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NEPA Draft Report Comments
c/o NEPA Task Force
House Resources Committee
1324 Longworth House Office Building
Washington, DC 20515

Subject: Draft Recommendations for Improving NEPA

Dear NEPA Task Force Members:

I'm writing to comment on the draft recommendations for improving the National Environmental Policy Act (NEPA) that you issued on December 21, 2005. I offer these comments based on some thirty years of experience with NEPA as a federal government official during the Ford, Carter, Reagan, and G.H.W. Bush administrations, as a consultant who deals regularly with environmental matters, as a litigant, and as the author of several textbooks and many professional papers dealing with NEPA-related topics.

Before turning to your recommendations, I want to comment on one statement that popped out at me in the text of your report, which I believe reflects a key problem with many people's understanding of NEPA. On page 9 you quote "an attorney who deals with agencies throughout the West" as follows:

> *"I believe and the congressional record shows that Congress chose those terms 'major federal action significantly affecting the environment' very carefully. Yet, over the years the Courts and CEQ have greatly expanded those words so that federal agencies believe that NEPA applies to all actions, not just major and significant actions."*

You go on to note that "Federal agencies did not offer any opinions on this assertion. However, it was noted that agencies are defaulting to the preparation of an EIS without fully debating whether or not the action is 'major' as currently set forth in regulations."

Both the attorney's observation and your commentary on it seem to reflect confusion between NEPA in general and the specific requirement of Section 102(c) that agencies prepare "detailed statements" of environmental impacts of major federal actions significantly affecting the quality of the human environment. I think it is clear that the policies and statements of responsibility articulated in Section 101of NEPA apply to *all* actions and officers of the United States Government, as does the

call in Section 102(a) for the use of interdisciplinary analysis as a basis for decision making. Section 102(c), however, requires that what we have come to call environmental impact statements be prepared only on "major federal actions significantly affecting the quality of the human environment."

This confusion is understandable, because the Council on Environmental Quality (CEQ) has never been very clear about the distinction between NEPA overall and the requirement of Section 102(c), and has been remiss, I believe, in providing guidance to agencies for dealing with anything but the Section 102(c) requirement. As a result, it is common for agencies, litigators, and other interpreters of the law to say, and act as though, NEPA as a whole applies only to "major federal actions" with "significant" effects. The problem with *this* is that it leaves all concerned adrift about how to deal with everything that is *not* clearly and unequivocally such a major action with such significant impacts. From this driftiness spring many of the problems that you accurately outline in your report.

The tendency to confuse NEPA per se with NEPA's requirement for environmental impact statements (EIS) is exacerbated by the very thin guidance CEQ has provided about how to determine whether a given proposed action *should* be the subject of an EIS. The mechanism prescribed by CEQ for making such a determination is the environmental assessment (EA), and CEQ's regulations, at 40 CFR 1508.27, do a creditable job of outlining what an EA should address. But the regulations give their readers very little guidance as to how an EA should be structured and prepared – while going into great and loving detail about how to do, review, finalize, and use an EIS. As a result, agencies and their consultants tend to prepare EAs whose structure and content (and bulk) are indistinguishable from EISs, and that take just as long to prepare. Courts have no basis for measuring the adequacy of EAs other than their similarity to EISs. Agencies and applicants for Federal assistance and permits, unclear about the scope of NEPA's application, stumble about trying to decide whether "NEPA applies" to a given action, rather than going through an orderly process of deciding whether each such action is a major one that may have significant effects.

It is my firm belief that many of the problems you and others have identified with NEPA could be remedied by paying closer attention to how we determine whether a given proposed action has the potential for significantly affecting the quality of the human environment, while also looking for ways to ensure that the Federal establishment pays attention to NEPA's policy directives.

Turning now to your recommendations:

**Group 1 - Addressing Delays in the process**

*Recommendation 1.1: Amend NEPA to define "major federal action." NEPA would be enhanced to create a new definition of "major federal action" that would only*

*include new and continuing projects that would require substantial planning, time, resources, or expenditures.*

This is a creditable attempt to address the problem I've just discussed, but I don't think it will work, and I fear how the Law of Unintended Consequences would play itself out on it. For example, what does "substantial" mean? Is not this word subject to at least as much interpretation as "significantly" is?

*Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS).* The recommendation goes on to suggest various time limits, with several caveats and exceptions.

The fact that you were compelled even in this draft report to so considerably condition this recommendation suggests why it is unlikely to be a useful one. In my experience, it is *never* helpful to anyone – including project proponents – to try to prescribe arbitrary standards. They always end up being highly conditional, and much time and effort are then expended deciding whether each prescribed condition applies.

*Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS).*

This is an excellent idea in principle, but it will be difficult to do in practice. For one thing, an amendment to NEPA itself would be complicated, since the statute doesn't even mention CEs and EAs. For another, agencies legitimately need a good deal of latitude in establishing CEs, because the things they do vary so greatly from agency to agency. While I agree (obviously) that greater clarity of direction about EAs would be desirable, I doubt that "criteria" are quite what are needed. A better *process* for conducting EA analyses, and perhaps for establishing CEs and screening their application, would be very desirable, and could best be done, I think, via changes in the CEQ regulations.

*Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation.*

Perhaps a good idea, but why is it not sufficient to have these criteria in the regulations?

**Group 2 - Enhancing Public Participation**

*Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal*

*action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.*

I personally sympathize with this recommendation. Many of my clients are local property owners and users of federal lands who feel victimized by federal agency actions and want to use the NEPA process to protect their lands and ways of life. But again I fear the devil in the details. How local is "local?" Within ten miles? Fifty miles? Upstream or downstream? Upwind or downwind? What about the non-local public that visits a National Park? What about non-local hunters who depend on game that winters at a wildlife refuge? Is it even constitutional to establish a geographic hierarchy of American citizens?

*Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7.*

I doubt if this would accomplish a thing that isn't just as well accomplished by having the limits (which as you note virtually have to allow for exceptions) in the regulations. What *would* be useful in terms of facilitating public participation (the presumed reason for this recommendation) would be to require and somehow enforce a plain English writing requirement, and mandate remedial writing classes for the drafters of NEPA documents.

**Group 3 – Better Involvement for State, Local and Tribal Stakeholders**

*Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.*

I think what you're trying to get at here – improving the participation of stakeholders in the NEPA process – is terribly important, and definitely needs doing. But I don't think the "cooperating agency" mechanism is a very useful way to do it. For one thing, a lot of tribal, state, and local stakeholders don't want to *cooperate* in NEPA review, either because they dislike the process or dislike the action being reviewed; "cooperating" to them seems like "collaborating" in the pejorative sense. For another thing, "cooperating agencies" are traditionally understood to contribute something to the NEPA process – to help with it somehow – but many stakeholders don't want to contribute; they quite legitimately simply want to make sure that their concerns are addressed by the agency officials who in the end call the shots.

I think that what needs to be done is to either amend NEPA or (more likely) the CEQ regulations to provide for systematic *consultation* with stakeholders, somewhat along the lines employed in project review under Section 106 of the National Historic Preservation Act. The genius of the Section 106 review process (when it works properly) is that it requires consultation that is aimed at *actually reaching a binding agreement* – which virtually precludes the possibility of successful litigation challenging the result – while always allowing the responsible agency to "pull the

plug" and make a decision. In recent years, in my opinion, the Section 106 process has gotten terribly cluttered with bureaucratic trappings that greatly reduce its effectiveness, but in principle it is an excellent process. Grafting something like it onto both EIS preparation and (equally importantly) EA-based decisions about the significance of impacts could go a long way toward both improving stakeholder involvement and streamlining federal agency decision making.

*Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.*

Another good idea in principle, but the trick is going to be to determine "functional equivalence," particularly in the context of constantly changing state laws and regulations.

**Group 4 - Addressing Litigation Issues**

*Recommendation 4.1: Amend NEPA to create a citizen suit provision.*

This may be a good idea, but a number of the elements you go on to suggest should be in such a provision raise serious questions. For instance:

• *Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.*

But what if the problem isn't the quality of the information or the science, but the quality of public or stakeholder involvement, or some aspect of the environment that isn't amenable to "scientific" examination? Some of my clients are ranchers who value their traditional lifeways and uses of the land, and as a result are unhappy about proposed federal actions that will impact their land use. Would you preclude them from litigating to seek attention to their concerns?

• *Clarify that parties must be involved throughout the process in order to have standing in an appeal.*

What if the would-be appellant wasn't aware of "the process" until it was well underway? What if he or she doesn't read English very well? What if he or she becomes involved by virtue of, say, purchasing a piece of affected property when the process is already underway? What about the temptation such a provision would create for agencies to keep their activities as secret from the public as possible?

The other elements you outline raise similar questions.

*Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents.*

In other words, before undertaking a NEPA analysis an agency would have to run the project past CEQ? This – to say the least – seems a bit inconsistent with your desire to streamline the process.

**Group 5- Clarifying Alternatives Analysis**

*Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible.*

So if my clients, who are concerned about – say – an airport whose construction will affect their ranch, want to suggest that the Federal Aviation Administration consider an alternative location, FAA would have to do so only if it determined that using the location was economically and technically feasible? Fair enough, but that is precisely what alternatives analysis in an EA or EIS ought to be about. Or would my clients have to demonstrate the economic and technical feasibility of the alternative they want FAA to consider? Should the affected public, affected stakeholders, really be stuck with this responsibility? This hardly seems a fair exercise of governmental responsibility to those who pay its freight, but if this isn't what you intend, I'm not sure that you're proposing anything that isn't already a fundamental part of alternatives analysis. This strikes me as another recommendation that seems nice in principle but in practice is very naïve.

*Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project.*

This seems like an excellent idea. The "no action" alternative and its impacts are often given altogether too little serious attention.

*Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.*

Another excellent idea. Without binding commitments to mitigation, NEPA documents have little meaning. Such commitments should be mandatory both with respect to provisions developed in the course of EIS preparation and – even more importantly – with respect to measures adopted to hold impacts below a "significant" level and hence obviate the need for an EIS.

**Group 6 – Better Federal Agency Coordination**

*Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.*

Absolutely! This is a very important and positive recommendation that could go far toward curing many of the problems with NEPA implementation today. Consultation should be mandatory not only in the preparation of EISs but even more critically, in the analyses on which EAs are based. Again let me recommend the consultation process under Section 106 of the National Historic Preservation Act (though not necessarily the specific provisions of the Section 106 regulations) as a model for such consultation.

*Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.*

Something along this line is probably a very good idea. The meaning of lead agency status is often unclear, as are the procedures by which agencies decide and let others know who has the lead.

**Group 7 - Additional Authority for the Council on Environmental Quality**

*Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality.*

Good idea.

*Recommendation 7.2: Direct CEQ to control NEPA related costs.*

Fine in principle, difficult to do in practice. By "NEPA-related costs" does one mean the cost of preparing NEPA analyses, or the costs of project delay, or the costs of NEPA-related changes in a project design, or all three, or what? And who is to decide what costs are "NEPA-related?" And what should be done about, say, the cost of a project delay that results from an agency's failure to undertake NEPA review until forced to do so by a lawsuit? Is this a cost of doing NEPA review, or a cost of stupidity? And on what would one actually impose ceilings?

**Group 8 - Clarify meaning of "cumulative impacts"**

*Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions.*

Let's see: say the proposal is to add a lane to an existing highway through a rural area. The area has begun to experience impacts from sprawl over the last ten years or

so. The Federal Highway Administration and the State highway agency "assess existing conditions" and find that, yep, there has been sprawl in the area, resulting from many factors but likely to be exacerbated by the proposed widening. How does this "account for" past actions? It merely *describes* current conditions. I think this recommendation needs a good deal of clarification.

*Recommendation 8.2: Direct CEQ to promulgate regulations to … focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable."*

This would defeat the whole purpose of cumulative effects analysis. In the example given above, no one may currently have "concrete proposals" to go out and build new housing tracts along the widened highway, but it is utterly predictable that such tracts will be built; this is an obvious effect of widening the highway.

**Group 9 - Studies**

*Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws.*

Excellent idea. I would go farther and recommend that CEQ study the feasibility of folding the provisions of such other laws into NEPA to create a truly integrated environmental impact assessment authority. At the same time, Congress should pledge itself to refrain from enacting more special-purpose environmental laws without providing for their coordination with NEPA.

*Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws.*

Another good idea, but probably much harder to implement.

Thank you for the opportunity to comment on these important recommendations.

Sincerely,