud, Charles W. Warren, J. Gustave Speth, Michael R. Deland, Kathleen A. McGinty, George T. Frampton, Jr., Gary Widman, and Nick Yost to The Honorable Cathy McMorris (September 19, 2005). Those principles of bi-partisan good government should be embraced by the Task Force. They should serve as the basic measuring stick to assess whether NEPA is being properly implemented today, and to evaluate any proposals for changes in the law or in its implementation.

Unfortunately, the Task Force to date has focused on a narrow, and almost uniformly negative, set of concerns: complaints raised by representatives of businesses that use federal public lands and natural resources for economic benefit that compliance with the Act's procedures imposes burdens and delays on their activities. The Task Force has shown little apparent interest in how NEPA protects environmental values, in fulfillment of Congress's original goals for the Act. Perhaps for that reason, the Task Force appears not to have been particularly interested in the views of conservationists and recreationists who, not surprisingly, see the value of NEPA and other environmental laws in a very different light from business users of federal lands and resources. Moreover, the Task Force virtually ignored the people with the most hands-on experience in implementing NEPA: federal officials responsible for complying with the Act.

Apart from a single regional Forest Service official, and today's testimony from James Connaughton, Chairman of the Council on Environmental Quality, the Task Force has shown no interest in learning how federal agencies view NEPA, or how they think the Act's implementation can be improved. The Department of Energy,

for example, conducts hundreds of NEPA analyses each year; its highest environmental official, Assistant Secretary John Spitaleri Shaw, recently observed that “NEPA is an essential platform for providing useful information to decisionmakers and the public, supporting good decisionmaking, and thus advancing DOE’s mission.” Department of Energy, NEPA Lessons Learned (March 1, 2005) at 1, at <http://www.eh.doe.gov/neap/lessons.html>. Why would the Task Force not want to hear his views? Or the views of experienced Justice Department litigators on the extent to which NEPA litigation reflects real problems in agency compliance? By contrast, CEQ’s recent Interagency NEPA Task Force drew heavily upon the expertise and perspective of experienced federal NEPA managers in conducting a sober assessment of the Act’s implementation and in developing meaningful recommendations for improving the NEPA process. None of the CEQ Task Force’s recommendations, significantly, suggest a need for changes in the Act itself or in the CEQ regulations that serve effectively as the bible for federal agencies complying with NEPA.

Perhaps the most glaring omission in the Task Force’s deliberations has been its failure even to address the urgent threat to NEPA’s integrity and future arising from the actions of Congress, and of certain administrative agencies, seeking to carve out piece-meal exemptions from the Act’s requirements. My report, *NEPA Under Siege*, describes these assaults on the Act, ranging from measures in the 2003 Healthy Forests Restoration Act that restrict analysis of alternatives and limit public participation in forest thinning projects to the “rebuttable presumption” established by the recent Energy Policy Act of 2005 that numerous oil and gas activities are categorically excluded from NEPA analysis. The most disturbing of these measures (1) exempt large categories of government activity from the NEPA environmental review process, (2) restrict the substance of environmental analysis under NEPA, in particular by allowing federal agencies to ignore environmentally superior alternatives to a proposed action, and (3) limit opportunities for the public to comment on and challenge agency environmental reviews. Cumulatively, these proposals threaten to kill the NEPA process with a thousand cuts.

The Chairman of the Committee on Resources has identified the proliferation of these ad hoc exemptions as one reason for the Task Force to undertake a comprehensive review of the Act’s working. Yet the Task Force has not examined the justification for and impact of such ad hoc exemptions from the Act’s procedures, has not considered whether such exemptions serve or disserve NEPA’s purposes, and has not called for a moratorium on such measures pending the completion of the Task Force’s review. To the contrary, members of the House Resources Committee have themselves repeatedly advanced proposals to limit NEPA’s application, such as Representative Pombo’s proposal to eliminate alternatives analysis for renewable energy projects, even while the Task Force has been engaged in this review.

The Task Force has thus assembled a regrettably poor foundation, in my view, for a balanced, responsible assessment of NEPA’s role in government decision-making or the ways in which its implementation could be improved.

### **III. THE VALUES NEPA SERVES**

Congress enacted the National Environmental Policy Act in 1969 by overwhelming bipartisan majorities. The Senate committee report on NEPA stated: “It is the unanimous view of the members of the Y Committee that our Nation’s present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.” Much of the problem, the Senate committee concluded, lay in the fact that federal agencies lacked clear statutory direction to incorporate environmental values into their decision-making: “One major factor contributing to environmental abuse and deterioration is that actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment.” NEPA was acclaimed by ranking Republicans and Democrats in Congress as “landmark legislation” and “the most important and far-reaching environmental and conservation measure ever enacted.” When President Nixon signed NEPA into law on New Year’s Day, 1970, he hailed the Act as providing the “direction” for the country to “regain[] a productive harmony between man and nature.”

NEPA has three visionary elements: a far-sighted declaration of national environmental policy, an action-forcing mechanism to ensure that the federal government achieves the Act’s environmental goals, and a broad recognition of the importance of public participation in government decision-making that affects the human environment.

First, the Act declares a national policy for environmental protection. Recognizing the “profound impact of man’s activity on the—natural environment,” and the

“critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.” Section 101 of NEPA commits the federal government to “use all practicable means and measures, Y in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” Congress directed that “to the fullest extent possible” the policies, regulations, and laws of the United States be interpreted and administered in accordance with the Act’s environmental policies.

Second, NEPA creates an “action-forcing” mechanism to reduce the environmental damage caused by federal actions “undertaken without adequate consideration of, or knowledge about, their impact on the environment.” The Act directs federal agencies, before proceeding with any “major Federal action,” to prepare a “detailed statement” addressing how such action may affect the environment. The statement, now known as an “environmental impact statement” or “EIS,” must consider and disclose to the public the environmental impact of the proposed action, alternatives to the proposed action, and the relationship between short-term benefits from the action and long-term environmental productivity. In addition to EISs, agencies prepare less-extensive “environmental assessments,” or “EAs,” under NEPA to help them determine whether proposed actions will have significant impacts warranting preparation of an EIS, and may adopt rules excluding from analysis categories of minor federal actions that have been found not to have significant effects, either individually or cumulatively.

NEPA thus gives effect to the common-sense axiom “look before you leap.” The Act does not require federal agencies to choose an environmentally-friendly course over a less environmentally-friendly option. But, as a practical matter, the requirement to prepare an EIS ensures that agency decisions will reflect environmental values. As the Supreme Court has observed:

Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precautionary language of...the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies to respond to the needs of environmental quality.

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Analysis of alternatives is the “heart” of an EIS, as the CEQ regulations recognize. Comparing the environmental impacts of an agency plan with the impacts of alternative courses of action helps define the relevant issues and provides a clear basis for choosing among options. By considering and, where appropriate, adopting reasonable alternatives that meet agency objectives with less environmental impact, federal agencies can achieve NEPA’s environmental protection goals while implementing their primary missions.

The third visionary element of NEPA is its creation of broad opportunities for members of the public to participate in government decisions that affect their environment. Congresswoman McMorris suggested at the November 10th hearing that public participation in the NEPA process comes only at the end, when a final document is circulated. Nothing could be further from the truth. Opportunities for public participation in the NEPA process start at the very beginning, when agencies conduct “scoping” meetings to determine what environmental issues and concerns should be studied. The public can propose alternative approaches for the agency to evaluate, and can later comment on gaps and misunderstandings in the agency’s analysis at the draft stage of the EIS. The circulation of the final EIS typically includes another period for public scrutiny, but it is only the end of a long public process. And “the public” includes not only individual citizens, but businesses, charitable organizations, towns and other local governments, tribes, state agencies, and even other federal agencies affected by a proposed action.

Public participation in the NEPA process serves two functions. First, individual citizens and communities affected by a proposed federal agency action can be a valuable source of information and ideas, improving the quality of environmental analysis in NEPA documents as well as the quality of agency decisions. Second, allowing citizens to communicate and engage with federal decision-makers serves fundamental principles of democratic governance. NEPA reflects the belief that citizens have a right to know, and to be heard, when their government proposes actions that may affect them. For many individuals and communities who understandably perceive federal agencies as remote and insensitive, public participation in the NEPA process creates a valuable crack in the bureaucratic wall. Indeed, for many federal agencies the process of broad public involvement established under NEPA is the

primary avenue for communicating with and engaging the public regarding their activities and for fulfilling more general requirements in their governing statutes for public participation.

NEPA has been extraordinarily successful in accomplishing these goals over its 35-year history. First, NEPA has unquestionably improved the quality of federal agency decision-making in terms of its sensitivity to environmental concerns. Examples are legion in which proposed federal actions that would have had serious environmental consequences were dramatically improved, or even in some instances abandoned, as a result of the NEPA process. To cite just a few instances:

- In the early 1990s, mounting problems with obsolescent nuclear reactors at its Savannah River site put the Department of Energy under pressure to build enormously expensive new reactors to produce tritium, a key constituent of nuclear warheads. A programmatic EIS allowed DOE to evaluate alternative technologies, including using a particle accelerator or existing commercial reactors, leading ultimately to cancellation of the tritium production reactors. Secretary of Energy James Watkins testified before the House Armed Services Committee: "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us, and that would have been wrong for the country."
- The NEPA process led to improvements in a land management plan for the Los Alamos National Laboratory that averted a potentially serious release of radiation when the sensitive nuclear laboratory was swept by wildfire in May 2000. The laboratory's initial management plan did not address the risk of wildfire, but comments on the draft EIS alerted the Los Alamos staff to that risk. The laboratory prepared a fire contingency plan, cut back trees and underbrush around its buildings, and replaced wooden pallets holding drums of radioactive waste with aluminum. Those preparations turned out to be invaluable when a major wildfire swept Los Alamos the following year.
- In 1997, the Federal Energy Regulatory Commission was considering issuance of a license for construction of a major new hydropower dam on the Penobscot River in Maine. The EIS disclosed that the proposed Basin Mills Dam would undermine long-standing federal, state and tribal efforts to restore wild Atlantic salmon populations to the Penobscot River. FERC received strong comments in opposition to the project from federal and state fishery managers and the Penobscot Indian Nation, among others, and concluded that the public interest was best served by denial of the license.
- The Ivory-billed woodpecker, recently rediscovered to great public celebration, owes its survival in large part to NEPA. In 1971, shortly after NEPA's enactment, the Army Corps of Engineers proposed to channelize the Cache River for flood control, threatening the bottomland hardwood wetlands in the river basin on which the woodpecker and many other species of wildlife depended. Environmentalists challenged the adequacy of the Corps' NEPA analysis in court, pointing out that the Corps had failed to evaluate alternatives to its massive dredging program that would cause less damage to wetland habitat. The court enjoined the Corps from proceeding until it fully considered alternatives, and public outcry subsequently led to the abandonment of the dredging project and the creation of the national wildlife refuge where the Ivory-billed woodpecker was recently sighted.
- A massive timber sale proposed for the Gifford Pinchot National Forest in Oregon, stalled by controversy over impacts on sensitive forest habitat, was entirely rethought as a result of the NEPA process. A coalition of environmentalists, the timber industry, labor representatives and local citizens worked together to develop a plan to use timber harvest to restore the forest's natural ecosystem. Instead of clearcuts, the new proposal focuses on thinning dense stands of Douglas fir (the result of previous clearcutting) to recreate a more natural, diverse forest structure, while still yielding 5.2 million board feet of commercial timber. The citizen alternative was adopted by the Forest Service and implemented without appeals or litigation. A local resident involved in the process says: "It's a win, win, win."
- In Michigan, communities concerned about the impacts of a proposed new four-lane freeway successfully used the NEPA process to force the state highway agency to consider alternatives for expanding and improving an existing highway, avoiding the largest wetland loss in Michigan's history and saving taxpayers \$1.5 billion. Similarly, a proposed freeway in Kentucky's scenic bluegrass region was redesigned to protect historic, aesthetic and natural values thanks to public input and legal action during the NEPA planning process. The National Trust for Historic Preservation acclaimed the Paris Pike as a project that "celebrates the spirit of place instead of obliterating it."

These and other similar examples only begin to tell the story of NEPA's success, however. One of NEPA's most significant effects has likely been to deter federal agencies from bringing forward proposed projects that could not withstand public examination and debate. Prior to NEPA, federal agencies could embark on massive dam- or road-building projects, for example, without public consultation and with virtually no advance notice. As a result, family farms, valuable habitat, and sometimes whole communities were destroyed without the opportunity for full and fair debate. One dramatic example is Operation Plowshare, the proposal by the Atomic Energy Commission in the 1950s and 60s to use nuclear weapons to excavate harbors, dig canals, and create quarries. Such projects could never survive public scrutiny under NEPA, and today simply never get off the drawing boards.

More broadly, NEPA has had pervasive effects on the conduct and thinking of federal administrative agencies. Congress's directive that federal agencies use an "interdisciplinary approach" in decision-making affecting the environment, together with the Act's requirement that agencies conduct detailed environmental analyses of major actions, has required federal agencies to add biologists, geologists, landscape architects, archeologists, and environmental planners to their staffs. These new employees brought new perspectives and sensitivities to agencies that formerly had relatively narrow, mission-oriented cultures. NEPA's requirement that agencies consult with federal and state agencies with special environmental expertise also has helped broaden agency awareness of environmental values.

Equally important, NEPA has succeeded in expanding public engagement in government decision-making, improving the quality of agency decisions and fulfilling principles of democratic governance that are central to our society. Today, citizens take it as a given that major governmental actions that could affect their lives and their communities will be subject to searching public examination and discussion. As CEQ concluded in a report commemorating NEPA's 25th anniversary, "NEPA's most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions." CEQ noted that "agencies today are more likely to consider the views of those who live and work in the surrounding community and others during the decision-making process." As a result, "Federal agencies today are better informed about and more responsible for the consequences of their actions than they were before NEPA was passed."

NEPA thus functions, as Congress intended, as a critical tool for democratic government decision-making. The Act ensures that federal agencies weigh environmental consequences before taking major action, and establishes an orderly, clear framework for involving the public in major decisions affecting their lives and communities.

#### **IV. CRITICISMS OF THE ACT**

The Task Force has nonetheless heard complaints about the Act, particularly from representatives of businesses seeking economic benefit from federal lands and resources. That criticism has focused on the general allegation that NEPA imposes undue burdens on business interests. NEPA's critics also claim that litigation by citizens seeking to enforce the Act is brought for improper purposes, and inappropriately bogs down federal decision processes. Neither complaint, in my view, is warranted.

##### *The Argument That NEPA Is Too Burdensome and Time-Consuming*

As an initial matter, it bears emphasis that making agency decision-making more deliberate—and creating opportunities for public debate and discussion—was one of the original objectives of NEPA. NEPA was adopted out of concern that federal agencies too often acted unilaterally, without taking the time to consider alternatives to their proposed actions and without providing an opportunity for the public to comment. Thus, complaints about the delays produced by NEPA may simply reflect disagreement with NEPA's goal of fostering more careful, and more open, federal decision-making.

In addition, those objecting to alleged delays and administrative burdens imposed by NEPA generally fail to acknowledge the great lengths to which federal agencies have already gone to streamline the NEPA process. Many thousands of minor government functions are categorically exempted from NEPA analysis each year. CEQ has estimated another 50,000 federal actions are given limited review in environmental assessments each year. As a result of this winnowing process, agencies prepare only about 500 draft, final and supplemental EISs annually. In the case of federally-funded highway projects, for example, 97% of the projects are dealt with under a categorical exclusion or by preparing an EA; only 3% require preparation of an EIS.

Finally, the evidence does not support the argument that the NEPA review process causes inordinate delays in decision-making. For example, studies by the Federal Highway Administration (“FHWA”) show that environmental reviews take up only a quarter of the total time devoted to planning and constructing a major highway project, hardly a disproportionate commitment for projects that will make permanent changes to the landscape. The significant delays that sometimes occur in highway projects are generally due to other causes, such as lack of funding, the low priority assigned to a project by the sponsoring state transportation agency, or significant local disagreements over the merits of the project. A comprehensive survey conducted by the Natural Resources Council of America of agency NEPA implementation confirmed that NEPA is not a major cause of project delays:

In none of the twelve agencies reviewed during this study did NEPA emerge as the principal cause of excessive delays or costs. Instead, the NEPA process was often viewed as the means by which a wide range of planning and review requirements were integrated. Other administrative and Congressional requirements were sometimes cited as resulting in lengthy delays in decision making, which persons outside the agencies attributed to NEPA.

Robert Smythe & Caroline Isber, Natural Resources Council of America, NEPA in the Agencies—2002 1 (October 2002).

That is not to say that NEPA’s implementation cannot be improved, or that every environmental review under the Act is well managed. Although CEQ’s regulations emphasize that environmental reviews should be efficient, timely and useful for federal decision-makers, federal agencies sometimes produce EISs that are too lengthy and technical for agency decision-makers or the public to readily understand. NEPA processes are sometimes poorly managed, uncoordinated, and unduly prolonged. As discussed below, better management of the NEPA process, and improved guidance and training for federal agencies, are important in order to make the Act work more effectively. But there is no evidence that NEPA has, as a general matter, imposed burdens and delays on agencies beyond what Congress originally contemplated in enacting NEPA or beyond what is necessary to accomplish NEPA’s environmental-protection goal.

*The Argument That NEPA Generates Wasteful Litigation*

Critics of NEPA also contend that the Act produces too much wasteful litigation. But this criticism overlooks the essential role the independent federal judiciary plays in ensuring that NEPA is actually enforced. When federal agencies’ NEPA compliance falls short, litigation brought by aggrieved parties enforces the Act’s commands for environmental review and public consultation in the context of particular projects. More broadly, individual NEPA suits send the message to agencies that the courts will police compliance with the law. Agency personnel and industry representatives sometimes complain about the pressure that the Act places on agencies to do thorough and defensible environmental reviews, lamenting the creation of “bullet-proof” EISs. It is more illuminating, perhaps, to ask what federal EISs would look like if there were no concern about potential citizen enforcement. Six-page checklists, with no substance, like some agency EAs today? If citizens did not have the right to go to court to enforce NEPA, I think it is fair to presume that the law would quickly become a virtual dead letter.

Congresswoman McMorris observed during the Task Force’s hearing on November 10th that it is not clear that “anything has been settled” by NEPA litigation. To the contrary, the courts’ rulings in NEPA cases have clarified many of the basic principles for conducting environmental impact analysis under the Act. The application of those principles to the circumstances of a particular federal project, however, is inevitably case-specific. It is thus not surprising that the courts confront certain difficult issues, such as whether a federal agency has properly determined that its action will not have significant effects on the human environment, or has adequately considered cumulative impacts, over and over again in the context of particular cases.

In any event, NEPA’s critics greatly exaggerate the volume of litigation NEPA generates. At the November 10th, for example, Congresswoman McMorris suggested that “thousands of NEPA suits” were pending before the courts. In fact, according to CEQ, only 251 NEPA suits were pending in 2004. Because agency compliance with NEPA is now generally quite good, NEPA actually generates a relatively small volume of litigation. Concerned parties typically file about 100 NEPA lawsuits per year, representing only 0.2% of the 50,000 or so federal actions documented each year under NEPA. CEQ, Environmental Quality: 25th Anniversary Report 51 (1994-95). The incidence of NEPA litigation has risen slightly in this Administration, averaging about 140 suits per year, but that number still represents an infinitesimal

fraction of federal actions subject to the Act. Not surprisingly, given the broad range of interests involved in the NEPA process, the types of plaintiffs bringing these suits cover the waterfront, including state agencies, local governments, business groups, individual property owners, and Indian tribes, as well as environmental groups.

Even the tiny fraction of NEPA actions that give rise to court suits overstates the significance of litigation, because only a few of these suits result in court orders blocking government action. According to data compiled by CEQ, preliminary injunctive relief was granted in NEPA cases only 55 times from 2001-2004, and permanent injunctions were issued only 42 times (often, presumably, in the same case in which preliminary injunctive relief had been granted). The term "permanent injunction" is misleading in this context, of course, because even a final court order only imposes a temporary delay until the agency revises its environmental review to comply with NEPA. The courts ordered a remand of certain issues to the federal agency in 66 cases in those four years. On the other hand, the courts ruled for the defendant agencies 214 times during this period, and dismissed NEPA cases (in some cases after a settlement) in another 259 cases. CEQ litigation surveys 2001-2004, at <http://ceq.eh.doe.gov/nepa>. Given the continuing importance of judicial enforcement in ensuring faithful implementation of NEPA, the complexity of environmental impact analysis and the controversy frequently generated by major government actions, these data are neither surprising nor particularly troubling.

NEPA's critics also routinely disparage the motivations of plaintiffs who challenge agency environmental reviews. Business interests, some of whom openly admit that they themselves turn to the courts to enforce the Act, often characterize environmental plaintiffs as improperly seeking "mere delay" in federal projects they oppose. There is no record in the hundreds of NEPA decisions issued by the courts to support such ad hominem attacks. The rules of civil procedure require counsel in any litigation to certify, based on reasonable inquiry, that the action is not brought for any improper purpose, such as to harass or to cause unnecessary delay or needless cost, and that the claims presented have a sound basis in fact and law. To my knowledge, no court has ever sanctioned a NEPA plaintiff for bringing a frivolous complaint, or for filing suit for improper purpose, such as mere delay. The only cases I have found in which the courts have entertained motions for such sanctions involved businesses suing under NEPA to protect purely economic interests—seeking to impede a competitor who has received a federal permit or license, for example—rather than environmental interests, and even those requests have been denied.

Litigation is expensive and time-consuming; it is generally the last resort citizens and conservation groups invoke after serious problems in an agency's environmental review have gone unaddressed. Moreover, environmental plaintiffs understand that NEPA only requires reasonable, good-faith consideration and disclosure of environmental consequences, and cannot be invoked to reverse an agency's substantive decision to proceed with an action. Environmental plaintiffs thus harbor no expectation that a federal court will substitute its judgment on the wisdom of a proposed project for that of the agency. What environmentalists do hope is that requiring an agency to fully evaluate and disclose the environmental impacts of a proposed action may lead to a different, more environmentally-sensitive approach—adoption of an alternative with less environmental impact, or commitment of additional mitigation, for example. Where environmental damage is particularly severe, and appears to outweigh the public benefits of a project, environmentalists may hope that the agency—or Congress—can be persuaded to cancel a proposed project altogether. But such hopes are founded in the beneficial effect that identification and disclosure of environmental consequences have on government decision making, just as Congress envisioned when it enacted NEPA.

For these reasons, the severe procedural barriers some have suggested to limit NEPA litigation are wholly unwarranted, and would serve only to prevent the public from vindicating its rights under the Act. Members of the Task Force discussed at the November 10th hearing a proposal to require plaintiffs to file a substantial bond before bringing suit under NEPA, for example. That mechanism would impose crippling and unfair disabilities on citizens and non-profit organizations. Like a poll tax or a literacy test, it would serve effectively to exclude the poor and minorities from protecting their rights in the federal courts. Others have suggested impossibly tight statutes of limitation for bringing suit—20 days, for example. Such time pressures would make reasoned consideration of whether litigation is warranted virtually impossible, particularly for citizens faced with wading through massive agency decision documents. Unnecessary litigation, brought as a protective measure to avoid the loss of a plaintiff's rights, would inevitably result.

## V. REFORMS TO IMPROVE THE ACT'S IMPLEMENTATION

Although much criticism of NEPA is unwarranted, there are important improvements that can and should be made to the NEPA process to better protect environmental values, in fulfillment of Congress's purposes. None of these improvements would require legislation.

### *Make Mitigation Promises Mandatory*

First, agency promises during the course of the NEPA review process to "mitigate" the adverse effects of federal actions should be recognized by the agencies as binding commitments. Virtually every federal agency decision made under NEPA includes some mitigation designed to avoid, reduce, or compensate for environmental damage that would otherwise occur. Mitigation measures may include, for example, installing fish passage at a new hydropower dam, restoring degraded wetlands to compensate for wetlands destroyed by a new roadway, or adopting traffic reduction measures to reduce air pollution from a new development. Agencies routinely point to proposed mitigation measures in NEPA documents to explain how the adverse effects of a federal agency action have been reduced to an acceptable level. Agencies also rely on mitigation to justify the conclusion that their actions will not have sufficiently significant adverse effects to require an EIS, allowing them to issue a "mitigated FONSI" on the basis of a relatively superficial EA instead. Failure to carry through on such mitigation seriously undermines NEPA's goal of protecting the environment, and undermines the integrity of the NEPA review process.

To maintain the integrity of their NEPA analyses, federal agencies should revise their NEPA procedures to preclude hollow promises of mitigation. When an agency proposes a mitigation measure as part of the preferred alternative under NEPA, the agency's decision to proceed with the action should include a commitment to proceed with the mitigation as well. Unless the proposed mitigation is guaranteed under the requirements of a separate statute or regulation, agencies should be allowed to rely upon mitigation in the NEPA process only if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit. The feasibility of this proposed reform is confirmed by the Department of the Army's 2002 NEPA regulations, which require Army officials to demonstrate that any mitigation measures included in a final decision have been funded as an integral part of the project and to commit to implementing the mitigation and monitoring its effectiveness. 32 C.F.R. ' 651.15(b) (2003). Similarly, where the Army relies on mitigation measures to conclude that an EIS is not needed, such measures "become legally binding and must be accomplished as the project is implemented." *Id.*

### *Require Monitoring of Project Impacts*

A second useful reform would be to enhance monitoring of the environmental effects of projects after they are completed. Too often, federal agencies invest significant resources in complex scientific assessments of the potential consequences of a proposed action without committing sufficient resources to monitoring the project's actual impacts.

Enhanced monitoring goes hand in glove with the proposal to make promised mitigation measures enforceable commitments. On-the-ground inspection and evaluation to make sure mitigation measures are being implemented successfully are essential to make mitigation commitments real. Improved monitoring also will provide the basic data necessary to conduct adaptive management, where that technique is potentially useful, and to help implement agency environmental management systems. Monitoring should reveal where the agency's actions are having greater impacts than anticipated, allowing the agency, and the public, to assess whether additional mitigation steps are needed. By the same token, monitoring will demonstrate whether projects or programs have produced completely unanticipated environmental effects. Monitoring thus can help ensure that NEPA supports a continuing, flexible, and responsive approach to managing the environmental effects of agency actions. Finally, improved monitoring will provide the data needed to allow agencies and environmental professionals to assess the accuracy and reliability of environmental reviews and evaluate new methodologies for environmental impact assessment, improving the NEPA process in the long term.

### *Improve Management, Training and Funding for Agency NEPA Compliance*

Although NEPA has been in effect for 35 years, federal agencies still struggle to carry out its mandate to incorporate environmental values and public views in

federal decision-making. CEQ has called repeatedly for agencies to improve their implementation of NEPA to make environmental reviews more focused, more useful to the decision-maker, and less burdensome. The CEQ regulations direct federal agencies to reduce paperwork by limiting the length of EISs, using the scoping process to identify significant issues and writing in plain language, and to reduce delay by integrating the NEPA process into the agencies' early planning, establishing time frames for the analysis and coordinating with other responsible federal, state and local agencies. 40 C.F.R. §§ 1500.4, 1500.5.

Not all federal agencies have heeded CEQ's direction, unfortunately. Furthermore, some aspects of environmental impact assessment are technically complex and poorly understood by federal agency officials. Cumulative impact analysis, for example, is a difficult and evolving field that often poses challenges for federal agencies engaged in environmental reviews. Integration of NEPA analysis with adaptive management and with newly-developed agency environmental management systems is another challenge, requiring creative and careful thinking from federal agencies.

Improving agency implementation of NEPA will require increased attention by agency managers, who must take responsibility for ensuring that environmental reviews are integrated into agency decision processes, coordinated with other affected agencies, and completed in a timely manner. Expanded guidance and training for federal agencies on NEPA implementation is also critically important. The Inter-agency NEPA Task Force recently called on CEQ to provide more training and guidance for federal agencies, particularly on difficult technical issues, such as cumulative effects analysis and adaptive management. NEPA Task Force, Report to the Council on Environmental Quality: Modernizing NEPA Implementation (Sept. 2003). CEQ's ability to meet the critical need for such guidance and training is constrained, unfortunately, by severe funding and staffing limitations.

More generally, there is a serious and mounting shortfall in the financial resources provided to federal agencies to carry out their NEPA responsibilities. Every study of NEPA implementation has highlighted the problem of inadequate financial and staff resources. Unfortunately, the deficiency in agency NEPA funding continues to get worse: agency NEPA staffs face increasing workloads, but a majority of agency NEPA offices have nonetheless suffered substantial reductions in both their budgets and staff positions in the past few years. Staff in the Army Corps of Engineers' Office of Environmental Quality, for example, which oversees all environmental aspects of the Army Corps' civil works program, has been reduced over the last several years from 12 to 3 full time employees ("FTEs"). Similarly, the Department of Energy's headquarters Environmental Office has been reduced over the past decade from 26 FTEs to 14, and its budget cut from \$7 million to \$1.5 million, even as its NEPA workload has increased. Without adequate funding and staffing to carry out their NEPA responsibilities, the pressure will inevitably mount on agencies to find ways to short-cut NEPA compliance.

A meaningful effort to improve NEPA's implementation thus must include commitments of additional resources so that agencies can carry out their responsibilities under the Act effectively and efficiently.

## **VI. CONCLUSION**

NEPA is a simple, but profound, guarantee of good government—government that cares about the effects of its actions on the human environment, on its citizens, and on future generations. Each of your constituents depends on NEPA for the basic information about what the Federal government is doing that will affect his or her life and community. NEPA continues to serve the important values Congress recognized in establishing our national environmental policy of "productive harmony" between man and nature. Federal agencies can and should work harder to fulfill NEPA's purposes. But the Act continues to serve the American public well. NEPA should be celebrated on its 35th anniversary, not undermined.

Miss MCMORRIS. Thank you. Mr. Goldstein.

### **STATEMENT OF NICK GOLDSTEIN, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION**

Mr. GOLDSTEIN. Chairwoman McMorris and other members of the Task Force, I am Nick Goldstein, Staff Attorney for the American Road and Transportation Builders Association.

ARTBA represents more than 5,000 members nationwide involved in all sectors of the transportation, design and construction

industry. I would like to begin my testimony by thanking the House Committee on Resources and the members present today for undertaking a comprehensive effort to review and update the National Environmental Policy Act, NEPA.

Let me stress at the outset that ARTBA shares the Task Force's goal of protecting the environment and minimizing the impact of development. This was the original intent of NEPA. NEPA should be a means by which to reach informed decisions about major Federal actions. However, in its current state, NEPA generates far more documents than decisions.

I think all of those appearing before you today would agree that NEPA plays an essential role in any project decisionmaking process and that improvements can be made to the NEPA process that would not weaken or diminish the overall effects of the act.

Specifically, changes in NEPA could be made that reduce the amount of delay to transportation projects. Even the Sierra Club in its 2003 report, "On the Road to Better Transportation Projects," noted that, quote, "the NEPA process is not perfect, and there are methods to improve it," end quote.

Sometimes when we look at these issues, it is difficult to see the forest through the trees. This Nation has been in a—is in a transportation capacity crisis. And the use of NEPA as an impediment to addressing this challenge is counter to the public interest.

Where NEPA is largely being abused is in the case of new capacity-enhancing projects. It is these projects which have the greatest potential to improve air quality and public safety through the reduction of travel congestion.

In addition to procedural reforms, ARTBA feels that it is critical that this Task Force focus on the abuse of NEPA through litigation. The major causes of abuse under NEPA is that the statute allows for lawsuits to be filed with no basis in fact, that have no other intention but to cause delays to Federal projects. And some organizations take full advantage of this opportunity.

In graphic terms, Jay Kardan, Conservation Chairman of the Virginia Chapter of the Sierra Club, offered this perspective. Quote: "Facts and reason are much less important than the amount of noise you can make. Officials who support highway projects should be mercilessly abused, shamed, ridiculed, and otherwise made to suffer pain. This objective should be to cleave a division through the community so painful that people will remember it for decades afterward."

This is not the intent of NEPA. But it reflects how the statute can and is being abused.

When NEPA is used in this manner, its purpose of achieving balance and obtaining consensus decisions regarding federally funded projects is defeated. Instead, it is transformed into a vehicle for needless delay and stifles community decisionmaking.

ARTBA most recently experienced the effects of NEPA being used as a tool for delay in litigation involving a widening project of U.S. 95 outside of Las Vegas, Nevada. It is also being felt in parts of Utah as part of the ongoing political struggles over the legacy highway project.

These types of disruptions have a much bigger effect than simply putting a construction project on hold while litigation takes place.

Also put on hold by lawsuits are improvements in air quality, public health, and safety.

It is with this in mind that I offer the Task Force the following recommendations for improving NEPA:

First, a 180-day time limit on lawsuits has been established in the recently passed transportation bill as mentioned here today. This is reasonable and should be extended through NEPA to all projects.

Second, consideration of the environmental benefits to proposed projects as opposed to just their impacts as well as the environmental consequences of not undertaking a project need to be incorporated into the NEPA process.

Third, NEPA litigation should be limited only to those issues that have been fully raised and discussed during the public comment period for a project. This will help ensure that litigation is not used simply to move the goal posts by opponents of a project that has otherwise satisfied NEPA requirements.

And finally, the development of a dispute resolution process, ensuring that litigation is used as a last resort rather than a first step in solving these types of problems.

Members of the Task Force, ARTBA deeply appreciates the opportunity to present testimony to you as part of this important and needed discussion on NEPA. And I look forward to any questions that you might have. Thank you.

Miss McMORRIS. Thank you.

[The prepared statement of Mr. Goldstein follows:]

**Statement of Nick Goldstein, Staff Attorney,  
American Road and Transportation Builders Association**

Good morning, Chairwoman McMorris and other members of the task force. 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 subject of updating and improving the National Environmental Policy Act (NEPA).

I am Nick Goldstein, staff attorney for ARTBA. 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 is based here in Washington, D.C., and has provided the industry's consensus policy views before Congress, the executive branch, and the federal judiciary for 103 years. 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. ARTBA also supports NEPA and realizes that it is an integral component of the transportation planning process.

ARTBA celebrates the commitment of the transportation construction industry to the environment every year when we hand out the association's 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. Many, if not all of these projects would not have been so recognized were it not for the NEPA process.

**NEPA Background**

Madame Chairwoman, transportation infrastructure projects must navigate through an often time-consuming and complex planning process. In 1969, Congress passed 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 activated 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 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 fact 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 significant 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 the most substantial potential benefits for public safety and

mobility for the traveling public and are, therefore, frequently high 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.

NEPA was never meant to be a statute that enabled delay, but rather a vehicle to promote balance. While the centerpiece of that balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how the project or any identified alternative will affect those needs. When NEPA is used as a method of preventing a chosen outcome by those who disagree with that decision, its purpose as a balancing statute is defeated.

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 an independent review and approval process, forcing separate reviews of separate regulations, and unique determinations of key benchmark issues—such as the purpose and needs of a project—and requiring planners to answer multiple 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 with this goal have been included in the recently enacted “Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users” (SAFETEA-LU).

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.”

The Sierra Club has also recognized this, stating in a 2003 report concerning the effect of NEPA on transportation projects that “the NEPA process is not perfect, and there are methods to improve it.” One recommendation which the Sierra Club considered “the most promising” was the need for early collaboration among partners and stakeholders in the planning process. ARTBA wholeheartedly agrees. Issues need to be vetted as early in the process as possible so they may be resolved or, in the alternative, bad projects can be abandoned before great amounts of work are invested in them. Better coordination among the various agencies and stakeholders involved in the NEPA process is one area where all sides in this discussion believe positive changes can be made.

### **Delay Kills**

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 annual deaths 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.

### **Updating and improving the NEPA Process**

The area of the NEPA process which would yield the greatest reduction in project delay is frivolous and malicious litigation which subverts the NEPA process. This is not to say that all NEPA litigation needs to be curbed, or that NEPA litigation, as a whole, is a hindrance on the process. When used properly, litigation resolves disputes arising from the NEPA process that cannot be dealt with through any other method. However, when abused, NEPA litigation allows a small minority of individuals to hijack the NEPA process in an attempt to perpetually delay projects simply for the sake of delaying them.

This strategy of “delay for the sake of delay” has been described in numerous outlets by plaintiffs in NEPA litigation. One of the more graphic examples of this mentality is evident in the following 1999 quote from Jay Kardan, Conservation Chairman of the Virginia Chapter of the Sierra Club regarding opposition to highway projects:

“Facts and reason are much less important than the amount of noise you can make...Officials who support [highway projects] should be mercilessly abused, shamed, ridiculed and otherwise made to suffer pain...The objective should be to cleave a division through the community so painful that people will remember it for decades afterward.”

The same mindset was echoed by Roy Kienitz in his aforementioned Senate testimony:

“In the struggle between proponents and opponents of a...[highway] project, the best an opponent can hope for is to delay things until the proponents change their minds or tire of the fight.”

Also, a “Grassroots Litigation” training manual prepared by the Community Environmental Legal Defense Fund states:

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

This approach to NEPA litigation undermines the entire process. It advocates using NEPA litigation when no legitimate environmental issues exist to be debated. Instead of allowing communities to make informed decisions, their power is usurped by small groups of well-funded project opponents. Worse yet, these project opponents

are often based out of state and not part of the communities they purport to represent.

This type of NEPA litigation was recently illustrated in litigation involving a highway widening project on U.S. 95 in Las Vegas, Nevada. As a result of a lawsuit filed years after the final EIS for the project was completed, ongoing construction of the project was completely halted for almost one year. During that time, air quality and public safety improvements were delayed in the affected communities, the cost of project materials rose by millions of dollars, work plans were disrupted, and employees were out of jobs temporarily, and in some cases, permanently.

Using the Las Vegas case as an illustrative example, 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 and 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 the segment of U.S. 95 that was at issue in this case services 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 that was scheduled for improvement.

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, four years after construction was already underway, while litigation continued until a settlement was reached in late June of 2005.

#### **NEPA Litigation Places Environmental Benefits at Risk**

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 there is little 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. 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 eight percent. Thus, equipment costs associated with the U.S. 95 project are estimated to have risen approximately \$3,060,000 during the time of the injunction. That means taxpayers could pay more than an additional \$3 million as a result of the delays caused by this NEPA-related litigation.

#### **What does Frivolous Litigation 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 litigation. There are currently in excess of 1,500 cases which “define” NEPA. Another such example can be found in Utah where the Legacy Highway project has been delayed for over five years at a cost of nearly \$1.5 billion. During this time, as with U.S. 95 in Nevada, air quality has worsened, commutes have become longer, and transportation-related public health and safety has declined.

NEPA 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 demonstrated 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 project. 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—providing, at best, a lopsided perspective on environmental impacts. Had ARTBA not submitted a “friend of the court” brief in the U.S. 95 case, the project’s 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, should include other consideration 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 part of 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 over 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 quality decisions in a more timely manner.

Particular changes to the NEPA process ARTBA recommends are:

- A set time limit on project related NEPA lawsuits. The recently enacted “Safe, Accountable, Flexible and Efficient Transportation Equity Act—A Legacy for Users” includes a provision setting a 180-day time limit for lawsuits involving highway projects.
- 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.
- 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.

- Establishment of a dispute resolution process as part of NEPA. This would further ensure that only those issues which are truly not resolvable proceed to litigation.
  - 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.
  - 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, as proposed by the Bush Administration.
- Once again, Madame Chairwoman, ARTBA thanks you not only for the opportunity to participate in this hearing, but also for the establishment and work of this task force. I would be happy to answer any questions you or the other members may have.

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**Response to questions submitted for the record by Nick Goldstein,  
Staff Attorney, American Road and Transportation Builders Association**

1. *You cite a number of environmental benefits that are jeopardized by NEPA litigation. It seems as though the "impact" are the only focus when an agency reviews a proposed project. Shouldn't the benefits of that proposed project be given equal weight?*

Certainly. The NEPA process should be updated so that it considers the environmental and public health benefits of a project as well as the potentially problematic impacts. Such an approach would provide a more complete and honest discussion of the project involved and help ensure regulators are making balanced decisions. For example, in the case of the U.S. 95 project, as documented in my written testimony, the following benefits are anticipated upon the project's completion through the year 2025:

- a 58.8 ton reduction in carbon monoxide emissions;
- a 54.3 ton reduction in volatile organic compounds (VOCs);
- an 87.8 ton reduction in carbon dioxide emissions;
- U.S. 95 commuters will use 87.8 percent less motor fuel over 25 years than they would under a "no build" option, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter);
- Las Vegas U.S. 95 commuters will spend 86 percent less time stuck in traffic about 30 minutes saved for the twice a day commute 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.

Under existing NEPA requirements, these clear enhancements to the natural environment, health, safety and quality of life of Nevadans are not considered. To ensure a comprehensive NEPA process, the benefits of transportation improvement projects should be given equal consideration when the environmental impacts are discussed during the EIS process.

Also, the environmental impact of not going forward with a proposed project should be discussed as well. With U.S. 95, this would mean weighing the effects of continuing the present state of congestion, and the resulting environmental and public health harms. To put this into perspective, in the case of U.S. 95, 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 over 300 percent.

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 its original design 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. Studies have shown that motor vehicles traveling at speeds under 55 miles per hour produce greater levels of vehicle emissions. As such, not proceeding with the project would lead to dramatically increased motor emissions. Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95. 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. All of these factors need to be considered in the NEPA process as a consequence of not going forward with the U.S. 95 project.

Finally, a step which would help discussions of projects reviewed under NEPA to be more complete would be to guarantee a "spot at the table" for non-public agency project proponents as well as project opponents. This should apply to litigation as well, where non-public agency project proponents should be granted legal standing in the same manner as organizations which oppose projects. A major reason that NEPA discussions center mainly on impacts is that those in favor of proposed projects, be they community members or developers, are often not allowed to participate once a proposal is challenged. This should be changed to make discussions more complete.

The goal of NEPA has always been to enable communities to make informed decisions regarding public projects. It is important to note that the "public interest" is not just served by groups who self-proclaim themselves as its guardian. It is also served by allowing the many others in the affected community who look to transportation improvements as an essential component of their public health and quality of life to be heard. By providing the public with all sides of the debate, instead of limiting discussion to one side of an issue, NEPA will be better equipped to meet this goal.

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Miss MCMORRIS. Mr. Harwood.

**STATEMENT OF ALAN HARWOOD, EDAW, INC.**

Mr. HARWOOD. Madam Chair, members of the Task Force thank you for the invitation to appear in today's hearing.

The firm that I represent, EDAW, Incorporated, is a leading environmental consulting firm. We pioneered the blending of environmental planning and sustainable development three decades before environmental considerations were mandated under NEPA. Our collective body of work has included literally hundreds of NEPA projects for nearly every Federal agency.

My testimony here today reflects more than 20 years of experience as a NEPA practitioner and the collective input of my partners across the country.

Let me start by offering just a couple of observations about the NEPA process.

The presence of NEPA has had a profound and positive effect on the Nation's natural and built environment. When implemented correctly, the formalized nature of the NEPA process establishes a standard framework for sound decisionmaking. But NEPA is not perfect. It sometimes suffers from the three Cs. It can be costly, cumbersome and confusing.

And it is my understanding that we are here today as a congressional effort to update and improve NEPA as a policy tool, but not eliminate it. Similarly, NEPA requirements should be used to improve projects but not stop them. In both cases, the proper balance is usually best achieved in the practical middle ground rather than either extreme.

It is from this balanced perspective that I offer seven suggestions for improving NEPA. First, the threat of litigation under NEPA is entirely too pervasive. Judicial review should not be the primary mechanism for ensuring NEPA compliance. So to minimize legal maneuvering, CEQ, as an independent agency with NEPA expertise, should be empowered to resolve most NEPA disputes administratively prior to court action and a time limit for filing litigation should be established, much as it is done in California.

Second, environmental considerations must never be ignored and should be a central factor to help select project alternatives. But the mandate to fully evaluate alternatives should be relaxed in

certain cases, subject to oversight by CEQ to allow for a reduced level of alternatives analysis, particularly when a given alternative fails to meet the stated purpose and need.

Third, the range of environmental considerations should be comprehensive and holistic. The NEPA should focus on fundamental environmental issues as defined by CEQ and should not be used a substitute for a design review process or other process that is under another law.

Fourth, public notification and public review are integral components of NEPA and must be protected. If guidelines established by CEQ are met, the provisions for certain process milestones, including required notification and review periods could be streamlined to increase agency flexibility and improve efficiency.

Fifth, one of the most useful outcomes of the NEPA process is the identification and development of mitigation measures. Unfortunately, implementation of recommended mitigation measures is voluntary. There should be formal enforcement measures and ongoing compliance oversight under CEQ's purview to ensure agency implementation of specified mitigation commitments that are integral to the environmental approval process.

Sixth, the qualifying requirements for categorical exclusions vary widely among different agencies. In coordination with CEQ, the exemptions available for proposed actions under categorical exclusion guidelines should be clarified and made more consistent and documentation is required for—should be reduced for categorical excluded projects.

And finally, the decentralization of NEPA works well under many circumstances, but depends greatly on the NEPA expertise of individual Federal agencies and often individual Federal employees.

It is our opinion that CEQ should be strengthened, expanded, and funded as an integral independent agency with clear authority to simplify and streamline environmental procedures, provide implementation guidance and oversight, coordinate NEPA training and serve as administrative arbiter or mediator of NEPA issues and disputes so that the threat of judicial involvement is greatly minimized.

In closing, NEPA's original purpose to ensure the consideration of environmental values in Federal actions continues to be a noble and worthy goal. No changes that would diminish the law should be contemplated. However, there are several procedures and process requirements that should be refined and streamlined to provide efficiency, clarity, and cost effectiveness. Such modifications would reflect the Nation's environmental maturation over the last 35 years.

There is now broad support for environmental quality. And there have been many environmental protection successes over the last three decades that have made our great Nation and the world a better place to live and a better legacy for future generations.

We have learned that it is far less costly to plan with environmental considerations than to repair our damaged air, water and land. We should not be distracted by the self-serving arguments of narrow special interests. The fundamental issues is not the battle between environmental protection and economic development. It is

the inherent conflict between long-term and short-term decision-making. A longer, broader perspective realizes that what is good for the environment is also good for the economy, and by definition, good for people.

Thank you for the opportunity to testify. I welcome any questions.

[The prepared statement of Mr. Harwood follows:]

**Statement of Alan Harwood, Principal and Vice President,  
EDAW, Inc.**

**Introduction**

Madame Chairwoman and Members of the Task Force, thank you for the invitation to participate in today's hearing. It is a privilege and an honor to appear before this esteemed panel to address this most important issue. I appreciate the opportunity to discuss ways to update and improve the National Environmental Policy Act (NEPA).

The firm I represent, EDAW, Inc., is a leading environmental consulting firm. Our name comes from the initials of the four founding partners who began a legacy of environmental planning and sustainable development 30 years before environmental considerations were mandated under NEPA. Today, more than 35 years after NEPA, my firm continues to seek the appropriate balance between development and conservation, or to state it more broadly, we continue to balance the interests of man and nature.

Since the inception of NEPA, we have been involved in projects across the country, including the Pacific Northwest, the Rocky Mountains, the Mississippi River, the Gulf Coast, the Florida Everglades, and, of course, here in our Nation's Capital. We have worked on new federal facilities and historic buildings with the General Services Administration, land exchange agreements and open space enhancements with the National Park Service, proposed riverboat casinos and waterfront development with the Army Corps of Engineers, water supply infrastructure with the Bureau of Land Management, target ranges and installation improvements with the Department of Defense, restoration projects for the Federal Emergency Management Agency, and many perimeter security projects in coordination with the Department of Homeland Security. Our current environmental projects include the Martin Luther King Memorial, the Denver Federal Center, a flood control levee in California, the Pentagon master plan, and a baseball stadium for the Washington Nationals.

My testimony reflects more than 20 years of experience evaluating, identifying and mitigating impacts for scores of proposed actions as a NEPA practitioner. Overwhelmingly, my specific environmental analysis work has involved land development projects. Land development projects, including federal buildings or private facilities seeking regulatory approvals, are different than other federal actions relating to national programs, mineral extraction, or resource management. Land development typically occurs in high-profile urban locations and usually is politically charged with extensive public scrutiny and controversy. This background has led me to the following observations about the NEPA process.

**Observations on NEPA**

It has been several decades since the NEPA legislation was drafted and many years since the 40 Most Frequently Asked Questions were circulated by the Council on Environmental Quality (CEQ). Since that time, current practices and agency and public expectations have greatly evolved. For some agencies, case law now provides seemingly more guidance than the original legislation and implementing guidelines. Therefore, in my opinion, it is apparent that this current review and update of NEPA is warranted and overdue. Based on my experience, I offer the following observations about NEPA:

1. The "presence" of NEPA has had a profound and positive effect on the nation's natural and built environment. This is because the worst ideas, the most egregious projects, never see the light of day as formal proposals, and questionable projects are heavily screened, reviewed, and subject to public scrutiny. There is now widespread acknowledgment that environmental considerations play a significant role in the acceptance of a project.
2. When implemented correctly, the formalized nature of the NEPA process establishes a standard framework for sound decision-making. Several features of the legislation are particularly noteworthy:

- a. NEPA's documentation requirement facilitates clarity of purpose and helps define proposals. Even a simple written description of a proposed project improves communication and provides a common understanding of a project and potential issues.
  - b. NEPA's public involvement procedures ensure input from affected communities. Public engagement can help identify potential issues, convey shared or conflicting concerns, explain likely outcomes, and communicate recommended actions.
  - c. The thorough analysis of potential consequences can help resolve technical questions. Accurate definition of potential impacts can help determine appropriate and creative mitigation measures to improve a project and benefit the public by avoiding, reducing, or offsetting identified impacts.
3. NEPA is not perfect. It sometimes suffers from the three C's: Cumbersome, Confusing, and Costly.
  4. The NEPA process draws out project opponents rather than supporters. Scoping meetings and public review hearings tend to encourage opposition to a project—usually from the general public but sometimes from a variety of special interests. Hearing adverse reactions to projects is useful, but so are positive responses.

#### **Suggestions for NEPA**

My observations for the Task Force are borne from my experience as a NEPA practitioner and shaped by the unique challenges inherent in land use planning and development. My suggestions to the Task Force are also based on my professional expertise and the collective input of my EDAW partners across the country.

It is my understanding that we are here today as part of a Congressional effort to update and improve NEPA as a policy tool—but not eliminate it. Similarly, NEPA requirements should be used to improve projects—but not stop them. In both cases, the proper balance is usually best achieved in the practical middle ground rather than either extreme.

It is from this balanced perspective that I offer seven suggestions for improving NEPA:

1. The threat of litigation under NEPA is entirely too pervasive. Too often the NEPA process is used as a threat by community groups to fight or block projects they don't like—even if there is widespread but less vocal support for the project. Public outcry should be eliminated as a determinant for a decision on whether an EA or an EIS is the appropriate vehicle for NEPA compliance, and judicial review should not be the primary mechanism for ensuring NEPA compliance. To minimize legal maneuvering, CEQ, as an independent agency with NEPA expertise, should be empowered to resolve most NEPA disputes administratively prior to court action, and a time limit for filing litigation should be established.
2. Environmental considerations must never be ignored and should be essential factors to help select project alternatives, including alternative programs or sites. But NEPA should not force the equal inclusion of alternatives throughout the analysis process regardless of feasibility. Allowing a build/no build format would be preferable to analyzing an alternative location for a private-sector project that will not proceed if the preferred alternative is not approved. The mandate to fully evaluate alternatives should be relaxed in certain cases, subject to oversight by CEQ, to allow for a reduced level of alternatives analysis, particularly when a given alternative fails to meet the stated purpose and need.

A major public facility was proposed for a site extending from the edge of downtown into an historic minority community. NEPA required the full analysis of an alternative location, which project opponents quickly adopted and rallied around. The result was misleading to residents and confusing for elected officials. An EIS should not become a vehicle for giving the public false hope.

3. The range of environmental considerations should be comprehensive and holistic. A hard look at a wide variety of natural and man-made environmental issues is integral to NEPA. Subjective resources such as visual quality should be evaluated objectively through features such as height, density, and mass rather than window treatments, balconies, or material colors. NEPA should focus on fundamental environmental issues, as defined by CEQ, and should not be used as a substitute for a design review process.

A prominent memorial has been proposed for a site on the National Mall. Some review agencies, while supporting the concept and basic components, have taken issue with some of the design details. NEPA requires an evaluation of

alternatives, yet an EA should focus on environmental considerations and should not be used to debate aesthetic preferences.

4. Public notification and public review are integral components of NEPA and must be protected. However, for many relatively simple public projects, the mandatory timeframes under NEPA can conflict with the existing approval processes of other agencies, disrupt project schedules, and cause unnecessary delays. If guidelines established by CEQ are met, the provisions for certain process milestones, including required notification and review periods, should be streamlined to increase agency flexibility and improve efficiency.
5. One of the most useful outcomes of the NEPA process is the identification and development of recommended mitigation measures. Project modifications, features, or even off-site benefits that avoid, minimize, or compensate for identified environmental impacts can be practical, cost-effective solutions to challenging issues. Unfortunately, implementation of recommended mitigation measures is voluntary. There should be formal enforcement measures and ongoing compliance oversight under CEQ's purview to ensure agency implementation of specified mitigation commitments that are integral to the environmental approval process.

A federal headquarters building was planned adjacent to a sensitive natural area. The stream and steep slopes with mature trees was identified as a resource protection area and became the centerpiece of the building design (and helping the design win several awards). For reasons that are not entirely clear, during construction the trees were removed and the stream was stabilized with rip-rap rather than preserved. The NEPA process should not be used to secure project approval without commitments to fundamental mitigation measures.

6. The qualification requirements for Categorical Exclusions vary widely among different federal agencies. In some cases, renovated buildings get more scrutiny than new construction. In coordination with CEQ, the exemptions available for proposed actions under Categorical Exclusion guidelines should be clarified and made more consistent, and documentation requirements should be reduced for categorically excluded projects.
7. The decentralization of NEPA works well under many circumstances but depends greatly on the NEPA expertise of individual federal agencies and, often, individual federal employees. To overcome the variable quality of NEPA awareness and practice in different federal agencies, a central organization with the authority to provide clarification and resolve differences of opinions relating to NEPA is needed. The CEQ should be strengthened, expanded, and funded as an integral, independent agency with the clear authority to simplify and streamline environmental procedures, provide implementation guidance and oversight, coordinate NEPA training, and serve as administrative arbiters of NEPA issues and disputes so that the threat of judicial involvement is greatly minimized.

### Summary

In closing, NEPA's original purpose to ensure the consideration of environmental values in federal actions continues to be a noble and worthy goal, and one that is generally implemented. No changes that would diminish the law should be contemplated. However, there are several procedures and process requirements that should be refined and streamlined to provide efficiency, clarity, and cost-effectiveness.

Such modifications would reflect the nation's environmental maturation over the last 35 years. There is now broad acceptance of environmental quality as a worthwhile pursuit for local and national governments. Many environmental protection successes that have occurred during the last three decades have made our great nation and the world a better place to live and a better legacy for future generations. By improving and strengthening NEPA, we can ensure that these benefits will continue. We have learned that it is far less costly to plan with environmental considerations, than to repair our damaged air, water, and land.

We should not be distracted by the self-serving arguments of narrow special interests. The fundamental issue is not the battle between environmental protection and economic development; it is the inherent conflict between long-term and short-term decision-making. A longer, broader perspective realizes that what is good for the environment is also good for the economy—and by definition, good for people.

Thank you for the opportunity to testify. I will be glad to respond to questions.

**STATEMENT OF JOHN MARTIN, PATTON BOGGS LLP**

Mr. MARTIN. Thank you, Madam Chairwoman. First I would like to thank the Task Force and all of the staff people who have worked so hard at this effort. And I would like to, if I may, echo one of the themes I think you see from literally all of the witnesses that are appearing today and all the witnesses that I am aware of that have appeared before the Task Force before.

And that is that we all embrace the policies that underlie NEPA, the original policies, notably two policies: first, public participation; and second, conveying information on environmental consequences before a Federal decisionmaker actually makes that decision.

Those are policies that I embrace—my client, Devon Energy Corporation, embraces. And I have to say that those folks that I have represented over the course of 25 years of environmental litigation embrace those policies as well.

I am inclined to believe that NEPA, like any 30-year-old statute, is a statute that can be improved. It is not perfect. It is something that I think we can in fact improve upon. Before I get into some of the details, some of the suggestions that I have made, I would like to, if I may, just talk briefly about context. I represent oil and gas companies, many oil and gas companies who are involved now in development of natural gas resources through Federal leases in the western United States.

In the ordinary course what we see is 2 levels of NEPA review:

First, we see a broad-based programmatic EIS. This is a lengthy document. And no, it is not a document that was the sort of document that was originally projected when the statute was passed or when the regulations were promulgated in the 1970s. Back then, people were talking about in the regulations an EIS of perhaps 150 pages, a maximum of 300 pages. That is not what is happening today.

The EISs with which I am most familiar are multiple thousands of pages. One that I am familiar with is four volumes. The administrative record comprises 100,000 pages.

The duration for this, again, is not what we originally thought. Back in the 1970s, CEQ was projecting that the duration to conduct an EIS was approximately 12 months in a most complex EIS. These days we are talking about an average of between 24 and 36 months for the EISs with which I am familiar.

So ladies and gentlemen, the first level of NEPA review that we are dealing with as a general proposition is an EIS that is programmatic in nature. It is multiple thousands of pages. It has appendices. It takes a long duration. In fact, it is expensive. We expend a lot of resources on it.

The second level is for individual projects. There, in the ordinary course, what we do is we tier an environmental assessment to that EIS. The environmental assessment is not that 10-page document that was originally projected in the CEQ regulations. No. In most instances, it is much longer. An EA I am familiar with that just came out in this industry a few months ago was 150 pages in length and consumed over 6 months' time to create.

So you can see that this is a much more involved process, I think, than what we originally anticipated when this statute was passed. And I do believe that there are things that we can do to

strengthen the process to make it a simpler, more effective process, one that decisionmakers will be able to make greater use of.

First, in terms of alternatives analysis. I think it would be useful if we could clarify to agencies that they have the clear ability to define and limit the number of alternatives that are analyzed.

Right now in the CEQ regulations and, frankly, in the case law, there is the suggestion that agencies need to go outside that own jurisdiction and consider alternatives that perhaps the agencies recognized are not at all useful and ones they would never pursue.

Second, in the vein of augmenting the public participation at a point in time when it is most effective, I would recommend that we require exhaustion of administrative remedies. The point is that if someone objects to what the agency is doing, properly, that person, should invest herself in the process early and tell the agency, "I want you to consider this, I want you to evaluate that, I want you to engage in this process," at a point in time when the agency can actually respond and include it in the EIS or the EA.

Third, the statute of limitations. To echo Mr. Goldstein's concern, I would like to see a 180-day statute of limitations generally. This is not an abstract concern for me. Our clients invest literally millions of dollars in plans of development. And what happens under the current regime is they have to concern themselves with the challenge that may occur as long as 6 years after the particular decision is made. And in some instances, it is after the company has invested many millions of dollars in the lease, in the development of that prospect. That is inappropriate. And I don't think it is unfair to ask that folks challenge it within a reasonable period of time.

Fourth, I think it ought to be clear that the proponents of particular projects should have the right to intervene and should clearly have standing. As it turns out under the current regime, particularly in the Ninth Circuit, it is not clear that we with economic interests—the proponents of the particular program—have standing or the capacity to intervene.

And if I might summarize. And then finally I would ask that remedies be clarified so that judges have greater direction in terms of what they proscribe by way of remedies and litigation. Thanks again for the opportunity to testify.

Miss MCMORRIS. Thank you very much.

[The prepared statement of Mr. Martin follows:]

**Statement of John C. Martin, Patton Boggs LLP**

My name is John Martin, and I am an attorney who has worked in the field of environmental litigation for more than 25 years. Over the years, I have represented clients on many matters involving the National Environmental Policy Act (NEPA), and have published and taught on NEPA issues. I currently represent a number of companies whose ability to undertake energy projects has been delayed or thwarted by the application of NEPA. I would like to take this opportunity to share my thoughts on NEPA, and how revisions to the legislation could decrease uncertainty associated with the NEPA process, while preserving the statute's capacity to inform decision-makers of environmental issues before permanent commitments of resources are made. While many of my comments reflect concerns raised by my clients in energy-related fields, the issues raised here are equally relevant to NEPA's application in other contexts.

NEPA was intended to further the laudable goal that agencies take into consideration the anticipated environmental impacts of their actions before making decisions. In addition, the public was to be given the opportunity to provide their

comments on the environmental impacts associated with particular projects. Our clients support these policies: we believe government decision-makers should be informed of environmental impacts associated with their choices and that the public should be informed of, and permitted to comment on, those impacts as well.

Unfortunately, over the years, ambiguities and gaps in the initial NEPA statute, inconsistencies in case law, and incomplete and confusing agency regulations have produced the unintended consequences that now overshadow NEPA's original goals. For many, NEPA has come to mean years of delay and uncertainty as well as the imposition of huge costs on the government and private parties to no effective end. Rather than focusing on efforts tailored to best address realistic environmental concerns, government agencies are spending vast amounts of time and money to attempt to anticipate and respond in advance to every conceivable litigation attack a potential plaintiff might make. In many instances, public funds that should be going toward fulfilling substantive agency mandates are instead going toward bulletproofing EISs and defending lawsuits. Instead of processing permits, agencies work on litigation strategies. Instead of taking actions that protect the environment, agencies engage in "paralysis through analysis."

Once litigation sets in, projects can become mired in such lengthy disputes that they are no longer viable. Even before that happens, the huge uncertainties surrounding the Government's response, the vagaries of litigation and the timing of a final answer, mean that it may simply be infeasible to direct resources to a project where NEPA is involved. All of this creates an artificial and inefficient allocation of resources, with large amounts of time and money going to litigation expenses and to the study of the potential environmental impacts of paths that will never be taken.

In addition, of course, the uncertainty and the inordinate delays created by NEPA lawsuits often subject project proponents as well as federal, state and local governments to vast financial losses. For example, the threat and reality of NEPA litigation has repeatedly given rise to needless delays—often for several years—in development of the nation's critical energy resources, including oil and gas. Courts may enjoin project activities pending resolution of a lawsuit, which can take years. Even if they do not, the uncertainty arising from the litigation may make it impossible to commit necessary investments and the window of opportunity for the project may be lost.

These procedural impediments directly hurt not only the companies that would develop the resources at issue but the public at large. Delays and uncertainty mean lost jobs. In addition, federal, state and local governments count on the income from royalties and production taxes to fund their schools, roads and other needed infrastructure. Moreover, in some cases, NEPA litigation gives rise to a cruel irony: NEPA can cause, rather than cure, environmental harm.

For all these reasons, substantial changes to NEPA are long overdue. My suggested legislative amendments fall into the following four over-arching categories:

- Clarify and revise the scope of agencies' NEPA obligations;
- Impose requirements on NEPA plaintiffs to discourage frivolous lawsuits;
- Permit increased participation in litigation by project proponents and other interested parties;
- Provide courts with more guidance;

Specific suggestions in each of these areas are presented below.

## **I. Clarify and Revise the Scope of Agencies' NEPA Obligations.**

### *A. Clarify the Alternatives an Agency Must Analyze.*

NEPA requires an Environmental Impact Statement ("EIS") to consider "alternatives to the proposed action."<sup>1</sup> The statute itself, however, provides little guidance on how an agency must fulfill this "alternatives" analysis. The 1978 regulations promulgated by the Council on Environmental Quality ("CEQ") emphasize the importance of the alternatives analysis to an EIS, denoting it "the heart of an [EIS]."<sup>2</sup> The CEQ regulations require agencies to "include reasonable alternatives not within the jurisdiction of the lead agency" as well as the "no action" alternative.<sup>3</sup> These regulations also require the agency to describe the "underlying purpose and need" that the alternatives and proposed action must meet.<sup>4</sup> Beyond these very general directives, however, the CEQ regulations provide minimal instruction as to how this analysis must proceed.

<sup>1</sup> 42 U.S.C. § 4332(C)(iii).

<sup>2</sup> 40 C.F.R. § 1502.14.

<sup>3</sup> 40 C.F.R. § 1502.14(c), (d).

<sup>4</sup> 40 C.F.R. § 1502.13.

Unfortunately, the case law that has developed over the years does not resolve this uncertainty. The jurisprudence regarding the duty of agencies to consider alternatives is dominated by two court opinions whose interpretations sometimes lead to inconsistent results. The first case, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), adopted a “rule of reason” and took a broad view of the range of alternatives that should be discussed. In that case, alternatives outside an agency’s scope of statutory authority that require legislation or administrative action were still considered viable alternatives. Moreover, even an alternative that was a partial solution to the issue was to be considered. Nevertheless, “remote” or “speculative” alternatives did not need to be discussed.

In 1978, the Supreme Court addressed NEPA alternatives analysis in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). There the Court affirmed application of the “rule of reason” but seemed to eliminate from consideration most alternatives that had not yet been studied. *Vermont Yankee* directed that an agency need not consider an infinite range of alternatives, but it must consider a range of alternatives that are reasonable and feasible.

Lower courts interpreting these cases and subsequent precedent have reached a range of conclusions about the breadth of alternatives that need to be considered.<sup>5</sup> Given the confusion over how far agencies must go in examining alternatives that have no realistic likelihood of being selected, some legislative constraints should be placed on what alternatives an agency must consider. For example, amendments to NEPA should make clear that when the proponent of a project would never employ a particular technology or construct a project on a particular location, the “alternative” should not be evaluated in detail. Similarly, legislation should confirm that when an alternative would not fulfill the purpose of and need for the project, as articulated by the agency, it need not be considered in detail. Rather, agencies should be vested with express statutory authority to decline to consider alternatives that they consider not “reasonable” or “realistic.” Finally, where an alternative would be outside the jurisdiction of the agency, that agency should not be required to evaluate that alternative.

#### *B. Provide for Short Form EISs.*

In many instances, agency decision-makers receive little benefit from a very detailed analysis of the environmental impacts associated with a project that, for example, has been analyzed in detail before but arguably requires a “supplemental” EIS in light of some new information or occurrence, or is an activity with limited or very predictable impacts, such as an activity that is repeated over and over again in essentially the same fashion. In cases of this sort, the agency should have express authority to (i) shorten comment periods, (ii) avoid any repetition of pre-existing analyses, (iii) limit the text that the agency otherwise would prepare, and (iv) respond, in a summary fashion, to comments on the EIS.

#### *C. Impose Timelines and Cost Caps on NEPA Documentation.*

In March 1981, the CEQ published the Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations.<sup>6</sup> In response to the question of how long the NEPA process should take to complete, the CEQ responded that “under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process” but that program EISs may require a greater period of time.<sup>7</sup> CEQ also noted that when only an EA is necessary, “the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.”<sup>8</sup>

Today, contrary to CEQ’s anticipated timelines, EISs can take years to complete and cost millions. Similarly, Environmental Assessments (EAs) have begun to look more like EISs, costing more and taking more time. Congress should consider

<sup>5</sup> Compare *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (narrowly construing the alternatives requirement and holding that “[a]n agency cannot redefine its goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process) with *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (broadly construing the alternatives analysis and finding: “the evaluation of “alternatives” mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.”).

<sup>6</sup> See 46 Fed. Reg. 18026 (March 16, 1981).

<sup>7</sup> *Id.* (question 35).

<sup>8</sup> *Id.*

granting agencies specific authority to set timelines and spending limits for specific NEPA documents and link them to the level of decision being made (e.g., mandate a six-month deadline for particular categories of EISs). Likewise, Congress should make clear that agencies have wide latitude in how they document their NEPA findings and should consider approving short-form or “checklist” formats for particular types of NEPA analyses.

*D. Make Use of Adaptive Management Techniques.*

Currently, CEQ regulations arguably require agencies to identify and fill in information gaps when there is incomplete information relevant to reasonably foreseeable significant adverse impacts and the overall cost of obtaining the information is not exorbitant.<sup>9</sup> This requirement to fill in information gaps is often quite expensive and time consuming. Agencies instead should be expressly permitted the prerogative to develop NEPA documentation based on current information, and to use rigorous adaptive management techniques (i) to adopt more targeted mitigation measures as needed, (ii) to recommend Best Management Practices, and (iii) to generate a Supplemental EIS when there is significant new information on environmental issues that bear on the action.

*E. Expand the Use of Categorical Exclusions.*

Categorical exclusions provide for expedited review when a proposed action is of a type that is likely to impose little or no environmental impact. These projects do not escape review. Instead, a categorical exclusion requires agencies to confirm that the impacts associated with a proposed action are indeed extremely limited. We support prior comments that have requested broader authorization to employ categorical exclusions from the statute. Examples of appropriate additional categorical exclusions include:

- existing projects that simply require a renewal permit (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing);
- activities that are non-significant or temporary (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing);
- completed or proposed mitigation actions that are sufficient to avoid significant impacts (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing); and
- approval of on-lease linear facilities when they are placed in existing corridors or areas of prior disturbance (suggested by Dave Brown of BP America at the August 1, 2005 hearing).

Agencies should have the flexibility to utilize categorical exclusions in these and other appropriate situations: an agency’s expertise should be applied to discern situations where full-fledged analysis would only repeat work already done on comparable projects or where a project is unlikely to give rise to significant impacts. In these situations, categorical exclusions should be employed. Providing agencies with this flexibility will allow the United States to avoid unnecessary and duplicative agency efforts that do not benefit the environment and waste valuable resources.

*F. Clarify that Agencies Need Not Examine Impacts That Are Not Reasonably Foreseeable.*

Some interpretations of the existing NEPA regulatory scheme suggest that when conducting an EIS, an agency must predict all potential impacts of events, including, for example, terrorist attacks, where the nature, and even the likelihood, of those events is completely unforeseeable. NEPA should not require agencies to predict unpredictable events or quantify unquantifiable risks, especially where there is no causal nexus between the project and the event in question. Where courts are permitted to impose these fundamentally impossible tasks on agencies, NEPA becomes nothing more than a convenient veto for any project opponent willing to initiate a lawsuit. The statute should make clear that only reasonably foreseeable impacts, with a close causal relationship to the action in question, need be examined, and should set guidelines for what constitutes “reasonable foreseeability” in this context.

**II. Impose Requirements to Discourage Frivolous Lawsuits.**

*A. Require Exhaustion of Administrative Remedies.*

Exhaustion of remedies is a well-established principle in administrative law: a party must pursue available means of recourse within an agency before resorting

<sup>9</sup>40 C.F.R. § 1502.22.

to a judicial challenge of the agency's action. Under the related doctrine of "waiver," a party must raise a particular issue before the agency in order to be able to pursue a subsequent judicial challenge based on that issue.<sup>10</sup> Moreover, an objection to an agency position must be made with sufficient specificity reasonably to alert the agency to the potential flaws in its analysis.<sup>11</sup> These doctrines have multiple purposes: avoiding premature claims before agencies can develop appropriate background, allowing agencies to apply their own expertise, giving agencies the "first chance" to exercise their own discretion before judicial review, and providing agencies the opportunity to find and ameliorate their own errors.<sup>12</sup>

Where NEPA is concerned, however, current case law is not clear that parties must raise issues before the agency and must exhaust administrative remedies in order to pursue judicial review. Some case law suggests that a party need not raise a particular issue before the agency so long as some other party has raised that issue. Some courts apply a balancing test to determine whether exhaustion should apply, weighing the agency's interests in appropriate process against the harm to a plaintiff if judicial review is denied. In other cases, exhaustion is routinely required where an agency's regulations require administrative appeal before judicial review.<sup>13</sup> Finally, at least one court has held that because NEPA applies to all federal agencies, no agency has expertise in NEPA and exhaustion rule does not apply.<sup>14</sup> This lack of uniformity in the NEPA context not only adds to litigation uncertainty after agency decisions are made, but also forces agencies to try to anticipate objections from a potential plaintiff, even where those objections were never raised before the agency.<sup>15</sup>

To address this confusion and give agencies an opportunity to respond to potential criticisms, the doctrines of exhaustion and waiver should be codified in NEPA. NEPA should be amended to explicitly require the timely participation of third parties in proceedings before the agency. The statute should make clear that parties are required to put agencies on notice of potential flaws in their NEPA analyses by providing sufficiently detailed comments during the public process. For example, parties seeking to challenge an agency's alternatives analysis should be required to alert the agency to overlooked alternatives well before the Final EIS and Record of Decision (ROD) are entered.<sup>16</sup> Similarly, parties should not be allowed to claim that NEPA documents inadequately considered the environmental or other effects of the proposed action when they failed to raise those issues during the public comment process or declined to pursue all available opportunities for administrative challenges.<sup>17</sup> Third parties should be prohibited from bringing actions based upon matters that they neglected to discuss thoroughly before the agency during administrative proceedings or that they failed to pursue through all available administrative procedures.

<sup>10</sup> See, e.g., *Marathon Oil Co. v. United States*, 807 F.2d 759, 767-68 (9th Cir. 1986); *Tex Tin Corp. v. U.S. E.P.A.*, (D.C. Cir. 1991) ("[a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking for the court to consider the issue.")

<sup>11</sup> See *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988), cert. denied, 489 U.S. 1078 (1989).

<sup>12</sup> See, e.g., *McKart v. United States*, 395 U.S. 185, 194-95 (1969) (addressing exhaustion) *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (addressing waiver and explaining that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.... Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")

<sup>13</sup> See *Trout Unlimited v. Dep't of Agriculture*, 320 F. Supp. 2d 1090, 1098 (D. Colo. 2004).

<sup>14</sup> See *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987).

<sup>15</sup> The Supreme Court has recently reconfirmed that parties challenging an agency's NEPA compliance bear a responsibility to "structure their participation so that it is meaningful, so that it alerts the agency to the [parties'] position and contentions." *Dep't of Transportation v. Public Citizen*, 124 S. Ct. 2204, 2213 (2004). See also *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (similar). *Ilio'Ulaokalani Coalition v. Rumsfeld*, 369 F. Supp. 2d 1246, 1253 (D. Hawai'i 2005). The Court indicated that this is true even though the agency has the primary responsibility to ensure NEPA compliance, but the Court went on to note that flaws in the NEPA process "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Public Citizen*, 124 S. Ct. at 2214.

<sup>16</sup> *Public Citizen*, 124 S. Ct. at 2214 (finding respondents "forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action").

<sup>17</sup> See, e.g., *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991).

*B. Strengthen Bond Requirements for Plaintiffs Seeking Injunctions.*

Federal Rule of Civil Procedure 65(c), which covers preliminary injunctions, provides:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.<sup>18</sup>

Federal Rule of Civil Procedure 62(c), which covers injunctions pending appeal, requires a bond to be in an amount “proper for the security of the rights of the adverse party.” Fed. R. Civ. P. 62(c). The posting of either type of injunction bonds allows the court to preserve the status quo, but at the same time protects defendants against damage they might suffer if the court later finds a permanent injunction is not warranted.

Despite these two rules, a number of cases suggest that some plaintiffs occupy a privileged position and are only required to post a nominal bond if they obtain an injunction that halts a project.<sup>19</sup> This “NEPA exception” to the bond requirement is meant to allow private organizations to pursue NEPA enforcement. In most cases, plaintiffs are not required to post a bond at all, or only a small nominal bond, irrespective of their potential financial resources.<sup>20</sup> Thus, over the years, the concept of protecting the “public interest” has become conflated with the goal of stifling agency action.

The injunctions granted by courts routinely cost industry and the government huge sums while a project is delayed and additional environmental analyses are conducted in order to correct a deficiency in an EIS. When the injunction is wrongly issued and no bond has been posted, industry participants have no recourse in recovering their substantial losses and the government has no recourse for the resources it has inappropriately allocated to additional NEPA analyses. Amendments to NEPA should explicitly disclaim the “NEPA exception” to the Federal Rules’ clear requirements that plaintiffs post bonds to cover the “costs and damages” and to “secure[] the rights of the adverse party.” Courts should be required to conduct an appropriate balancing test that considers not just the desire to have private parties enforce NEPA, but also protect the rights of the government and project proponents and defray the costs from lawsuits which result in serious delay and huge price tags.

*C. Impose a 180-Day Statute of Limitations on NEPA Claims.*

Neither NEPA, nor the Administrative Procedure Act (“APA”), which provides a private right of action under NEPA, have an explicit statute of limitations. While the issue is not completely settled, most Circuit Courts of Appeal hold that the appropriate statute of limitation for bringing a NEPA action is six years. The view is grounded on the language of 28 U.S.C. § 2401(a), which is the general statute of limitations for claims against the United States and which has been routinely applied to Administrative Procedure Act lawsuits.<sup>21</sup> Some case law and commentators suggest, however, that statutes of limitations do not apply to NEPA claims.<sup>22</sup>

Courts applying the six-year period consider a final EIS or Record of Decision based on that EIS to constitute “final agency action.”<sup>23</sup> In most instances, projects

<sup>18</sup> Fed. R. Civ. P. 65(c) (emphasis added).

<sup>19</sup> See, e.g., *Save Our Sonoran v. Flowers*, 381 F.3d 905, 916 (9th Cir. 2004) (noting Ninth Circuit’s “long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation”); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) (“where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered”).

<sup>20</sup> A few courts have adopted a “balancing” test, considering the relative hardship to the parties. See, e.g., *Save Our Sonoran v. Flowers*, 381 F.3d at 916 (requiring \$50,000 bond and noting such an amount was appropriate “[s]o long as a district court does not set such a high bond that it serves to thwart citizen actions”).

<sup>21</sup> 28 U.S.C. § 2401(a) (“[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”). See, e.g., *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *Southwest Williamson County Community Ass’n v. Slater*, 173 F.3d 1033, 1036-37 (6th Cir. 1999); *Chemical Weapons Working Group, Inc. v. Dep’t of the Army*, 111 F.3d 1485, 1494-95 (10th Cir. 1997).

<sup>22</sup> See, e.g., *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) (“NEPA itself does not contain a statute of limitations” therefore timeliness challenges involve only the doctrine of laches); Daniel R. Mandelker, *NEPA Law and Litigation* § 4:34 (opining that Park County takes the better view). Because laches is an ad hoc doctrine that is determined on a case-by-case basis by individual courts, it provides little predictability to parties seeking finality in agency decisionmaking. Nor does it provide clear advance guidance to plaintiffs who may be considering whether and when to raise their claims.

<sup>23</sup> See, e.g., *Southwest Williamson County*, 173 F.3d at 1036.

subject to NEPA will engender significant investment (e.g., planning, permitting, preliminary construction activities) and may be substantially underway even a few months after an EIS or ROD has been approved. Obviously, the more time that has elapsed, the greater the potential for substantial investment and other commitment in reliance on agency approvals. In addition, the public (and especially parties that have expressed their interest through participation in the project) certainly have notice of an agency's final decision in ample time to bring a prompt challenge.<sup>24</sup> Thus, no legitimate policy is promoted by a delay in litigation. Imposing a shorter time period imposes little risk that a potential plaintiff was taken completely unawares. We recommend a general limit of 180 days.<sup>25</sup> In addition, if another statute prescribes a shorter duration, we recommend that NEPA be amended to explicitly yield to any shorter period of time prescribed for bringing an action.

*D. Provide For Responsibility for Attorneys' Fees.*

Under the "American Rule" governing attorneys' fees, parties generally bear their legal expenses, regardless of the result of the litigation. In addition to facing the costs associated with additional environmental analyses, the government and project proponents consequently often incur significant legal fees while responding to a NEPA challenge. There is one exception to this rule that applies to NEPA: the Equal Access to Justice Act<sup>26</sup> ("EAJA") allows federal courts to award costs and fees to a prevailing party in a NEPA action against the government, provided that the government's position is not substantially justified. Many cases have allowed successful public interest parties to recover their fees when there is a material alteration or a court-ordered change in the legal relationship between the parties.<sup>27</sup>

There is currently no opportunity, however, for project proponents to recover their costs and fees from private parties who initiate frivolous NEPA litigation. The Task Force should consider conferring authority upon the district courts to award attorneys' fees incurred by the government and industry in defending unfounded NEPA litigation. If, for example, NEPA prescribed that the district court may exercise its discretion to award attorneys' fees against any party challenging a federal project on NEPA grounds in those circumstances, the provision might well limit the number of frivolous challenges. Such a provision would not, however, chill or inhibit plaintiffs' ability to bring meritorious NEPA actions, since it would be limited to the most egregious of cases.

**III. Permit Increased Participation in Litigation by Project Proponents and other Interested Parties.**

*A. Change the Intervention Standards for Project Proponents.*

Although most federal courts follow a liberal policy in allowing citizen groups and environmental associations to defend the general public's broad interest in environmental protection, some courts have been far less willing to allow private parties to defend an agency's position on the grounds that those parties have economic interests.<sup>28</sup> Project proponents typically have a direct and significant interest in the property or transaction that is the subject of a lawsuit brought under NEPA, yet face hurdles in participating in the litigation. Specifically, it has proven difficult for some parties to intervene "as of right" in the litigation because some courts have held that the government is the only proper defendant in a NEPA challenge. To remedy this fundamental unfairness, we recommend amending NEPA to expressly protect the rights of prospective intervenors who have a significant economic interest in the outcome of NEPA claims.

NEPA itself does not contain a provision addressing intervention by private parties. Rather, federal courts rely on the Federal Rules of Civil Procedure to decide

<sup>24</sup> See, e.g., 40 C.F.R. §1505.2 (public record of decision where EIS is prepared); 40 C.F.R. §1506.6 (public notice and involvement requirements).

<sup>25</sup> For other administrative review, environmental statutes have traditionally required challenges during a more restricted period. For example, the Clean Water Act required review of most administrative regulatory decisions within 120 days. See Clean Water Act §509(b), 33 U.S.C. §1369(b). See also Clean Air Act §307(b), 42 U.S.C. §7607(b) (generally requiring an action challenging administrative decisions to be brought within sixty days). This period also coincides with the limitation imposed by Section 6002(l)(1) of the recently passed Transportation Act.

<sup>26</sup> 28 U.S.C. §2412(b)(d).

<sup>27</sup> See *Preservation Coalition of Erie County v. Fed'l Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (examples include enforceable judgments, consent decrees, court order to prepare a supplemental EIS).

<sup>28</sup> Compare *Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (concluding that D.C. Circuit's generous attitude toward Rule 24(a) in general should carry over to NEPA context) with *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (denying intervention on the merits to project proponents).

whether a party can intervene in a lawsuit raising NEPA challenges. Recently, federal courts, particularly in the Ninth Circuit, have applied Rule 24(a) in such a way as to close the courts to private parties who are directly affected by the outcome of the cases in question.<sup>29</sup> According to Ninth Circuit precedent, NEPA does not provide protection for purely economic interests.<sup>30</sup> Courts in the Ninth Circuit have held that parties with purely economic interests do not have a “significantly protectable interest” in NEPA litigation and cannot intervene as of right under Rule 24.<sup>31</sup>

The Ninth Circuit’s interpretation can have unfair consequences in the context of NEPA. If a court concludes that only the government has the requisite interest in NEPA cases, project proponents can be barred from litigation despite the fact that their interests would be severely jeopardized by an adverse ruling and would not be adequately represented by the government defendant. Because the Ninth Circuit is the largest federal circuit—including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, and Hawaii—the effect of this troubling jurisprudence is wide-reaching. Other courts and commentators have been critical of the Ninth Circuit’s position.<sup>32</sup> NEPA legislative amendments should clarify that parties who have made substantial economic investments in a project have a “significantly protectable interest” under NEPA.

*B. Permit Participation by Project Proponents and Other Interested Industry Representatives in Government Settlement Negotiations.*

When a government agency decides to participate in settlement discussions with NGOs and other NEPA plaintiffs, affected businesses can be excluded. In keeping with the recommendation above that industry be full-fledged participants in the litigation, industry should also be an important part of any settlement. NEPA amendments should require settlement negotiations to include project proponents and other affected businesses.

**IV. Give Courts More Guidance.**

*A. Establish a Standard of Review within the NEPA Statute.*

The standard of review governing NEPA is that for informal decision-making and is borrowed from the Administrative Procedure Act (APA).<sup>33</sup> Judicial review determines whether an agency’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>34</sup> Obviously, the standard of judicial review a court selects determines its likelihood of overruling an agency’s decision. This “arbitrary and capricious” standard is the most deferential standard courts apply when reviewing agency decisions.<sup>35</sup> In NEPA cases, courts generally apply the APA’s arbitrary and capricious standard to an agency’s decision on whether an EIS is required or whether an action is categorically excluded. Courts differ, however, in how they apply that standard.<sup>36</sup> For example, some courts conclude that because NEPA is not the province of any particular agency, no one agency has “expertise” with respect to that statute and agencies are therefore due less deference in NEPA cases than in other administrative law contexts. In other cases, courts have found

<sup>29</sup> According to the Ninth Circuit, a party may intervene under Rule 24(a) provided the party satisfies four necessary factors: (1) motions for intervention must be timely; (2) the nonparty must claim a “significantly protectable interest” relating to the subject matter of the action; (3) the nonparty must demonstrate that his ability to protect his interest will be “impair[ed] or impede[d] by a negative result in the action; and (4) the nonparty must demonstrate that his interests are “inadequately represented” by the existing parties.” See, e.g., *Sierra Club v. United States E.P.A.*, 995 F.2d 1478, 1481 (9th Cir. 1993). Applying this test, the Ninth Circuit has repeatedly ruled that industry parties cannot intervene as of right in NEPA cases because only the government is a proper defendant. See, e.g., *Churchill County v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998). The Ninth Circuit’s “government-only” ruling stems from an interpretation of the “significantly protectable interest” test that excludes economic interests. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002). The court has reasoned that NEPA requires action only by the government, and therefore only the government can be liable. *Churchill County v. Babbitt*, 150 F.3d at 1082.

<sup>30</sup> *Portland Audubon Soc. v. Hodel*, 886 F.2d 302, 309 (9th Cir. 1989).

<sup>31</sup> *Id.* But see *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (citing *Bennett v. Spear*, 520 U.S. 154, 166 (1997)); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125 (8th Cir. 1999).

<sup>32</sup> See, e.g., *The Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (noting Ninth Circuit’s jurisprudence on intervention in NEPA cases is “unduly rigid in light of Rule 24’s purpose of protecting third parties affected by litigation” and instead allowing prospective intervenors to participate in all aspects of litigation).

<sup>33</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

<sup>34</sup> 5 U.S.C. § 706(2)(A).

<sup>35</sup> See, e.g., *Mandelker*, *NEPA Law and Litigation* §8:2.

<sup>36</sup> *Id.* at §8:7.

that a “reasonableness” standard applies to the threshold legal question of whether an action is a “major federal action” under NEPA.<sup>37</sup>

In order to ensure that agencies’ NEPA decision-making receive all the deference they are due, the statute should include an explicit standard of review for NEPA cases.

*B. Clarify Remedies When a NEPA Violation is Found.*

Currently, some case law may be read to suggest that once a court finds a violation of NEPA, it must halt the entire project. Yet, in many instances, courts are able to tailor an injunction to protect the environmental interest at issue during the pendency of the preparation of an EIS. The authority to issue an injunction of this sort should be codified and encouraged.

**CONCLUSION**

Thank you for the opportunity to testify here today. My clients and I appreciate the Task Force’s efforts in providing this series of public hearings as a forum for those interested in improving NEPA. The recommendations I have made here seek to address some of the more critical flaws in the current NEPA regulatory scheme. Each of these issues—as well as many others—merit investigation and discussion in a level of detail not appropriate for today’s hearings. We look forward to working with you, and others in Congress, to listen to other concerns, to analyze fully the effects of the current system and to develop a reasoned, responsible approach to NEPA reform.

[Response to questions submitted for the record by Mr. Martin follows:]

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DECEMBER 9, 2005

VIA U.S. MAIL AND EMAIL

Task Force on Improving NEPA  
Attn: Joanna MacKay  
House Committee on Resources  
Longworth House Office Building, 1320  
Washington, DC 20515-6201

Re: Responses to Additional Questions Posed by Task Force

To the Task Force on Improving NEPA:

I would first like to thank you for granting me the opportunity to testify before the Task Force on November 17, 2005. My clients and I appreciate the Task Force’s efforts in providing this public forum so that those interested in improving NEPA may offer our recommendations.

In addition, I would like to respond to the Task Force’s follow-up questions, which I received in a letter dated November 22, 2005. The Task Force posed two additional questions: (1) “Apart from the Ninth Circuit Rule 24 decision you cite, is there a problem with project proponents not being able to participate in litigation or are they choosing not to participate?” and (2) “Could your recommendation that exhaustion of administrative remedies actually cause more delays than under current law?” I will respond to each of these inquiries in turn.

**1. Participation in Litigation by Project Proponents**

Private parties with an economic interest in a project, including project proponents, currently have no assurance that they will be able to defend their projects against attacks brought by project opponents. This circumstance arises because

<sup>37</sup> *Goos v. Interstate Commerce Comm’n*, 911 F.2d 1283 (8th Cir. 1990). Compare, e.g., *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003) (plaintiffs face “high bar to success” since decision not to prepare EIS is “accorded a considerable degree of deference”) with *Grand Canyon Trust v. FAA*, 290 F.2d 339, 340-41 (D.C. Cir. 2003) (stating agency’s EA must take “hard look at the environmental concern, must make convincing case for FONSI, and agency must ensure projects has sufficient safeguards to reduce impacts to minimum when EIS not prepared).

some federal courts—including the Courts of Appeals for the Fifth, Seventh and Ninth Circuits and the District Court for the District of New Mexico—have ruled that parties with economic interests in projects may not intervene as of right in NEPA lawsuits attacking those projects. Despite the potentially devastating economic injuries they will suffer, these courts maintain that such parties simply do not have a “significantly protectable interest.”<sup>1</sup> Instead, project proponents, and others who have an “economic” interest in NEPA litigation, must rely on the Government, whose interest is, of course, not identical to their own, to defend the litigation. Those parties are left to simply hope that the Government’s litigation strategy will incidentally vindicate their rights as well.

It is difficult to determine precisely how many of these parties have been denied the opportunity to participate in NEPA litigation. Given that this narrow interpretation of the right to intervene in NEPA cases may be seen as “the law of the land” in certain jurisdictions, many parties may be discouraged from attempting to intervene. In that sense, some project proponents may be said to have “chosen” not to seek intervention, but, in fact, they have been denied intervention. Those instances of intervention denied, of course, cannot be documented. It is certainly true that while there are a number of cases expressly denying parties the right to intervene, even more parties have effectively lost the right to intervene by the precedent established in those cases.

Denying the right to participate in NEPA litigation to the parties who, in many instances, have the strongest tangible interests in the outcome of that litigation not only contravenes fundamental notions of fairness, but it diminishes the NEPA, as well as the judicial process. NEPA is intended to foster participation, to encourage the airing of different perspectives on a project, and, most essentially, to draw out information from all sides about a particular project. Similarly, the judicial process rests on the assumption that an adversarial process involving parties with direct, concrete interests on both sides of an issue is likely to produce the best results. Denying the right to participate to those whose interests are economic undercuts these basic principles, and means that the ultimate resolution of a NEPA issue is more likely to be reached based on an incomplete picture of the project and its likely impacts. The interests at stake in projects subject to NEPA—the production of much-needed energy resources, the rebuilding of critical infrastructure, the protection of public lands, and many others—are too important not to include all interested parties in the resolution of challenges to those projects.

Congress can alleviate this problem by amending NEPA to make clear that parties whose economic interests are affected by litigation have a right to intervention just as do those parties whose interests are less tangible.

#### *a. Existing Case Law Denying Intervention*

As my previous written testimony explains, the United States Court of Appeals for the Ninth Circuit has repeatedly held that industry parties cannot intervene as of right in NEPA cases, asserting that the government is the only proper defendant. See, e.g., *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.2d 1105, 114 (9th Cir. 2000); *Churchill County v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002).

Although other courts and commentators have rejected this interpretation, the Ninth Circuit is not alone in advancing it. The United States Courts of Appeals for the Seventh and Fifth Circuits and the United States District Court for the District of New Mexico have also suggested that parties with economic interests in a project will not be permitted to defend those interests if they are attacked in litigation under NEPA.

In *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), private parties attempted to intervene to prevent economic losses that would result if a challenged project did not proceed as planned. The Seventh Circuit explained that NEPA provides no protection for economic interests and that only the federal government could defend against NEPA challenges: “all other entities have no right to intervene.” 673 F.2d at 185.

Following the Seventh Circuit’s lead, in *Collin County v. Homeowners Ass’n for Values Essential to Neighborhoods*, 915 F.2d 167 (5th Cir. 1990), a citizens’ group

<sup>1</sup> Because NEPA does not contain a provision addressing intervention by project proponents, the courts decide whether those parties can intervene under the Federal Rules of Civil Procedure. Under Rule 24(a), any party may intervene in an action provided the applicant “claims an interest relating to the—subject of the action,” and the applicant is “so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.” Fed. R. Civ. P. 24(a). A number of courts have interpreted this “interest” requirement narrowly so as to prevent project proponents from participating until the remediation phase of the NEPA lawsuit.

was opposing construction of a highway. Collin County brought an action against the citizens' group, seeking a declaration that the final EIS for the highway project complied with NEPA. 915 F.2d at 168-69. The court dismissed the suit, holding that the county lacked standing to bring a declaratory action against a citizens' group. Then, even though it had already dismissed the case, the Fifth Circuit went a step further, announcing in dicta that only governmental bodies can defend NEPA actions and that Collin County could not have intervened in a NEPA lawsuit brought by the citizens' group. *Id.* at 171.

Finally, explaining that the Court of Appeals for the Tenth Circuit had not yet ruled on this issue, the District Court for the District of New Mexico seized the opportunity to deny intervention. In *Forest Guardians v. BLM*, 188 F.R.D. 389, 395 (D.N.M. 1999), the court explained that it was "taking guidance from the Ninth Circuit line of cases," and excluded grazing permittees from participation in a NEPA action brought by environmental groups because "applicants here do not have a legally protectable interest...to allow full as-of-right intervention under Rule 24." 188 F.R.D. at 195.

Thus, although parties attacking projects under NEPA generally have broad rights to participate in litigation, project proponents in many instances simply do not have an equivalent right to intervene to defend their interests in such litigation.

*b. Affirming a right to intervention*

Congress could take steps to affirm private participation in the defense of NEPA actions by amending the statute to clarify that: (i) industry has the right to intervene as of right under Federal Rule of Civil Procedure 24(a), and (ii) industry assertions of purely economic harm should be considered to fall within the "zone of interests" protected under NEPA. These two changes should make clear that affected business interests have a right to participate as a full-fledged party in any litigation challenging a government project's NEPA compliance.

Such an amendment to the NEPA statute should also help to clarify that Defendant-Intervenors should not lose their standing in a NEPA case if the government declines to pursue an appeal of a district court ruling. Currently, the status of a Defendant-Intervenor seeking to appeal a district court's NEPA decision may be unclear where the government declines to appeal. Absent an appeal by the government, a defendant-intervenor must have independent jurisdictional grounds on which to pursue an appeal and must satisfy the standing requirements of Article III. See, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). To establish standing, a defendant-intervenor must show, among other things, that it has suffered an invasion of a "legally-protected interest." See *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1340 (9th Cir.1992) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991)). As discussed above, several courts have held that only environmental interests, narrowly construed, fall within that zone of legally protected interests, while economic interests do not. By clarifying that economic interests fall within NEPA's "zone of interests," Congress can ensure that project proponents may defend their interests both at the trial court level and on appeal.

**2. An exhaustion requirement would improve the NEPA process, foster the goals of NEPA, and, on balance, would likely expedite resolution of NEPA challenges.**

Although requiring parties to present their concerns to the agency in the first instance may occasionally extend the timetable for completing administrative review, it fosters the fully-informed decisionmaking that is the goal of NEPA and it allows agencies the opportunity to address potential concerns before decisions are made and before litigation is invoked. It would also likely reduce the likelihood of litigation. Thus, on balance, it is more likely to improve, rather than exacerbate, the problems of extreme and unwarranted delay that currently plague NEPA processes.

Exhaustion is based on the notion that a party that wants to sue an administrative agency for a decision that the agency has made must first avail itself of public participation and appeal opportunities that the agency provides relating to that decision. Where exhaustion is required, a party must do two things if it later wants to sue the agency: (1) it must raise any future litigation issues before the agency first; (2) it must participate in all the steps of the agency process, not just some of them.<sup>2</sup>

<sup>2</sup>While these two concepts have become muddled in the case law, both are important aspects of the doctrine of exhaustion. The first is sometimes described as "waiver" because a party who has not raised an issue before the agency has "waived" that particular issue and cannot raise

Within the NEPA process, there are many opportunities for affected parties to participate, ask questions, voice their concerns, and seek solutions. An agency's NEPA's public participation process typically includes public scoping meetings, comment periods, and protest or other agency appeal procedures. NEPA works best when interested parties participate fully in the agency process, and provide the agency with an opportunity to address their concerns. The process breaks down when interested parties decline to participate fully—either by neglecting to raise all their issues, or by ignoring some of the stages of agency proceedings—and then months, or even years later, those parties go straight to court to complain that the Agency neglected their concerns. Although an exhaustion requirement in NEPA arguably could force administrative agencies to do a little “extra work” to address additional comments, and this could result in some delay, encouraging potential issues to be aired in a predecisional process—exactly as NEPA originally contemplated—will foster better decisionmaking. Moreover, any delays from these additional predecisional efforts are likely to be more than offset by resolving issues early and avoiding protracted and costly litigation.

I hope that these additional responses are helpful. If the Task Force has any additional questions, please do not hesitate to contact me.

BEST REGARDS,  
JOHN C. MARTIN

cc: Glen Maynard  
Todd Ennenga  
Rick Axthelm

Miss MCMORRIS. Excellent testimony from everyone, and we really appreciate you being here and taking the time to be here.

Mrs. Drake. Would you start?

Mrs. DRAKE. Yes. Thank you, Madam Chairwoman. I would also like to thank all of you for being here, and once again at a Task Force hearing I have heard the thing that we all believe; and that is, we all think that NEPA, the underlying thread of NEPA, is a very good thing, to have Federal agencies involved, Federal—that their knowing a project is going to have public participation, we think that is good.

But I do think Mr. Harwood said it well when he said, what we really need to look at are the procedures and the process.

And I think I would like to start with Mr. Yost and Mr. Dreher, and maybe follow it up by Mr. Goldstein, because the thing that I have heard across the Nation are the lawsuits.

And I know that Mr. Yost and Mr. Dreher—I hope I am saying that right—have said that there is a very small number of lawsuits, and so it really shouldn't be a concern. But that is not what we have heard. We have seen pictures of stacks of papers that would fill the trunk of a car, the issue of people doing above and beyond and requiring additional things just in case there is a lawsuit.

Personally, I think if there are 150 cases and only 11 of them where the courts found an injunction makes you wonder about what was behind those 145 that didn't take place. And we did have someone testify in Norfolk what our big fear is, and that is, lawsuits come about through NEPA because it is a easy way to do it. That is to paraphrase. But we actually had one of the people testify that they used NEPA in order to file the lawsuit.

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it during litigation. The second is often referred to more generally as “exhaustion,” because a party must exhaust the entire administrative agency process before proceeding to the judicial review process.

So, I would just like for to you comment. And I know you say that is a small number, but the fear of the lawsuit, I think is what generates a lot of paperwork, a lot of extra work, a lot of extra time. And I lost my train of thought on the last question. But I will let you answer that and then I will get it back. Thank you.

Mr. YOST. I think, Congresswoman Drake, that there is good sense in what you're saying there, that the fear is in a sense it is real. But three things: First, were it not for litigation, nobody would pay any attention to NEPA and environmental impact statements. And I think that is just sort of a fact of life. That is what makes Federal agencies do what Congress has told them they are supposed to do because somebody is looking over their shoulder.

Mrs. DRAKE. Mr. Yost, wouldn't you think Congress should look over their shoulder rather than the courts? That is part of our job is oversight, and that is part of what we are doing right now.

Mr. YOST. I think that that makes a lot of sense, but I don't think they are mutually exclusive. We have, as Chairman Connaughton said, about 50,000 NEPA actions annually. That is an awful lot of detail for Congress to get involved in. But second, picking up on what you're saying, one of the recommendations I made, which I have discussed with your Chairwoman before, is trying to get good legal input.

And I suggest in my presentation that involving the Justice Department is a way to do it without having to look for outside resources to advise agencies on the adequacy of their documents before they hit the street, so that you have those who will ultimately be defending the document having a say in the preparation of the document, which means it is going to be a lot better document when it comes out.

But also I agree what is implicit in what you were saying and what a number of the other witnesses have said about when there is judicial review, moving it along quickly. And I have made several recommendations in there, including statute of limitations, priority for suits, measures to try and ensure that the administrative record is promptly prepared. So there are a number of steps that can be taken to expedite litigation.

Mrs. DRAKE. What about some sort of a checklist that you cannot file a lawsuit unless there have been violations? Like you said, this is a big hammer. So the agencies have to do the right thing because of the court case. But what we are hearing today is that there is no standard. You can just automatically go into court under NEPA. I would think before you go into court, somebody should have violated something. And maybe some sort of a check list. I really like the idea of a mediation or dispute resolution before the court case.

Mr. YOST. I think mediation or a dispute regulation is a very worthwhile idea. It is unethical for a lawyer to bring a suit without a belief in a reasonable prospect of success in that suit. As you know, the Federal court system has a system of sanctions whereby if somebody brings an irresponsible suit, they can be sanctioned. Mr. Dreher was accurate, as far as I know, in his statement that no NEPA plaintiff has ever been sanctioned by a Federal judge.

Mrs. DRAKE. If I could just add to that, my question would be: Is that because there are no guidelines for filing the suit?

But thank you, Madam Chairwoman. I will yield back. My time has expired.

Miss MCMORRIS. I will give the other two an opportunity to answer. And just for everyone's information, it looks like we are going to have votes again at 10 after, so we are going to try to keep it going. OK.

Mr. DREHER. Thank you, Madam Chairwoman. This is obviously an important issue. As you know, I have represented individuals in litigation. I have also defended Federal agencies and I have also advised private clients about litigation matter. So I think I have a relatively balanced view on it. I have to say, first, that you have to bear in mind that NEPA is enforced through citizen litigation.

And most importantly, NEPA is intended to empower ordinary citizens in dealing with the forces of big government. And going to an independent judge is an essential right to carry that out, to be able to tell your constituents that they have rights to actually be heard and to get disputes resolved.

I would welcome suggestions for dispute resolution. I welcome the suggestion that CEQ and the Federal agencies be given resources to try to explore ways to resolve these issues. I particularly think engaging in public participation early in the scoping process, bring the public in, find out their concerns, can lead to resolution of those concerns.

But, ultimately, I think you have to allow citizens their right to go to court if they are seriously aggrieved.

Now, I think it is not that there are no standards. I think the difficulty is that there are a set of principles that you apply in environmental analysis to particular cases. But the way they fit those particular cases, obviously, has to vary from case to case. Whether an agency is doing an adequate job of identifying environmental impacts and looking at cumulative effects is going to depend upon a case-specific inquiry.

And sometimes citizens will disagree about whether they think that is adequate. That doesn't mean they are acting in bad faith. I am not aware of any actual valid suggestions that citizens are acting in bad faith. I think your constituents, in fact, go to court only when they think they have rights that seriously are at risk.

I will pass with that.

Mr. GOLDSTEIN. Thank you, Congresswoman Drake. ARTBA shares your well-founded concerns. And actually if I might just quote from a grass-roots litigation training manual that was issued by the Community Environmental Defense Fund where they say that, quote: In an area devoid of endangered species, impacts to waterways and floodplains or Federal funding, NEPA may be the only tool that grass-roots groups have to litigate.

In cases like that, the battle is being fought just to fight a battle. A project has moved through the process, decisions have been made, people have been consulted. But people disagree with the decision, and with no other ground, under NEPA, as Chairman McMorris said, to open up the hearing, with a 37-cent stamp they can litigate.

In the case that I briefly described in my testimony that ARTBA is most familiar with is in Las Vegas, a NEPA suit was filed

4 years after completion of the final EIS. And here today Mr. Martin just brought up incidences where it has been 6 years.

It is not that litigation shouldn't occur. Indeed, well-timed litigation during the beginning of the process can save everybody from a bad project. And I don't think anybody disputes that projects that have true problems shouldn't be completed or shouldn't be taken up.

But these things need to be heard early on in the process, not 4 years and not 6 years hence.

Miss MCMORRIS. Thank you. OK, Mr. Udall.

Mr. TOM UDALL. Thank you, Madam Chair. The term "frivolous" lawsuits has been used here rather lightly I think in both oral and written testimony. And this—I don't think this is a term that should be used lightly. Rule 11 of the Federal Rules of Civil Procedure allow courts to discipline attorneys and parties for frivolous lawsuits.

Mr. Dreher, in your written testimony—and I think both you and Mr. Yost have spoken to this today—you say to my knowledge—and I assume you have done some kind of search here—no court has ever, ever—and we are even underlining "ever" here and emphasizing it—sanctioned a NEPA plaintiff for bringing a frivolous complaint or for filing a suit for improper purpose, such as a mere delay.

The only cases that you found in which courts have entertained motions for such sanctions involved businesses suing under NEPA to protect purely economic interests; seeking to impede a competitor who has received a Federal permit or a license, for example, rather than environmental interests. And even those requests have been denied.

Can anyone on the panel today come forward and give us a case or cases where the Federal courts have sanctioned anyone under the frivolous lawsuit provisions of rule 11? If you can't do it today, I would ask that question, and I am sure the Chair is going to allow supplemental testimony, allow you to come forward and give us a case where everybody is talking about these frivolous lawsuits. Please, any member of the panel that can tell me where these frivolous lawsuits under rule 11 are.

We have absolute silence here. OK, good. And please come forward later. I would be happy to hear them. We really want to get to the facts here in this hearing. That is what it is all about.

Mr. MARTIN. Congressman—

Mr. TOM UDALL. I want cases. I don't want a response. If you have a list of cases where there has been an abuse under rule 11, that is what I am looking for; that is, what a frivolous lawsuit is under the rules.

Mr. MARTIN. Let me express, if I may, my view of that which might depart from what you have heard or at least the inferences that apparently you're drawing. I think it is fair to say that lawyers like professor Dreher do not file frivolous lawsuits.

And I am not here to tell you that the lawsuits that I have defended over the years were frivolous per se. Now, there is a question, though, I think it is simply a policy question, and the question is whether or not NEPA properly should be used to delay or stop projects.

I would go so far as to say that someone who is a plaintiff representing a client in the circumstances that Professor Dreher's clients were in, who didn't consider a NEPA action for the purpose perhaps of delay or stopping a project, might well have a problem in terms of whether or not he had met his obligation to zealously represent a client.

I think the real question is whether or not this is the right use of NEPA as opposed to whether or not it is frivolous per se. So that is my view.

Mr. DREHER. Mr. Chairman, Chairman Udall, if I could respond on the same issue; you know, the notion that NEPA can be used to stop projects. You know, one of the examples that the Task Force looked at last week was the suggestion that the environmentalists had drowned New Orleans from a 1977 lawsuit in which a Corps EIS was found to be deficient. No one disputed a note, by the way, no one disputed that the Corps' EIS was in fact defective in that lawsuit. The real issue I think that the Task Force, if it is serious about congressional oversight, might want to ask is why would the Corps not have fixed its EIS in the almost 30 years it had since 1977, if it believes that the measures that it was impeded in putting into place were, in fact, the best way to protect the citizens of New Orleans. The Corps didn't think so. The Corps chose a different set of alternatives, of measures after the lawsuit. But the point here is very simple. NEPA doesn't stop anything. NEPA can't be used to tell a Federal agency that it can't build a project. The only thing NEPA does is make sure that the agency fully considers environmental impacts and tells the public an honest account of what is going to happen.

Any Federal agency willing to do that can go forward with its project. And NEPA also doesn't successfully delay projects—if the issue—what is the point of delaying a project unless you actually think that the environmental information you will get when the agency goes back and acknowledges the problems might be significant enough to change the whole picture?

That is what happened with the ivory billed woodpecker. A citizen lawsuit against a proposal to dredge the Kashe River in Arkansas led to a complete change in public perspective on whether that project should go forward. The lawsuit was ultimately resolved. The Corps had the ability to build the project. But the information that had come out had changed people's minds, including the government itself.

That is what NEPA can and should do. It should make sure that environmental information is actually considered fairly. And if that changes people's minds, that is what Congress wanted. That is what NEPA was enacted for.

Mr. TOM UDALL. Thank you.

Miss MCMORRIS. I have a question for Mr. Yost, and just thinking—I am thinking in my own district where we have the Colville National Forest, and we had some serious fires a few years back. And because of the way the NEPA regulations—the law and regulations are implemented, we lost most of the value of the trees before they could be salvaged. And right next door to the Colville National Forest, the Colville Tribal Reservation also lost trees. But because they have a different NEPA process, they were able to go

immediately. And they were able to salvage 90 percent of the value of the trees; whereas on the Colville National Forest, we lost 90 percent of the value of the trees.

NEPA applies to both. It is implemented differently. And so I think there are examples where, because of the way it is implemented, it does result in a delay that ultimately can have even a negative impact on the environment. And that is part of what I would like to see us address, is if we can implement it better.

And my question—and I will direct it to Mr. Yost, and if anyone else wants to answer, that is great. We hear some that have suggested the setting of the time limits. And one of your recommendations also is to direct some kind of time limit. Just wanting you to comment on do you think that should be done by statute; and if it could be done, without harming the intent of NEPA?

Mr. YOST. I think that that could be done either administratively or by statute and that—I made two suggestions as to how it might be done. And as you will recall, the existing CEQ NEPA regulations say that in an applicant situation, the applicant has a right to insist on time limits. And that is largely disregarded. And I think that it should not be disregarded.

I think CEQ could institute time limits. And initially it didn't do so because a one-time-limit-fits-all doesn't work when you're talking about a trans-Alaska pipeline or a single interchange on a highway, you're talking about things of vastly different magnitudes.

And so what I suggest is a series of presumptive time lines, and that at the beginning of the process the lead agency says, all right, we are going with category B, which means it is done in 15 months or whatever. I think CEQ could do that now. I think Congress could require them to do it now.

The second and alternative approach is to take the approach which was taken by the Congress this year in safety in expediting the NEPA process in transportation with respect to transportation projects. It is a very carefully thought out statute, which is, I think, respectful of NEPA's values. It has the lead agency setting time lines, bringing the other agencies in early in the process, and using reports to Congress as a means of making sure that things move along in a timely fashion; otherwise people have to explain themselves to Congress. That obviously would take a congressional enactment, to generalize what was done in safety, to all the different agencies. But I think that would also be a reasonable approach to take.

Overall, everything that I suggested can be done either administratively—it doesn't need a congressional enactment—except the matters pertaining to judicial review, such as statutes of limitations and so on.

Miss McMORRIS. Very briefly.

Mr. DREHER. If I could add one word to that, I think the overwhelming problem agencies face is lack of resources to carry these mandates out. You can give them the time lines. But if they don't have the staff and the money to do it—I worked at EPA; and EPA of course comments and has official roles under NEPA. And one of the things that was enormously helpful, Madam Chairwoman, was TEA-21. TEA-21 allowed the Federal Highway Administration to

give financial resources to agencies like Fish and Wildlife Services and EPA, so they could meet their obligations in a timely fashion.

And I had people at the regions of EPA say this is a godsend. It is not that we don't want to play. We literally don't have a body to send to the meeting. Now we can hire someone.

So I think finding some way to give these agencies resources, maybe from project applicants, maybe from the wealthier agencies like the Federal highways, is essential.

Miss MCMORRIS. Does anyone else wish to comment.

Mr. MARTIN. I would like to, if I may, just comment on some of those issues of delay and some of the things we might want to think about.

One of the cases that I have litigated, it has to do with coal-bed methane in Montana—is a case where we had an injunction issued roughly in late February of this year. The Department of the Interior, the BLM, in order to make up for their perceived deficiency, is going to do a supplemental EIS. So in addition to the 3 years that we expanded doing the original EIS, they are doing a supplemental EIS within the agency. That process will consume roughly 20 months' time.

I think it would be useful if we could find mechanisms BY which we could limit that period of time.

Now, right now, under the existing regulations—and I am talking about the resolutions both from Interior and CEQ—it would appear as if—at least we are told by the folks from BLM—that a minimum amount of time for any EIS these days is 5 months. And I am talking about just the comment periods and what not. Realistically what we are told is that if they fast-track an EIS, it might be 18 months.

They are attempting to fast-track this one. And we are looking at 20 months. I would submit that particularly in the context of a supplemental EIS, where we are dealing with, in this instance, one alternative, and we have a backdrop of 3 years of analysis, perhaps there ought to be ways that we can shorten this process.

It might be easier, quite frankly, if it were done on a statutory basis than if it were done on a regulatory basis, in part because we are dealing not only with CEQ regulations, but we are dealing with now three decades of decisions that we would confront and we would have to deal with in terms of being able to support the regulatory decisions that might come down with.

Let's talk for a moment about whether or not NEPA actually stops projects. Professor Dreher, I think, makes a very valid point when he explains that NEPA doesn't per se say that I can go out, file a lawsuit, and even if I win that lawsuit, stop that Federal project. But that is not really the way it can work. And I am not suggesting that it always works this way.

What happens in the industry that I represent is people make, on a daily basis investment decisions. They can consider the return on the equity. And if they are looking at a system where they face a potential delay of the example that I just described to you, almost 5 years' time, if they are looking at those sorts of delays, then they may decide that it is inappropriate to invest their money, their limited investment dollars, in the United States to recover natural gas

in the United States. And they may decide that instead it is more appropriate to go to a foreign country to invest otherwise.

And that is what happens on a relatively regular basis. And to that extent I think we do, in fact, have projects that are stopped by NEPA.

Miss MCMORRIS. Thank you. Mr. Inslee.

Mr. INSLEE. Thank you. I just want to make sure I understand Mr. Goldstein, Harwood, and Martin. Do you have evidence that a plaintiff has ever been sanctioned for bringing a NEPA lawsuit under rule 11?

Mr. MARTIN. No, sir, I don't.

Mr. INSLEE. Any of the other two gentlemen?

Mr. GOLDSTEIN. No.

Mr. HARWOOD. No.

Mr. INSLEE. Well, that being said, if you were before a court of law, I think you would be sanctioned under rule 11 for coming before this body and arguing that there is some type of epidemic of frivolous lawsuits being filed, when you come here and you can't point to one single case of a judicial decision that a frivolous lawsuit under rule 11 has been filed.

And I want to just tell you one Congressman's reaction to this argument you're making, with no single case, where one judge of all the thousands of lawsuits that have been filed, hasn't found a single case, it is just stunning to me that we listen to this argument.

Federal judges do find cases frivolous on occasion, and they have a rather rigorous obligation of lawyers who sign a certification when they file these complaints. And I am just—I just am flabbergasted that you come before us and argue that there's some type of epidemic on this.

Now let me ask you this, for these three gentlemen. Do you think there is ever any frivolous defenses ever proposed by the government who file answers to these cases and then are slapped around by the Federal judges because they grievously failed to follow the rule?

Do you think there is ever any frivolous defenses that are proposed?

Mr. MARTIN. Congressman, if I might respond first to your first point. I am not here to suggest to you that the lawyers that I have seen on the other side of litigation that I have defended have filed frivolous lawsuits.

And I am not prepared to say that I have not testified to that. And, in fact, I don't think that is accurate.

If your question is, has there been an occasion when a defendant has done something frivolous in defense of a NEPA statute, I don't know what the answer is.

Mr. INSLEE. Let me ask you this. There is this kind of image that plaintiffs are around there filing with a shotgun approach these things to stop the American economy and bring it back to some kind of Stone Age situation. That is the image that a lot of folks try to create.

My impression in reading the litigation that does exist under NEPA, and obviously we would like to eliminate that litigation by getting the Federal Government to follow the law, and my

impression is that a significant of the majority of cases filed against the government are successful.

I look at the litigation up in the Northwest, probably 70, 80 percent of it is successful because the courts conclude that the Federal Government did not follow the law.

Is there any sort of batting average that exists to indicate that my perception is inaccurate? Does anyone have any such objective information?

Mr. HARWOOD. I don't have any specific information of that particular point. But I do want to take issue with the term "frivolous lawsuit". I never used the word "frivolous" and I don't want to be characterized as somebody who did. I believe that NEPA is a good and just law and that it is something that is worthwhile and desirable.

There have been a number of lawsuits that—and I am not an attorney, so I am not going to get into case law because that is not my forte. I am a front line—almost first provider of NEPA services—extension of Federal staff as a private sector consultant.

What I have seen are lawsuits that attack process because they don't like the outcome of a decision.

Mr. INSLEE. Do you have a—

Mr. HARWOOD. It is not frivolous in any way. It is a just a difference of opinion.

Mr. INSLEE. My question is do you have any objective assessment that you can give to this Committee that suggests that the batting average of plaintiffs is less than 50 percent?

Mr. HARWOOD. I am happy to report that in the work that we have done, that we have been unanimous in defending against lawsuits.

Mr. INSLEE. Great. Do you have any objective evidence about the experience across the country?

Mr. HARWOOD. That is not my forte.

Mr. INSLEE. Let me just tell you that I am working on the assumption right now that—and, fortunately, plaintiffs win most of these cases, because unfortunately most of the cases I have even seen filed the government fouled up. And to come in now and sort of say, well, the plaintiffs are winning most of these lawsuits, and as a result of that we should take away their ability to file them, to me doesn't appear to be the right approach.

To me, a better approach is to work to find a way that the government can follow the law so we don't have to end up in these lawsuits. And I have—is there any suggestion from any of you on how we can accomplish that?

Mr. GOLDSTEIN. Well, I would like to briefly respond, and I don't think—at least—and I would also like to mention that, you know, I didn't use the word "frivolous" in my oral or written testimony. And I didn't mean to infer under rule 11 that any of these things are frivolous, and also that there are instances—and I believe that what you're referring to, if plaintiffs are successful and in instances where NEPA litigation is brought in the early stages of a project, in some cases it might be best for everybody, because then the project will take a different course or a different project or alternative will properly be considered.

But in the experiences that ARTBA has had where a lawsuit has been filed 4 years after construction is begun, and then halted construction for an extra year, and so there you have a half completed highway project which is bad for the environment, bad for the economy.

I think the process changes we are suggesting, such as alternative dispute resolution, possibly expansion on the front end of the public comment period, these are all things that would raise these issues at an earlier point in time. And if indeed litigation is the end result, at least it occurs earlier so that it doesn't provide as much delay when a process is already begun.

Mr. INSLEE. If the Chair would allow one follow-up question.

Mr. INSLEE. If the Chair will allow me just one follow-up question in response to what Mr. Goldstein said.

I'm holding your question, and it says, quote—this is testimony by Nick Goldstein, November 17, 2005 on behalf of the American Road Transportation Builders and Association. It says, quote, "The area of the NEPA process which would yield the greatest reduction in project delay is frivolous and malicious litigation which subverts the NEPA process," close quote.

Now, are you retracting that testimony, or is there something I don't understand?

Mr. GOLDSTEIN. No, I'm not. And actually, if you will notice, I didn't quote rule 11. And I believe "frivolous" can be used in a context where it's not invoking rule 11. But some of this litigation, when it occurs years after a project has already begun and years after construction has begun, after environmental impact statements have been gone over and have been discussed with the public and with agencies, after projects have already begun and then litigation is brought up between 4 and 6 years hence, then by some parties I believe it could fairly be characterized as malicious or even frivolous. But not in the rule 11 context. And please don't—I did not mean to infer that rule 11 has been violated in my testimony, which is why I didn't cite to it.

Mr. DREHER. Mr. Inslee, if I could just say one thing. I mean, with the prime example that Mr. Goldstein has offered with what amounts to frivolous but perhaps not frivolous litigation, is a case in Las Vegas involving a road in which the plaintiff's allegation is that the Federal agencies involved never considered the impact of air toxins emitted by cars on elementary school children in schools adjacent to the proposed expanded highway. They never thought about the impacts on the public health of children.

Now, if that's not an issue that NEPA ought to consider, I don't know what is. And it's true, they never considered it. And, moreover, the case was brought 2 years before the agency itself said we intend to let contracts for construction, 2 years before the agency said we will let contracts for construction.

Finally, it was settled with an agreement to put air monitors in these schools and to try to actually do things like put emissions controls on diesel buses. So it was settled in a way which would actually protect school children. I think that's a success story for the American public.

Mr. INSLEE. Thanks, Madam Chair, for your courtesy.

Mr. YOST. Mr. Inslee, if I could also briefly respond to what you had said. It seems to me that your underlying assumption—which nobody has rebutted on this panel—that since a substantial portion of NEPA litigation is successful on the part of plaintiffs shows that there are failings on the part of agencies, and the Chairwoman's concern—which also has not been rebutted by anybody on the panel—to the effect that the fear of litigation itself has impacts.

But both of those can be addressed by measures to ensure that the Federal agencies are doing better jobs of implementing NEPA, that they are devoting the resources necessary to do the best job possible, that they are devoting the legal resources to see that they are bulletproofing their documents to the best extent possible so as to have defensible documents in court.

And so insofar as there is validity in both of your concerns, I think the answer is the same answer.

Mr. INSLEE. Thank you.

Miss MCMORRIS. Mrs. Drake.

Mrs. DRAKE. If I could, just to follow up on what we were talking about before when we talked about TEA-21. I just wanted to ask Mr. Goldstein, what about the new highway bill? Do you believe that what's in the new highway bill, these type of provisions are appropriate, or do they weaken NEPA?

Mr. GOLDSTEIN. No. I actually think that they are entirely appropriate and could provide some very useful guidance for the Committee, particularly the statute of limitations, the 180-day statute of limitations. And also some of the—and I think what's more universally agreed upon on this panel are some of the recommendations for streamlining projects that can be found in the transportation bill; requiring agencies to speak together and to conduct all their reviews beforehand so that you are not conducting review A and then review B and then review C, but coordinating them among the agencies. This could cut years off of the process for projects.

Mrs. DRAKE. Madam Chairman, I just want to say for the record, I didn't hear people talking about frivolous lawsuits across the Nation. What I've heard people talking about are delays that are caused because people use NEPA, just like we heard testimony from an environmental group in Norfolk that said this is how we use NEPA, and what we just heard Mr. Goldstein read today. And so I think that's our concern, is not frivolous lawsuits, but lawsuits that are entered simply to cause a delay. And then we don't know the impact of people—I think Mr. Martin mentioned it—who just stop. You know, they can't afford to continue doing this. Or the people that end up going to another nation to open their business because they know in 18 months they can be up and running rather than going through all of this.

So thank you, Madam Chairwoman.

Mr. MARTIN. Madam Chairwoman, if I might just elaborate on that just briefly. Let me give you an idea of some of the impacts of a delay of the nature that I just described. And at the risk of focusing on that which I am most familiar with, i.e., the case that we're litigating at this point in time, we have affidavits that were filed in this case that deal with this particular injunction. They talk about as much as an \$18 million loss for a particular company

in northern Wyoming that will not be able to access its Federal leases. Now, when I'm talking about an \$18 million loss, I'm not talking about a loss to BP or Shell or Marathon or one of the large producers of oil and gas in the United States; I'm talking about a relatively small company in Sheridan, Wyoming with 19 employees. This is very significant for companies like that.

I'm aware of an individual in the oil and gas business who had to give up on a project because of a NEPA lawsuit and a NEPA injunction. And, yes, it's true; it may well be something that is only a delay; it's not something where we have a statute that says you must stop that project and you are not allowed to go forward with it. But the reality is that for businesses who are concerned about these investments, a delay of this nature can be the death nail to a project.

Let me add just, you know, again to talk if I may about the litigation with which I'm familiar. We had projections, affidavits that were filed, where we have estimates of roughly \$6 million in lost tax revenues and government royalties that were occasioned by the delays that I'm speaking of. So, in fact, these can be significant impediments. And, by the way, I don't think they are necessary impediments. I share my old friend Mr. Yost's view that, in fact, there are ways that we could simplify and clarify this process so that we wouldn't lose the essence of NEPA but perhaps what we would do is avoid these delays that are so hard on companies and, frankly, hard on communities and States as well.

Miss McMORRIS. OK. I will come back to you, Mr. Udall. Are you ready to go? OK.

Mr. TOM UDALL. Yes, Madam Chair. Thank you very much.

Mr. Dreher, in your testimony under—I guess on page 10 under section 5, you have a section titled "Reforms to Improve the Act's Implementation." could you talk a little bit about the first one under there of making mitigation promises mandatory?

Mr. DREHER. I would be happy to. And I that's something that there's some agreement with on this panel. I mean, one of the key aspects of NEPA is that it encourages agencies to look at ways that they can moderate their impact on the environment. That's one of the key points about alternatives analysis: Look for better ways to accomplish their purposes with less impact. And when agencies find ways, particularly when they find mitigation that would appear to reduce impacts to the point where they are publicly acceptable, it will help the project get approved. And then, moreover, it may even mean that they don't have to do a full EIS; they issue a FONSI, if you will.

The problem is that a lot of times Federal agencies don't follow through on that mitigation. There aren't really good studies on this in the NEPA context. There are pretty good studies in the 404 context. The Corps of Engineers, it turns out, rarely actually implements and enforces mitigation requirements for its 404 permits, leading to an 80 percent loss of wetlands rather than a net gain. And the problem is, therefore, that there is a hole in the NEPA bucket. The public thinks a project is going to be OK and they think that mitigation is going to be effective, and it doesn't get done.

Now, agencies can as a matter of internal practice, without any need for congressional direction, establish rules saying that they will make mitigation promises binding, they will put them as part of the project to begin with, they will require them to be funded, and that they will require project officials to actually carry that mitigation out and monitor it. The Department of the Army has done that, and I commend them for that. They have actually taken responsibility for mitigation. And I think every agency ought to do that. Mitigation is so important to the American public and to the purposes of NEPA that it shouldn't be left in the lurch.

Mr. TOM UDALL. And you also hit on the second thing that I wanted to ask about, is the monitoring. Could you—you mentioned it there, but you have it as a whole section, require monitoring of project impacts. Could you talk a little bit about that?

Mr. DREHER. Well, the problem about monitoring, of course, goes to the very issue of whether or not agencies are—the impacts of their actions turn out to be what they predict when they issue an EIS. NEPA should be a living process; I think Chairman Connaughton thinks that, I think Mr. Yost thinks that. And one of the key things you need to do is to find out if the real impacts on the ground are the ones you predicted. And if they are more than that, you may want to take additional steps to mitigate them. If they are less than that, it may teach you that in fact you are confident that your processes are working well.

So monitoring is essential to validate the whole NEPA process. But agencies, as you might imagine, with limited funds, find it the last priority. If they finish an EIS and they get approval to build a project, they go forward. And I think everybody involved thinks that more monitoring is necessary. CEQ has been asking for this for decades.

Mr. TOM UDALL. Thank you. And let me thank the entire panel for your testimony. I think there was very valuable testimony today and I think really helps the Task Force. Thank you very much.

Mr. HARWOOD. Mr. Congressman, I would just like to second. And one of the things that Mr. Dreher and I do strongly agree on is the monitoring the compliance of mitigation commitments. And I think I cited in my written testimony an example of where what became a centerpiece of environmental consideration for a new headquarters project ended up, through the construction process, was not retained. And as someone who takes great pride in predicting the future in terms of writing environmental documents, when that future does not come true, it is very disappointing. So I think ongoing mitigation, monitoring and oversight, and compliance ensuring measures are very needed.

Miss MCMORRIS. Good. Thank you. Just for everyone's information regarding these rule 11 frivolous lawsuits, there was some concerns raised today, some questions asked, and we are going to try to find out some more information and get some more background so that—for the Task Force's information.

Mr. TOM UDALL. Madam Chair, on that issue, are you going to tell the panelists a period of time of keeping the record open on the issue of them putting anything in?

Miss MCMORRIS. Yes. Definitely.

Mr. TOM UDALL. On this rule 11 issue. Thank you.

Miss MCMORRIS. It is true that we have heard the comments about resources to agencies as we've been at other places around the country. I think somehow we have to figure out a way, though, that it is money well spent, too. We've also heard where it's not just a matter of how much paper, how many—you know, how much paper you fill out or how many—that's not the measure. And it's a challenge to figure out a way to actually end up with a better document in the end, not just a larger document. So I hear what you are saying. But just recognize I think we need to take it a step further and figure out how we can actually set up the incentives so that it's a better document ultimately.

I wanted to ask Mr. Harwood specifically, just because you have the 20 years of experience with NEPA and the NEPA-related documents, if you could just shed some light on what changes you have seen in 20 years. Because part of the confusion, I think, we hear—I've heard from agencies that NEPA's implemented differently among the agencies, which I can imagine as, when you are trying to put together a project, that causes confusion. The number of lawsuits through the years, some probably have helped define; some have I think ultimately caused more confusion. And I just wanted you to speak to how the documents have changed over the last 20 years and what you've seen as far as implementation of NEPA.

Mr. HARWOOD. Thank you. That's actually an excellent question. Like the others here, one of the things that's happened is the documents have gotten longer, they've gotten more extensive. In many respects they've gotten better. I think we've gotten a little more focused on core issues and the mitigation measures that reduce impacts below a level of significance. I think the agencies have gotten more cautious, at the same time probably related measures, agency expertise with respect to NEPA, has gotten a lot less rigorous. There's a lot less rigor in terms of staff awareness and ability to use NEPA to make decisions. So there's less training, it appears, to staff. I don't know that for a fact, but that's what it seems like. They seem less prepared to deal with NEPA, and that makes them a little bit more cautious. And that leads to some of the longer documents where you are not focusing on the core issues, the ones that are addressed at scoping or the ones that you know through coordination with resource agencies are the key kind of things to focus on.

There have been some attempts to shorten documents by trying to dismiss and eliminate resource disciplines that aren't the focus of the document, but I think that's—the length of time, the length of the documents is probably the biggest problem.

And it's unfortunate that the other Congressman has left, but we have seen more challenges by citizens who end up not bringing lawsuits necessarily, but more threats of lawsuits. And I'm not getting into rule 11. I don't really know what that means. I'm not interested in that. I'm interested in—I don't represent environmental groups or private sector. I represent and work as an extension of Federal staff. So I felt like I should be sitting more in the middle of this table. And that balances what we are always trying to do, and I think that the ability to work with the Federal agencies really depends on the agency and on the individuals involved. And

there are some clear, dedicated, wonderful Federal employees that are really a treasure to work with. And I think those are the ones that we like to work with. But it's—they're few and far between. And I think that really gets to the heart of what we are talking about: a place to appeal to another level prior to intervention or legislation, an administrative level where—and certainly the Department of Justice is one way to do that prior, because they would be part of a defense of a NEPA document. But we think, really, CEQ can nip a lot of things in the bud. We've found that to be the case in the past, and we kind of strongly support them as an independent agency, a more robust and well-funded agency.

Miss MCMORRIS. Thank you.

Mr. DREHER. Madam Chairwoman, at the great expense of delaying this, can I just point out one single fact? CEQ has one FTE devoted to NEPA. If there is one thing that the agency needs, it's more resources to help the other agencies do their jobs well.

Mr. MARTIN. And if I might. And I apologize, and I recognize that this is more elongated than any of us had planned. But let me say that we've seen staffs at BLM have to basically expend huge resources to do an EIS, and at the same time they are the same people who have to process our applications for permit to drill. So I would like to, if I can, echo that point of view. If we could get more personnel, I think that's something that could be very helpful to everyone.

Miss MCMORRIS. Once again, let me say thank you to all of you for being here, for being here for several hours. I think all of your testimonies have been very helpful, and I appreciate just your honest perspectives with us and your suggestions as we move forward.

There may be other questions that the members of the Task Force would like to submit to you in writing, and I would appreciate a response in writing for the record. The record will stay open for 10 days. With that, the meeting is adjourned.

[Whereupon, at 1:35 p.m., the Task Force was adjourned.]

[NOTE: Information submitted for the record has been retained in the Committee's official files.]

