

Georgetown Environmental Law & Policy Institute

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Act
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Hearing on NEPA: Lessons Learned and Next Steps
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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). 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 bipartisan 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 ... 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, ... 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 precatory 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 win-

nowing 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 Interagency 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.