

Georgetown Environmental Law & Policy Institute

February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Staff draft report on recommendations for improving NEPA

Dear Chairwoman McMorris, Ranking Member Udall, and Members of the House NEPA Task Force:

Thank you for the opportunity to comment on the draft recommendations of the Task Force majority staff, and for the earlier opportunity to testify regarding the implementation of the National Environmental Policy Act (“NEPA”). These comments, which are intended to supplement my earlier testimony, are submitted on behalf of the Georgetown Environmental Law & Policy Institute. I would note that my comments do not necessarily reflect the views of Georgetown University or the governing board of the Institute.

General comments

My comments will not address in detail the prefatory discussion by the majority staff of the testimony submitted to the Task Force. I would note, however, that although the majority staff made efforts to provide a balanced statement of the conflicting views submitted to the Task Force regarding NEPA’s current implementation, the draft report occasionally offers inappropriately judgmental views, such as the staff’s comment on page 10 that, “[a]t a minimum,” the concerns advanced by some witnesses regarding NEPA’s implementation “sustain calls for modest changes to NEPA or its regulations.” As I make clear below, I believe that conclusion is not in fact remotely supported by the record.

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More generally, I would reiterate the concern I expressed in my testimony that the Task Force hearings did not succeed in establishing a balanced, objective and informative record on which to base conclusions regarding NEPA's effectiveness. As I noted in my testimony, the Task Force field hearings slighted the views of environmentalists, and, perhaps more surprisingly, largely ignored the opportunity to solicit the views of federal officials charged with implementing NEPA. Meaningful oversight of federal agencies' NEPA compliance should have included searching inquiry into the experience of the federal agencies themselves. As just one example, the staff report states at page 24 that "the Federal government witnesses did not indicate that additional resources would reduce delay." Given that only two Federal employees – the Forest Service's Regional Forester for the Northwest Region and the Chairman of the Council on Environmental Quality – testified before the Task Force during its entire inquiry, it seems remarkable for the staff, or the Task Force, to attempt to draw conclusions on this point, particularly in the face of the many surveys and investigations that have identified the lack of sufficient agency resources as a critical constraint on the effective implementation of the Act.

These concerns about the scope of the Task Force's inquiry go to the heart of the present issue: whether changes are needed to NEPA or to the CEQ regulations in order to improve the sometimes spotty performance of federal agencies charged with implementing the Act. Although I believe that much can and should be done to improve agency practice under NEPA, I do not believe the record before the Task Force remotely demonstrates that changes to the Act itself, or even to the Council on Environmental Quality's implementing regulations, are warranted. Rather, I think it is quite clear that significant improvements in NEPA practice can be accomplished through administrative reforms by the agencies themselves, with stronger guidance from CEQ (and perhaps more vigorous oversight from Congress). Indeed, many of the staff's recommendations for statutory change appear aimed at simply codifying existing principles of NEPA practice established by judicial decisions or by the CEQ regulations.

I think it is regrettable, therefore, that the Task Force spent so little time inquiring into the sufficiency of agency training, the extent to which agencies commit adequate staff and financial resources to NEPA compliance, and the extent to which improvements in guidance, training, and resources could reduce unnecessary delays and burdens in the NEPA process. Unfortunately, the impression created by the Task Force's investigation, reinforced by the majority staff report, is that the majority has focused from the outset on making changes to the Act rather than the perhaps less-politically attractive opportunity to exercise Congressional oversight to prod federal agencies to improve their administrative practices without endangering the integrity or purposes of the Act.

My assessment of the staff's recommendations for changes in the Act or the CEQ regulations focuses on the extent to which such proposals further, or instead disserve, the fundamental purposes of NEPA. The Task Force received a letter on September 19, 2005 from all of the living former Chairs of CEQ (and those of its former General Counsels who are not currently serving in the government). That letter calls upon the Task Force to honor three fundamental principles of NEPA:

First, *consideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making.* Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.

Second, *analysis of alternatives to an agency's proposed course of action is the heart of meaningful environmental review.* Review of reasonable alternatives allows agencies to evaluate systematically the potential effects of their decisions and to assess how they can better protect the environment while still fully implementing their primary missions.

Third, *the public plays an indispensable role in the NEPA process.* Public comments inform agencies of environmental impacts that they may have misunderstood or failed to recognize, and often provide valuable insights for reshaping proposed projects to minimize their adverse environmental effects. The public also serves as a watchdog, ensuring that Federal agencies fulfill their responsibilities under the law. Public participation under NEPA supports the democratic process by allowing citizens to communicate with and influence government actions that directly affect their health and well-being.

Letter from Russell E. Train, Russell W. Peterson, John Buserud, Charles W. Warren, J. Gustave Speth, Michael R. Deland, Kathleen A. McGinty, George T. Frampton Jr., Gary Widman, and Nick Yost to Cathy McMorris (Sept. 19, 2005), at 2 (emphases added).

I believe these principles should guide this Task Force in evaluating the staff's proposals, and any other recommendations submitted to or considered by the Task Force. Do such proposals advance or disserve the goal of environmentally-informed and responsible government decision-making? Do they enhance or restrict consideration of reasonable alternatives, the heart of environmental impact analysis? Do they promote or discourage effective public participation and disclosure of impacts? Finally, in light of NEPA's profound importance as the articulation of the United States' national environmental policy, and the time-tested simplicity of its basic mandate for consideration of environmental consequences, the Task Force should ask itself whether any proposed "improvement" really warrants amendment to the Act, or could instead be accomplished through administrative reforms and vigorous Congressional oversight.

Regrettably, as I describe below, the majority staff's proposals almost uniformly fail these central tests. Some of the majority staff's proposals seek to codify existing law, and are thus unnecessary. Other proposals, however, would seriously impair the accuracy and utility of environmental reviews under NEPA, or restrict public participation and judicial review. I urge the Task Force, therefore, to reject the staff's proposals.

Specific Comments on Staff Recommendations

Recommendation 1.1: Amend NEPA to define “major federal action.”

The staff’s proposal to create a new statutory definition of “major federal action” that would “only include new and continuing projects that would require substantial planning, time, resources, or expenditures” raises several serious concerns. First, although it may seem superficially attractive to seek to simplify NEPA’s implementation by clarifying key decision points, such as the point at which an EIS must be prepared, these decision points have proven over the years to be inherently fact-specific and resistant to reduction to simple formula (except at the outer edges, where categories of actions that virtually always or virtually never warrant detailed environmental consideration have been defined over time by the agencies themselves). The CEQ regulations, NEPA regulations adopted by other federal agencies, and judicial decisions interpreting the Act over the years nonetheless now provide relatively clear and settled guidance on these questions for agencies and stakeholders involved in the NEPA process. New legislative language, however well-intentioned, would risk making these key decision-points more uncertain and more subject to dispute and challenge.

More importantly, the test advanced by the staff simply relies on the wrong factors. Although the relative size of a federal agency’s undertaking has some relationship to its likely environmental impact, that relationship is imprecise and sometimes misleading. Large federal projects may in fact have relatively inconsequential environmental consequences, while small ones may have serious impacts. The key issue, therefore, is the *significance of the environmental effects* likely to result from a federal undertaking, not its size. Whether an agency needs to engage in detailed environmental review for a project can only be determined through an initial assessment of the likely scope of the project’s *impacts*. For this reason, CEQ and the courts have always linked the term “major federal action” to the remainder of the operative phrase, “significantly affecting the quality of the human environment.” An action with significant environmental effects is a major federal action deserving of careful consideration in an EIS, regardless of its absolute size or complexity. For these reasons, attempting to define federal actions warranting careful review simply by their relative size misses the point, and would lead to both significant overinclusion (unnecessary reviews of large actions with small consequences) and underinclusion (failure to perform reviews of smaller actions that nonetheless may have significant impacts).

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.

The staff’s proposal to impose mandatory time limits on the preparation of EISs and EAs also raises serious concerns. I should first note that I am in substantial agreement with the views expressed by Nick Yost, among others, that identification of presumptive timelines for preparation of NEPA documents can be helpful in ensuring timely completion of the NEPA process. In particular, I believe that federal agencies should establish appropriate timeframes for completion of particular NEPA documents during the scoping process, in consultation with other federal and state agencies, applicants, and other stakeholders, and should exercise appropriate management during

the NEPA process to ensure reasonable adherence to such timeframes. That, in fact, is the process called for in several recent bills enacted by Congress. I do not believe, however, that *mandatory* timelines, as envisioned by the staff, can be imposed without unacceptable risk to the integrity of the NEPA process itself.

First, although it may be both possible and useful for CEQ and federal agencies to identify presumptive timeframes for completion of NEPA documents for categories of federal actions, such timeframes cannot anticipate with exactitude the particular circumstances that may arise in the course of planning for any specific federal project and that may require an agency to devote more extended time to its environmental analysis. Timelines should therefore be presumptive, with recognition that agencies will need flexibility to vary from the expected timeframe where necessary to ensure full consideration of environmental issues raised by particular projects.

Second, although an agency's failure to adhere to an agreed-upon timeline may warrant oversight and occasional prompting by CEQ or by a Congressional committee, the staff's proposal to enforce timelines by simply deeming environmental compliance complete is antithetical to NEPA's central purpose. The interest of applicants and other stakeholders in timely completion of environmental reviews is legitimate, but it cannot override the Act's commitment to the American public that federal agencies will consider and disclose fully the effects of their actions on the human environment. Agency mismanagement of the NEPA process may well warrant oversight and administrative correction, but it cannot justify simply abandoning the NEPA process. Deeming environmental reviews complete upon expiration of a deadline would inevitably subvert NEPA's "action-forcing" role by extending an open invitation to federal agencies and applicants to drag out their NEPA processes to escape the requirement for environmental review.

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

The staff's proposal to amend the Act to create "unambiguous criteria" for categorical exclusions, environmental assessments and EISs, like recommendation 1.1 above, raises serious concerns. The staff's interest in imposing an artificial clarity upon key decision points in the NEPA process is understandable, but dangerous. The central decision points in the NEPA process – whether to prepare an EIS, an EA, or to forego detailed environmental analysis under a categorical exclusion – necessarily require careful consideration of the particular circumstances of a federal action, and resist oversimplification. The CEQ regulations, agency NEPA regulations, and judicial decisions provide meaningful guidance, but bright-line rules create an unacceptable risk of improper classification, subjecting some actions to more analysis and others to less than the Act contemplates.

The particular bright-line rule suggested by the majority staff contains several flaws. First, "temporary" activities can in some circumstances – construction of temporary logging roads to enter roadless stands within our National Forests, for example – have significant and lasting environmental impacts. Second, the burden suggested by

the staff, requiring agencies to use a categorical exclusion for such activities unless the agency has “compelling evidence” to utilize another process, would improperly constrain the judgment of federal agencies as to how best to integrate environmental considerations into their decision-making. The “action-forcing” purposes of the Act are hardly well-served by procedural mechanisms that impose extraordinary burdens of justification on federal agencies before they engage in environmental analysis.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents.

The staff’s proposal to codify criteria for the use of supplemental NEPA documents is apparently driven by a concern that agencies too frequently engage in supplemental environmental analysis, imposing unnecessary delays on applicants. *See* page 19 (“Another way delay manifested itself was the ‘reopening’ of the NEPA process when an end point appeared to be reached.”). The staff discussion cites “numerous examples of supplemental EAs and EISs being required after the process was concluded,” and asserts that there is “a perception – and some evidence” that such agencies do not apply consistent standards in deciding to prepare such documents. *Id.*

Consistent with this perspective, the staff proposal would sharply limit the authority of federal agencies to use supplemental NEPA documents to inform their decision-making. The staff proposal incorporates the two circumstances identified in the CEQ regulations as requiring preparation of a supplemental EIS – substantial changes in a proposed federal project, or significant new circumstances or information relevant to environmental concerns. *See* 40 C.F.R. 1502.9(c)(i), (ii). The staff proposal improperly makes these factors *conjunctive*, rather than *disjunctive*, however, by joining these factors with the conjunction “*and*” (rather than “*or*,” as in the CEQ regulation). The staff would thus apparently require a federal agency to demonstrate *both* substantial changes in a project and significant new information regarding its potential impacts before it could prepare a supplement, when either circumstance plainly should trigger further review. Moreover, the staff proposal omits the *remainder* of the CEQ regulation, which authorizes agencies to prepare supplemental NEPA documents, as a discretionary matter, when they determine that such documents would further the purposes of the Act. *See* 40 C.F.R. 1502.9(c)(2). The staff’s proposal would thus prevent agencies from using supplemental NEPA documents even where they believe such documents would be helpful to their own decision-makers and to the public’s understanding of the impacts of a federal action.

Nothing in the record before this Task Force justifies such a restrictive approach. Contrary to the staff’s claims, there is no evidence that agencies are widely engaging in the preparation of supplemental NEPA documents in circumstances where such supplementation is unjustified (or indeed, that they frequently employ supplemental NEPA documents at all). In my experience, agencies employ supplemental NEPA documents infrequently, and generally have very good reasons when they reopen the environmental record. Agencies prepare supplements when they recognize that extra steps are necessary to ensure that the public and the agency decision-makers are fully informed and the environmental record compiled by the agency is complete and defensible. The staff’s proposal to prohibit agencies from using the NEPA process in such a flexible manner will deprive the public and agency officials of helpful

information, contrary to NEPA's basic purpose, and expose agencies to unnecessary litigation risk where supplementation could ensure an adequate record.

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.

The majority staff's recommendation to require federal agencies to give more weight to issues and concerns raised by "local interests" than those raised by "outside groups and individuals" raises a number of serious concerns. First, the proposal is on its face regrettably divisive, suggesting that some interests – and some Americans – deserve more consideration than others in the federal government's decision-making. NEPA establishes a *national* environmental policy; it seeks to broadly include the public in government decision processes, rather than to divide and exclude. To the extent that the staff's proposal reflects genuine concerns that some communities and individuals are not being given effective access to agency decision processes, or that their views are being ignored, the Task Force should focus on improving opportunities for public involvement so that *all* persons affected by or interested in federal agency decisions can be heard, rather than favoring some over others.

More importantly, the staff's proposal to give particular weight to local concerns ignores the fundamental point that the environment and the ecosystems within it are interconnected at many levels, from local to regional to planetary. The environment thus cannot be understood or protected if human actions are analyzed only in their narrow, localized settings. As Professor Richard Lazarus has observed:

Environmental law's challenge is to regulate, where possible, the process of ecological transformation. This includes regulating the extent of transformation, its geographic location, and, at least as important, its pace. While much disagreement persists about each, it seems quite plain that the spatial and temporal scales of ecological transformation have increased from the local and regional to the global. We have traveled far beyond merely scratching the surface of the planet's ecosystem.... The twentieth century witnessed a dramatic escalation of humankind's impact on the natural environment in virtually every aspect of the planet's ecosystem: atmosphere, hydrosphere, and biosphere.

Richard J. Lazarus, *THE MAKING OF ENVIRONMENTAL LAW* 8-9 (2004). Thus, while a proposed federal action may have significant localized consequences that must be carefully assessed, it may also have impacts on a regional, national or even planetary scale.

For this reason, giving artificial weight to local comments improperly restricts an agency's consideration of the environmental effects of its action, and undermines reasoned decision-making. The ultimate *purpose* of public involvement under NEPA, after all, is to help ensure informed and responsible government decision-making. The value of public comments and views expressed during the NEPA process thus depends on the extent to which such comments assist an agency in understanding the environmental consequences of its action, rather than on the identity or residence of the author. The

comment period on an EIS is thus not a public referendum, where the number of comments or the persons submitting them determines an agency's decision.

Local residents may indeed be particularly affected by federal projects in or near their communities, and often have information of particular value to the federal agencies considering such projects. But comments from persons farther removed from local communities may also raise important environmental concerns or provide helpful information to a federal agency. National environmental groups can provide a valuable national perspective on public policy questions and sophisticated technical expertise on complex scientific issues; they also often represent members in close proximity to a federal project. The value of such comments obviously depends on the extent to which they help an agency reach a well-informed decision, not on where such comments originate. Indeed, in my opinion it would be fundamentally arbitrary and legally indefensible for an agency to give greater weight to the origin of public comments rather than to their substance.

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

The majority staff's proposal to establish statutory page limits for EISs is unnecessary, to the extent it simply codifies existing guidance in the CEQ regulations, and dangerous if it goes beyond that guidance. I understand the staff's concern with the length and complexity of modern EISs; many EISs are forbiddingly long and detailed, and difficult for either agency decision-makers or members of the public to read and comprehend. The staff's proposal to codify the CEQ regulations' presumptive page limits for EISs – “normally” less than 150 pages for most EISs, and “normally” less than 300 pages for “proposals of unusual scope or complexity,” *see* 40 C.F.R. 1502.7 – is both unnecessary and unwise, however.

To the extent that the staff proposal aims simply to codify the CEQ regulations' presumptive page limits, there is no need for legislation. Nor is it clear that establishing presumptive page limits in the Act itself would do much to improve agency practice. Improving the quality of agency EIS-writing requires better training for agency personnel and more attention from agency managers. Agency NEPA personnel are in fact well aware of the challenge that they face in writing NEPA documents so that they are transparent and understandable; NEPA conferences, such as the Department of Energy NEPA 35 conference here in Washington in November, focus extensively on such issues, and give prominent attention to particular examples of well-written, reader-friendly documents. Continued effort to improve the readability of NEPA documents is essential, but requires real commitments of resources for training and management. Those commitments are unlikely to be triggered simply by moving CEQ's guidance for the “normal” length of EISs into the statute.

If the staff's proposal is instead to make such page limits binding, however, then the fundamental purposes of NEPA – well-informed governmental decision-making and full public disclosure – would be put at risk. Some federal actions are simply too complex and raise too many difficult environmental concerns to address properly within 150, or even 300, pages. As with the staff's earlier proposal to deem environmental

analysis complete if it runs beyond a pre-determined timeline, the present proposal would require agencies to short-circuit their environmental analysis if it ran too long. Moreover, imposition of rigid page limits overlooks the importance of including sufficient technical detail in EISs to demonstrate that an agency has in fact taken a “hard look” at environmental issues and to permit the public to independently evaluate such issues. Federal agencies often gloss over or minimize potentially significant environmental concerns in their environmental documents. The public can be assured that the agency’s description of potential environmental impacts is honest and accurate only if the agency is required to disclose its supporting data and analysis. That analysis need not necessarily be presented in the text of the EIS itself, but it must at least be publicly circulated with the EIS as a technical appendix.

For this reason, page limits, like time limits, should continue to be presumptive, and should not constrain agencies from presenting full and accurate environmental analysis. The goal of improving the readability of agency NEPA documents can be achieved through improved training and management direction within the agencies; there is no need for, and considerable risk in, an attempt to dictate more readable documents through legislation.

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

Efforts to encourage the participation and cooperation of tribal, state and local governments in federal agency NEPA processes are appropriate and important. There is no reason to amend NEPA to promote such cooperation, however, and some risk to the NEPA process in doing so. NEPA already provides broad opportunities for tribal, state and local governments to engage in environmental analysis conducted by federal agencies as cooperating agencies, as agencies with particular expertise, and as commenting agencies. President Bush has established by Executive Order a broad federal policy to encourage and facilitate cooperate involvement by state, local and tribal governments in federal planning and decision-making for natural resources and protection of the environment. *Facilitation of Cooperative Conservation*, Exec. Order 13352 (Aug. 26, 2004).

While tribal, state and local government generally works cooperatively and constructively with federal agencies engaged in NEPA planning, there may be circumstances where a requirement of close cooperation between a tribal, state or local government and the responsible federal agency could obstruct and complicate the NEPA process. If a tribe, state or local government has taken political positions opposing the proposed federal action, as Nevada has with respect to Yucca Mountain, requiring the responsible federal agencies to accept such government entities as formal partners in the NEPA process could be counterproductive.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.

The majority staff’s proposal to allow state environmental reviews that are the “functional equivalent” of NEPA reviews to satisfy federal responsibilities for

environmental review raises both policy and practical problems. First, NEPA establishes a *national* environmental policy requiring that the federal government ensure that its decisions are properly informed by environmental consideration. The vast majority of federal actions subject to NEPA involve truly federal determinations, relating to the proper management of federal public lands, access to federal mineral resources, permits for activities regulated under federal law, or proposals for construction or development by federal agencies themselves. In those circumstances, the responsibility for environmental analysis is inherently a federal responsibility, and cannot properly be delegated to a state process.

NEPA already establishes an opportunity for states to take the lead responsibility for preparation of EISs under certain circumstances. *See* 42 U.S.C. § 4332(2)(D) (authorizing state agencies to prepare EISs for projects funded by federal grants to the state). In the highway setting, in particular, it is common for state highway agencies, which bear primary responsibility for transportation planning within their states, to take initial responsibility for preparation of EISs for federally-funded projects, with the ultimate concurrence of federal highway officials. In other circumstances, however, allowing a private applicant to substitute a state environmental review process for federal review under NEPA would improperly subordinate the national interest in informed federal decision-making.

Moreover, substituting another procedure for NEPA's carefully-tailored and well-understood process risks shortcutting either the substance of environmental review or the public's opportunities for involvement in that process. For that reason, the courts and Congress have always invoked the "functional equivalence" doctrine very narrowly. Only the Environmental Protection Agency, the only "truly environmental" agency within the federal government, has been exempted from formal compliance with NEPA, and only where its rulemaking procedures ensure both full consideration of environmental impacts and full opportunity for public involvement. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (exempting EPA from NEPA's requirements when setting new source performance standards under the Clean Air Act). The courts have rejected claims by other federal agencies that their procedures were comparable to NEPA's, however, noting that other agencies have an inherent conflict between their substantive missions and protection of the environment. *See, e.g., Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978) (refusing to exempt Forest Service from NEPA because its duties include both conservation and a duty to ensure substantial yield from timber harvest); *Jones v. Gordon*, 621 F.Supp. 7, 13 (D. Alaska 1985), *aff'd on other grounds*, 792 F.2d 821 (9th Cir. 1986) ("the mere fact that an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception").

Applying the "functional equivalence" concept to state environmental review processes will thus pose significant difficulties. State "little NEPAs" in fact vary quite extensively, and determining which state processes are truly the functional equivalent of the federal review under NEPA would be challenging. To be functionally equivalent to NEPA, state procedures must provide assurance comparable to that under NEPA that an agency will take a "hard look" at environmental issues, will fully disclose potential environmental impacts to the public, and will solicit the involvement and views of the

public and of other responsible federal, state and local government agencies. Such a state process must provide broad opportunities for public engagement at the scoping stage at the outset of the planning process, for public comment on draft environmental documents, and for citizens to seek judicial review. Given the wide variation in state environmental review requirements, reliance on state processes to ensure these procedural rights is inherently risky.

There is no reason to run such risks. The NEPA process already encourages appropriate coordination with state agencies, and allows federal agencies to gain the benefit of other, concurrent environmental reviews that may be required under state law. As I noted, the NEPA process already affords opportunities for state agencies to take the lead for conducting environmental reviews for projects that are primarily state responsibilities. State agencies can also become cooperating agencies, and co-leads in the federal NEPA process, for other projects where states have strong interests. Moreover, federal agencies may properly rely upon and incorporate information and conclusions generated during state environmental reviews into their own reviews under NEPA, saving time and avoiding duplication of effort.

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

The majority staff's proposal to amend NEPA to establish a citizen suit provision would seriously limit public participation and rights to judicial review under NEPA. Citizen suit provisions under such laws as the Clean Water Act, the Endangered Species Act, and the Clean Air Act have provided important guarantees of the public's right to obtain judicial review of government actions affecting their interests. By authorizing private suits against violators, citizen suit provisions have also served as an important backstop to the national interest in ensuring compliance with environmental requirements, supplementing limited agency enforcement resources. Unfortunately, the majority staff's proposal to create a citizen suit provision for NEPA does not appear intended to confirm and protect the important role of citizen enforcement under the Act; rather, it appears aimed only at restricting the public's existing rights to judicial review.

NEPA does not contain a citizen suit provision, but members of the public have always been able to secure judicial review of agency actions affecting their interests through the general provisions of the Administrative Procedure Act. Judicial review under the APA is not unlimited, of course. Plaintiffs must demonstrate concrete injury traceable to the federal agency's action and redressible by the court in order to meet the requirements of constitutional standing, and further show that their claims lie within the "zone of interests" of NEPA. Plaintiffs must meet timing requirements designed to protect federal agencies from premature interference by the courts, showing that the challenged agency action is final and ripe for review. The courts have imposed requirements that plaintiffs first raise their concerns before the federal agency, *see Public Citizen v. Dep't of Transportation*, 124 S.Ct. 2204, 2213-14 (2004), and customarily give federal agencies broad deference on questions of scientific judgment and statutory interpretation.

Nonetheless, the opportunity for citizens meeting these stringent procedural requirements to secure a judicial remedy when federal agencies fail to carry out their

responsibilities under NEPA has been essential to NEPA's successful implementation. No agency enforces NEPA's requirements; federal agencies would effectively be above the law if not for citizens' ability to obtain judicial review. Judicial decisions in citizen-brought litigation have established the meaning of NEPA's terms and provided important direction for federal agencies seeking guidance as to how to carry out their duties under the Act; it has also ensured thorough environmental consideration for a host of federal undertakings that might otherwise have caused significant and needless environmental harm. My prior testimony before the Task Force includes examples of citizen litigation that unquestionably served the strong public interest in environmental protection, including litigation that was instrumental in preserving the habitat of the Ivory-billed Woodpecker.

The burden imposed on federal agencies by such citizen litigation is relatively slight, as the majority staff report acknowledges. Only a tiny fraction of the vast array of federal actions documented under NEPA – 0.2% -- is challenged in court, and an even smaller fraction results in an injunction delaying a proposed action until an agency has complied with NEPA. Most NEPA lawsuits are resolved through settlement, or judgment for the government. Where an agency does lose a suit, the judicial remedy ensures faithful compliance with NEPA's terms, to the benefit of the American public as a whole.

Nevertheless, the majority staff evidently believes that citizen suit litigation under NEPA poses a significant problem. The "citizen suit" provision the staff proposes does nothing to ensure access to the courts for citizens; rather, it is solely devoted to restricting or eliminating the public's existing rights to judicial review, and thus insulating federal agencies from accountability for their errors. The majority staff's proposals appear to be animated by a sense that citizens should bear the responsibility for ensuring that federal agencies comply with NEPA, and a conviction that agencies should be exempted from responsibility if members of the public fail to inform agencies of potential concerns during the NEPA process. The Act places the duty to fully consider environmental impacts squarely on the federal agencies, however, and it is essential to our national environmental policy that they be accountable when they fail in that duty. I believe the specific restrictions advanced by the majority staff are thus unwarranted and unwise, and I do not believe that the record before the Task Force demonstrates any justification for placing such hurdles in the face of American citizens concerned about federal government actions that may damage their environment.

"Best available information and science"

The suggestion that "appellants" should have to demonstrate that an agency's NEPA analysis was not conducted using the "best available information and science" is inappropriate under NEPA, which places the responsibility on federal *agencies* to take a "hard look" at environmental problems. The term "best available science," as it appears in statutes such as the Endangered Species Act, has been construed to mean that an agency need consider only "available" scientific information, even where such information is incomplete or inadequate. By contrast, under NEPA, federal agencies have always been understood to be responsible for affirmatively securing data or conducting research if existing data do not permit a reasoned assessment of the likely impacts of their proposed action or a reasoned choice among alternatives (except in the

very limited circumstances defined by CEQ's regulations, 40 C.F.R. 1502.22, which permit an agency to forgo acquisition of needed data only where the costs of obtaining such data would be "exorbitant" or the means to obtain it are not known). Field research is an essential component of hydropower relicensing, for example, where the effects of proposed alterations in stream flows and project operations may be difficult or impossible to predict without studies and experimentation. Permitting federal agencies to limit their environmental consideration to available data would be irresponsible, and would directly undermine NEPA's purpose of ensuring informed government decisions.

Limiting judicial review to parties who participate throughout the NEPA process.

The staff's suggestion of a statutory exhaustion requirement, limiting judicial review to parties that participated throughout a NEPA process, is largely unnecessary in light of the Supreme Court's recent admonition in *Public Citizen* that plaintiffs must normally "structure their participation so that it ... alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration." Importantly, however, the Court noted that that principle is not absolute. "[T]he agency bears the primary responsibility to ensure that it complies with NEPA," the Court noted, "and an EA's or an EIS' flaws 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." 124 S.Ct. at 2214. Where an agency has in fact made significant and obvious errors in its environmental analysis, the interests of the larger public in ensuring that agencies comply faithfully with NEPA's requirements plainly outweighs any equitable considerations related to the conduct of a particular plaintiff. To the extent the staff's proposal would go beyond the Supreme Court's teaching by shielding agencies from judicial accountability where plaintiffs have not participated in the NEPA process even where the defects in the agencies' environmental analysis are obvious, the staff proposal would significantly undermine NEPA's goal of informed federal decision-making.

Prohibiting agencies from entering into settlements that limit third parties.

The staff's proposal that federal agencies and the Department of Justice be prohibited from entering into settlement agreements that "forbid or severely limit activities for businesses that were not part of the initial lawsuit" improperly interferes with executive discretion, and is likely an unconstitutional violation of separation of powers. It is also inappropriate, for it fails to recognize that the duty to comply with NEPA is always that of the federal agency proposing to take or to approve a federal action. Restricting the ability of the Executive Branch to settle litigation where the agency or the Justice Department believes a settlement is prudent will lead to prolonged litigation, directly contrary to the Task Force's professed concerns about the prevalence of NEPA litigation, and in many instances will result in adverse judgments against federal agencies. The interests of third parties may instead be protected through intervention or through presentation of such parties' concerns to the court before a settlement agreement requiring judicial approval is entered.

Guidelines on standing.

The staff's proposal to create statutory guidelines on who has standing to challenge an agency action would unsettle established principles of constitutional jurisprudence, and threaten to exclude citizens with concrete injuries from vindicating their rights in court. The issue of standing to raise environmental injury has been addressed in a series of prominent Supreme Court decisions, *see Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), and has been further refined in numerous decisions from the lower courts. The principles established in those decisions now provide relatively clear guidance for the courts, government agencies, and potential litigants to use in assessing whether a plaintiff possesses the requisite personal interest in a claim to invoke the authority of the federal courts. Under these well-settled precedents, a plaintiff must demonstrate a concrete personal injury, show that the injury is caused by the agency action, and demonstrate that the injury is redressible by the federal courts. In addition, a plaintiff must show that his or her claim lies within the zone of interests Congress intended to protect by enacting the statutory provision on which the plaintiff relies.

Attempting to redefine these settled principles by statute will inevitably lead to confusion and increased litigation. Moreover, to the extent that a statutory definition of standing adds requirements to the established constitutional elements of standing, it will necessarily exclude citizens with constitutionally-cognizable injuries from vindicating their rights in the federal courts.

Establish a 180 day statute of limitations for NEPA claims.

The staff's proposal to establish a stringent new statute of limitations for NEPA claims is, in my view, unwarranted, and will place citizens concerned about federal actions affecting their communities under inappropriate time pressure to evaluate complex NEPA documents and determine whether to seek judicial review. The general federal statute of limitations requires most federal claims, including NEPA claims, to be brought within six years. There is no evidence that NEPA claims, in contrast to other federal claims, are generally being brought in a dilatory manner, or that delay in asserting NEPA claims unduly impedes federal agencies or third parties.

Indeed, NEPA presents unique circumstances that will generally promote prompt assertion of claims, but may also counsel for more deliberation in some situations. Unlike many claims, where monetary damages awarded long after an injury or a contractual breach may provide a full remedy, the inherent nature of NEPA claims generally requires prompt assertion. The only effective remedy for a NEPA violation, from the plaintiff's point of view, is a court order directing the offending agency to correct any errors in its environmental analysis and to reconsider its decision to proceed with a project upon the new, corrected record. If a plaintiff delays in presenting a NEPA claim, he or she risks having the responsible federal agency commence construction, making injunctive relief profoundly more difficult to obtain or even mooting the plaintiff's claim altogether.

On the other hand, there are circumstances in which it makes sense, from the plaintiff's perspective and from the perspective of the government, other interested

parties, and the courts, for the plaintiff to defer bringing suit until it is clear that a proposed project will in fact be undertaken. It is not uncommon, for example, for highway projects or other developments to remain in limbo for years after their formal approval, until funding is secured; some projects are never built at all. In these situations, it makes no sense from any perspective to force immediate litigation regarding the sufficiency of the environmental analysis. Again, once a project actually appears imminent, simple prudence requires potential challengers to file suit promptly, but there will be situations where a suit brought immediately upon execution of a record of decision, to comply with a narrow statute of limitations, would represent a complete waste of effort for all concerned.

Ironically, the primary effect of a narrow statute of limitations may well be to increase litigation, since persons concerned about the environmental impact of federal projects would be forced to commence suit to protect their rights before they can fully review the record and before it is clear that the project will in fact be undertaken. Given the Task Force's professed concern about impacts of litigation under NEPA, it would make little sense to force potential plaintiffs out of the woodwork in this manner.

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects.

The text of the staff's proposal, which suggests making CEQ a "clearinghouse" for monitoring court decisions, does not seem related to the heading, which appears to suggest that agencies get clearance for the scope of their NEPA processes from CEQ. CEQ already bears important responsibilities for providing guidance to federal agencies regarding the NEPA process, including requirements defined in court decisions, and I support increased funding and staff for the Council to carry out those responsibilities. In the absence of additional resources, however, the Task Force should not impose additional duties on the Council's already-overburdened staff.

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

As the letter from the former CEQ Chairs notes, "analysis of alternatives to an agency's proposed course of action is the heart of meaningful environmental review." Letter from Russell E. Train, *et al.* to Cathy McMorris (Sept. 19, 2005), at 2. *See* 40 C.F.R. 1502.14 (section analyzing alternatives "is the heart of the environmental impact statement."). Consideration of reasonable alternatives that may have less environmental impact is the primary way that federal agencies can give effect to the national policy established in Section 101 of NEPA, which calls for the federal government to "create and maintain conditions under which man and nature can exist in productive harmony." For this reason, the Task Force should be very cautious in considering changes in the current law governing that central element in responsible environmental review.

In this case, the staff's proposal to amend NEPA to limit alternatives analysis to alternatives that are economically and technically feasible largely duplicates the requirements of existing law, and is superfluous. Existing law already clearly limits the responsibility of federal agencies under NEPA to considering those alternatives that are

“reasonable” (in addition, of course, to the no-action alternative). *See, e.g.*, 40 C.F.R. 1502.14(a) (directing federal agencies to explore and evaluate “all reasonable alternatives”). The courts have always interpreted “reasonableness” to include consideration of technical and economic feasibility. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (“To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.... Common sense also teaches us that the ‘detailed statement of alternatives’ cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”). The range of alternatives that an agency should consider is determined by reference to the project’s purpose and need; alternatives that do not serve, at least partially, the agency’s purpose and need are by definition not reasonable. There is thus no need for statutory amendment to codify existing law regarding the range of alternatives that agencies must consider.

The staff’s discussion of the factors that should be weighed in determining the feasibility of alternatives is troubling in several respects, however. First, in excluding alternatives unless they are supported by “feasibility and engineering studies,” the staff would impose an inappropriate and unrealistic burden on both federal agencies and other parties, including federal, state and local governments and members of the public, who participate in the NEPA process. An agency should not be required to conduct time-consuming and expensive engineering studies at the stage in its scoping when it is identifying reasonable alternatives for analysis. Nor should other stakeholders be required to present such detailed and costly analyses when they suggest alternatives to the agency. Agencies should retain their current flexibility in determining the extent to which such analysis is required, and to make reasonable determinations regarding the feasibility of alternatives without the delay and expense of formal engineering studies.

Second, in addition to technical and economic feasibility, the staff suggests that “socioeconomic” consequences, such as loss of jobs and overall impact on a community, also be considered in determining whether an alternative is capable of being implemented. To the extent that an agency’s statutory authority includes consideration of such socioeconomic impacts, they may certainly be relevant to the agency’s ultimate decision among alternatives. But agencies should not be permitted to reject alternatives at the outset based simply on their judgment that the alternative would be politically unacceptable or unpopular. Consideration of alternative approaches that depart from the status quo is essential to reasoned decision-making, particularly where federal lands or resources are currently in unacceptable condition and stronger measures may be required to restore them to health.

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

Again, the staff proposal appears superfluous, since the CEQ regulations and caselaw have long required agencies to consider the “no-action” alternative. 40 C.F.R. 1502.14(d). The no-action alternative serves as an environmental baseline to permit reasoned consideration of the relative effects of an agency’s proposed action and

alternatives to the agency's proposal; it also makes clear the extent to which a failure by an agency to take action in the face of existing environmental degradation may itself have adverse environmental effects. To the extent that the staff's proposal may reflect a concern that the benefits of a proposed federal action, including its potential environmental benefits, are not being fully addressed by federal agencies in their NEPA documents, my experience is precisely the opposite. Federal agencies need little instruction or encouragement to point out the benefits of their proposed actions, including circumstances where failing to act would result in continued environmental degradation.

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

The staff's proposal to direct CEQ to promulgate regulations to make mitigation proposals mandatory appears to have been based on my recommendations in my testimony. I appreciate the majority staff's inclusion of this recommendation in their package of proposals. As I pointed out in my testimony, the failure of agencies to ensure that promised mitigation measures are in fact implemented and effective undermines the credibility and integrity of their NEPA analyses. I strongly support action by federal agencies to make the implementation and monitoring of mitigation a required element of their NEPA planning, as the Department of the Army has done in its recent revisions to its NEPA regulations.

Having said this, I would note that this is largely a matter of administrative reform, within the capabilities of the federal agencies and the Executive Branch. No statutory amendment is needed to accomplish this worthwhile reform; only political will and leadership, as the Department of the Army's action exemplifies. CEQ could certainly provide stronger leadership on this issue, and amendment of its government-wide NEPA regulations may be appropriate, but I am not persuaded at this point that legislation is needed to prod CEQ to consider such action.

I would also note that the staff's description of this proposal is somewhat garbled, in that it appears to say that agencies need not make a binding commitment to proceed with mitigation if certain conditions are met. In fact, the conditions, which appear to have been drawn from my testimony, establish the conditions *necessary* to ensure that mitigation may reasonably be relied upon by an agency, *including* a formal commitment to implement such mitigation in the agency's record of decision. If such conditions are not met, the agency must forgo formal reliance upon the possible mitigation in its environmental analysis and decision-making. An agency would thus be required to prepare an EIS where environmental impacts appear significant, and could not rely upon purported mitigation measures to reduce such impacts below the threshold of significance in a "mitigated FONSI." Nor could an agency minimize the potential impacts of its undertaking in its public disclosures based on hypothetical mitigation measures that may never be implemented.

Thus, the staff's proposal should be reworded to state: "This guarantee *would include requirements that* (1) the mitigation be made an integral part of the proposed action," I am otherwise in agreement with the proposal, although as I note I am not

convinced that legislation, as opposed to Congressional oversight and action by the Executive Branch, is necessary to achieve this reform.

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

As my testimony makes clear, I believe that public involvement, including the involvement of interested local communities, local, state and federal agencies, tribes, and members of the public, is essential to the NEPA process. The former CEQ Chairs observed in their letter that “the public plays an indispensable role in the NEPA process,” noting that “public participation under NEPA supports the democratic process by allowing citizens to communicate with and influence government actions that directly affect their health and well-being.” Letter from Russell E. Train *et al.* to Cathy McMorris (Sept. 19, 2005), at 2.

The NEPA process already requires federal agencies to engage the public and other interested government bodies in a close and continuing dialogue, starting with scoping and proceeding through circulation of the draft EIS for public comment. I am not sure how much more the staff proposal envisions when it calls for requiring agencies to “periodically consult in a formal sense with interested parties throughout the NEPA process.” I would be cautious in imposing new and potentially quite burdensome procedural obligations on federal agencies that are already straining to comply with the Act with limited and diminishing resources. The issue of improving public involvement in the NEPA process may well be something that CEQ should study, but I do not believe that imposition of new statutory duties in this regard is prudent or necessary.

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

The staff proposal again appears largely intended to codify existing legal requirements and agency practice regarding the role of lead agencies. The CEQ regulations contain extensive discussion of the role and responsibilities of the lead agency, *see* 40 C.F.R. 1501.5, and the related role and responsibilities of cooperating agencies, *see* 40 C.F.R. 1501.6, and those concepts are well-understood by the federal and state agencies. There is thus no need to amend the Act to codify existing law.

The staff suggests adding “additional concepts,” such as charging the lead agency with responsibility to develop a consolidated record for NEPA reviews. I am concerned that such across-the-board expansion in the role of lead agencies may threaten existing relationships with and legal responsibilities held by other federal and state agencies. In some circumstances, several federal agencies may have independent legal jurisdiction and authority over a proposed project, and each agency must ensure that its NEPA review is sufficient to inform its decision. A highway project, for example, may well require federal approval not just from the Department of Transportation, but from the U.S. Army Corps of Engineers for any discharges of fill into wetlands or other waters. Although it is important for efficiency’s sake to ensure coordination among all of the agencies involved, it is critical that the environmental record established by the agencies in fact meets their differing needs, and will support their exercise of their differing legal authority. For this

reason, I think it would be imprudent to attempt a redefinition and expansion of the authority of lead agencies on a government-wide scale, without particularized attention to the circumstances involved in specific agency undertakings.

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

The staff’s proposal to amend NEPA to create a “NEPA Ombudsman” within CEQ is unnecessary, since CEQ already exercises effective dispute-resolution authority within the Executive Branch. Under Section 309 of the Clean Air Act, 42 U.S.C. §7609, EPA is authorized to review and comment on the environmental impact of major federal actions, and to refer any matter that the Administrator determines is unsatisfactory from the standpoint of public health, welfare, or environmental quality to CEQ. Although formal referrals of federal undertakings to CEQ under this authority are infrequent, CEQ more commonly plays an informal, but effective, dispute resolution role in its capacity as the White House’s environmental office. Disputes concerning the NEPA process or the acceptability of environmental impacts that arise between federal agencies or among federal agencies and other stakeholders, such as state, tribal and local governments, are often resolved through meetings and discussions fostered by CEQ, or if necessary by elevation within the Executive Branch.

CEQ’s ability to play this role in resolving disputes concerning the NEPA process is constrained, unfortunately, by its very limited resources. CEQ has effectively one FTE working on NEPA, with occasional additional input from other members of its staff. Additional resources are critically necessary to permit CEQ to fulfill its dispute-resolution role, as well as to provide effective guidance to federal agencies on the NEPA process. Amendment of NEPA to create a new dispute-resolution title is unnecessary, and will not accomplish anything in the absence of additional resources for CEQ to play its proper leadership role within the Executive Branch.

Recommendation 7.2: Direct CEQ to control NEPA related costs.

The staff’s proposal that CEQ be charged with assessing NEPA costs and making recommendations to Congress for cost ceilings is unnecessary, since CEQ already has authority to review such technical matters and to make recommendations for changes in agency implementation or, if necessary, for legislation. I would note, however, that proposals to limit NEPA costs may have an unintended, or perhaps intentional, impact on the quality and integrity of environmental analysis under the Act. Just as artificial time limits or page limits can have the effect of cutting off environmental analysis before it is complete, so can cost limits. Guidance from CEQ on how agencies can most cost-effectively fulfill their NEPA obligations would be valuable, but must ensure that agencies’ continue to commit the effort necessary to take a “hard look” at environmental problems.

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.

The staff's proposal to amend the Act to establish that an agency's assessment of existing environmental conditions should serve as the methodology to account for past actions is unnecessary, since CEQ has recently issued detailed guidance addressing this point. The staff's concern regarding the scope of cumulative impact analysis seems to be directed to the decision by the Ninth Circuit in *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), *amending* 379 F.3d 738 (9th Cir. 2004). In that decision, the Ninth Circuit held that the Forest Service must analyze the effects of past timber harvests, including the relative impacts of harvesting methods used, as part of its cumulative effects analysis. Although it is well-settled that the effects of past actions on the present environment are properly considered in assessing the cumulative effect of a proposed federal action on the environment, the Ninth Circuit decision raised concerns because it appeared to call for detailed comparative analysis of past timber harvests to inform the Forest Service's understanding of the likely *direct* effects of its proposed new harvest, a consideration that seemed unrelated to cumulative effects analysis.

On June 24, 2005, CEQ Chairman James L. Connaughton issued detailed guidance regarding how federal agencies should consider past actions in cumulative effects analysis. In his guidance memorandum, Chairman Connaughton noted that the effects of past actions may play two distinct roles in NEPA analysis: first, an agency should consider the impacts of past actions on the present environment during its cumulative effects analysis to determine whether its currently-proposed action may have an additive effect to such impacts; and second, an agency may find consideration of experience and information about past direct and indirect effects helpful in illuminating the likely direct and indirect effects of the proposed new action. The second function, Chairman Connaughton noted, is distinct from cumulative effects analysis, and he cautioned agencies to "clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions."

Given this detailed guidance, which has already been given deference by the federal courts, there is no need for any statutory amendment to address this issue.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

The staff's suggestion that CEQ be instructed to promulgate regulations that would focus cumulative effects analysis of future actions on "concrete actions," rather than actions that are "reasonably foreseeable," threatens to undermine the value and integrity of cumulative effects analysis. It is not clear what the staff have in mind by the term "concrete actions," but to the extent that the staff contemplates restricting cumulative effects analysis under NEPA to actions in which permits or other final approvals have been issued, the effect would be to destroy much of the value of cumulative effects analysis.

The great virtue of cumulative effects analysis is that it forces federal agencies to think responsibly about the "big picture" – to consider the impacts of their actions not from the narrow focus of their individual projects, but from the perspective of the environmental resources that their actions will affect. In a cumulative effects analysis, what matters is the total environmental stress that will be placed on a resource, or an

ecosystem, by the effects of past, present, and foreseeable future actions, including the additive impact of the proposed federal undertaking. Only by taking such a comprehensive look at all likely stresses, including reasonably foreseeable future impacts, can a federal agency make an informed assessment of the likely additive effect its proposed action may have on the environment. Restricting the agency's analysis to "concrete" future actions, and excluding other future actions that may not be finally approved but are nonetheless reasonably foreseeable, would give the agency and the public only a fragmentary picture of the real stresses on the affected environment, and preclude a reasoned assessment of the potential additive impact of the proposed action.

Cumulative effects analysis, like other aspects of the NEPA process, is already bounded by a "rule of reason," as the Supreme Court recently emphasized in *Department of Transportation v. Public Citizen*, 124 S.Ct. 2204, 2215 (2004). Agencies are not required to "crystal ball" their cumulative impact analysis; the courts will sustain an agency that uses reasonable judgment to identify foreseeable future actions. There is thus no justification even in administrative terms for the staff's proposal, and it would severely limit the accuracy and usefulness of cumulative effects analysis.

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

The staff's proposal that CEQ be directed to conduct a study to evaluate the extent that NEPA interacts with and overlaps other environmental laws is based on a profoundly mistaken understanding of the role that NEPA plays in relation to other, substantive federal regulatory statutes. NEPA is unique among federal environmental statutes in establishing a general mandate for federal agencies to consider the environmental effects of their actions, and set of procedures for agencies to use in fulfilling that mandate, rather than in establishing substantive standards or requirements for environmental protection. NEPA is thus a foundational statute, giving every federal agency, regardless how narrow its primary mission, authority to consider environmental values in its decision-making, and requiring every federal agency to do so through a common set of procedures that ensure accurate environmental analysis and broad public involvement.

Other federal statutes do not directly duplicate NEPA's unique functions. To the contrary, Congress has enacted our substantive environmental laws with the understanding that NEPA will play its proper role as a foundational environmental statute. The laws governing management of our federal lands, for example, impose planning responsibilities and management duties on federal land management agencies, but with the expectation that the actions of those agencies will be informed, and that the public will be involved, through NEPA analysis. No provision of the National Forest Management Act or the Federal Land Policy and Management Act specifies that agencies must consider environmental impacts, identify alternatives, or seek public comment regarding the environmental effects of their actions; those responsibilities were understood to be mandated by NEPA. Similarly, no provision in the Magnuson Act duplicates NEPA's requirement that federal officials consider alternatives and seek public comment on the environmental effects of proposed fishery management plans.

Were it not for the severe limits on CEQ's present resources to implement NEPA, I would welcome the staff's proposed study, for it might finally lay to rest the mistaken impression that NEPA has been superseded by later substantive environmental laws. Unfortunately, CEQ is strained even to provide badly-needed guidance and training to federal agencies concerning NEPA's implementation. For that reason, absent additional resources for CEQ to carry out the proposed study, I believe the staff's recommendation is imprudent.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues.

The staff's proposal to direct CEQ to conduct a study regarding NEPA staffing among federal agencies apparently responds to the repeated and well-documented concerns that I noted in my prior testimony about the limited resources currently being devoted by federal agencies to NEPA's implementation. *See, e.g.*, Robert Smythe & Caroline Isber, Natural Resources Council of America, NEPA IN THE AGENCIES – 2002 (Oct. 2002) (documenting increases in NEPA workload and reductions in staff and budgets among federal agencies). Again, if it were not for the severe constraints on CEQ's own resources, the proposed study could be valuable, even though largely redundant of prior studies. Unfortunately, given the demands on CEQ's very limited resources, the study appears to be an imprudent diversion from CEQ's more pressing duties to provide guidance and training for federal agencies.

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

The staff's proposal that CEQ be directed to study the extent to which NEPA and state environmental review laws overlap is also, I believe, imprudent without providing additional resource to CEQ to conduct such a study. As I noted with respect to recommendation 3.2, which calls for CEQ to prepare regulations allowing existing state environmental review processes to satisfy NEPA's requirements, the procedures and scope of state "little NEPAs" vary widely, and are not likely in most instances to assure thorough environmental analysis of major federal actions. Rather than engaging in a difficult evaluation of whether particular state processes might satisfy NEPA's requirements for thorough environmental analysis and public involvement, it would seem more prudent to provide guidance and encouragement to states, tribes and local governments to work as co-lead agencies in the federal NEPA process.

Conclusion

I appreciate the opportunity to offer my thoughts on the majority staff's recommendations. Unfortunately, I believe that the majority staff's proposals are imprudent and dangerous. Some of the majority staff's recommendations simply seek to codify existing law, and are thus unnecessary and superfluous. A few of the later recommendations suggest CEQ studies that might be worthwhile, although of limited value, but that would clearly be imprudent without provision of additional resources to the Council. But a large number of the majority staff's recommendations are for changes to NEPA or its implementing regulations that would undermine the integrity and accuracy of environmental analysis under the Act or restrict the public from participating

or protecting their rights under the law. I urge the Task Force to reject these recommendations, and to refocus its attention on ways in which the NEPA process can be improved through administrative reforms, under appropriate Congressional oversight, without endangering the fundamental principles of environmental review and public involvement.

Sincerely,

Robert G. Dreher
For the Georgetown Environmental
Law & Policy Institute