



**Testimony of Debbie Sease
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**Before the U.S. House of Representatives
Committee on Resources'
Task Force on Updating the National Environmental Policy Act**

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Madame Chairwoman, Members of the Task Force on Improving the National Environmental Policy Act.

My name is Debbie Sease. I am the Legislative Director for the Sierra Club. My business address is 408 C St. N.E., Washington, DC 20002. Thank you for inviting the Sierra Club to testify at this very important hearing.

On behalf of the Sierra Club's more than 750,000 members, thank you for the opportunity to testify on the National Environmental Policy Act.

Sierra Club, founded in 1892, is the nation's oldest grass-roots environmental organization. Sierra Club's purpose is "to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environments." As concerned citizens, the Sierra Club's 750,000 members are committed to securing policies that protect, preserve and restore environmental quality.

Signed into law by President Nixon in 1969, the National Environmental Policy Act, often referred to by its acronym NEPA, safeguards our nation's air, water and lands by requiring federal agencies to provide an assessment of the environmental impact of and alternatives to any major federal action that could significantly affect the quality of the environment. Under NEPA the agencies must examine the impact on the environment, consider alternative proposals and seek to minimize harmful effects of the project, disclose the findings to the public and get citizen input into the decision making process.

NEPA guarantees that Americans affected by a federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voice heard before the government makes a final decision. By making sure that the public is informed and that alternatives are considered, NEPA has allowed communities to reconsider some damaging projects and in countless cases helped improve those projects.

At the heart of NEPA is its requirement that alternatives must be considered – including those that will minimize possible damage to public health, environment or quality of life. NEPA also lets Americans have a say before the government makes its final decision about a project.

The National Environmental Policy Act is one of the nation's great success stories. It is a law that when properly implemented saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time. There is no need to overhaul NEPA because it works. Limiting public involvement and weakening environmental review won't avoid controversy or improve projects, it will only weaken our participatory democracy.

The Task Force is to be commended for seeking public input on the implementation of NEPA, particularly in light of CEQ reports from 1997 and 2003, both of which found that any flaws with NEPA lie in its implementation rather than the law. However, we would urge that the Task Force

recognize that the 5 hearings it has held to date do not begin to provide a comprehensive picture of the public's experience with NEPA and its implementation, nor can they offer an accurate reflection of the many positive experiences and broad support for NEPA among private citizens and public officials.

Unfortunately, several of the hearing venues were changed at the last minute, moving from centrally located population centers to more isolated communities, in some cases changing from weekend to weekday schedules. In some cases proponents of NEPA were denied an opportunity to offer testimony. For example, the third hearing on July 23rd intended to cover the role of NEPA in the southern states, was moved from Houston, Texas (population 1,953,000) to the small east Texas town of Nacogdoches (population 30,000). Eight of the 10 witnesses represented mining and timber extractive industries. Local Sierra Club members asked to testify at the hearing but were turned down.

It is worth noting that some of the requirements of NEPA about which critics have complained are those that require that the public be given access to information and be given a full range of opportunities for the public to be heard, through formal comment periods, hearings, etc.

NEPA Success Stories

By making sure the public is informed and alternatives are considered, NEPA has prevented some damaging projects by offering common sense alternatives that actually have significantly improved projects. It has contributed mightily to the enhancement of road and bridge projects, toxic site clean-up, and improvement of logging and drilling projects all over the country. As part of my testimony, for the record, I'm submitting a link to a report titled, *The Road to Better Transportation Projects: Public Involvement and the NEPA Process*, which outlines several examples of successful NEPA reviewed projects.

http://www.sierraclub.org/sprawl/nepa/sprawl_report.pdf

An example from that report that illustrates NEPA's ability to enhance projects without impeding them comes from the construction of I-70 in Colorado. A portion of I-70 through Glenwood Canyon, as originally designed, would have had massive negative impacts on environmental and public use values. Through the NEPA process, citizens successfully advocated for design changes to the road. These changes included the use of tunnels to limit noise and visual impacts, a different construction method that reduced damage to the canyon, and the inclusion of public facilities (rest stops, bike and jogging path, and a boat launch.) The project has received more than 30 awards for innovative design and environmental sensitivity.

Litigation Concerns about NEPA

Litigation is a tool that allows citizens and other local stakeholders to ensure that their voices are heard and that NEPA is being implemented. It is the law that alternatives are sought and

environmental impact statements are written if a project affects a community in a “major” or “significant” way. Federal agencies are required to “look before they leap.” If they do not, litigation is the last opportunity to ensure that they comply with the law. More often than not NEPA litigation does not prevent projects from happening; it only provides insurance that all alternatives are considered and the best information is available and utilized. It allows the public an opportunity to voice concerns and be part of the democratic process.

NEPA generates a proportionately low volume of litigation. Federal agencies primarily prepare Environmental Assessments (EAs), often eliminating public involvement, rather than an EIS. There are approximately 50,000 EAs, 500 draft, final and supplemental EISs for the “major” federal actions of which only about 100 lawsuits are generated, representing a mere 0.2% of the NEPA documents produced annually. (CEQ: 25th Anniversary Report).

Moreover, it is not just environmental groups that use NEPA to shine light on the government’s decision-making process. For example, it was Boise Cascade Corporation and the American Council of Snowmobile Associations, among others who sued under NEPA to overturn the Clinton Administration’s Roadless Rule in our national forests. Another example would be the New Mexico Cattle Growers Association suing under NEPA concerning habitat designation for the Southwestern Willow Flycatcher, an endangered species.

Save Our Wetlands vs. Rush - 1977

I’d like to address the 1977 and 1996 lawsuits over which the Task Force has expressed specific concern.

After 1965’s Hurricane Betsy, Congress ordered the Army Corps of Engineers to develop a flood protection plan for New Orleans. The Corps’ proposed project would have built a 25-mile long barrier and gate system from the Mississippi border to the Mississippi River. As designed, the project would have choked off water exchange into Lake Pontchartrain, dooming an incredibly productive fishery. Communities around the Lake and local fisherman opposed the project because of the massive impact it would have had on the economy and environment in the region. In addition, blockading Lake Pontchartrain would have left New Orleans unable to pump out water through the lake in the event of a flood from the Mississippi River or heavy rains from a tropical storm. In the end, that is why local groups advocated for building higher and stronger levees immediately around New Orleans as a simpler and safer alternative to the Corps’ plan.

In 1977, after the Army Corps of Engineers refused to evaluate the impacts of its proposed project and consider ways to reduce them, Save Our Wetlands filed suit and secured an injunction from U.S. District Judge Charles Schwartz, Jr., who concluded that the region "would be irreparably harmed" if the barrier project was allowed to continue and chastised the Army Corps of Engineers for a shoddy job. The Judge required the Corps to properly study its proposed massive new levee construction project before moving forward. The Corps eventually decided on its own to pursue an alternative plan.

Recent testimony from the Government Accountability Office indicates not only that this lawsuit wasn't responsible for the devastation of Katrina, but that it may have had a protective impact. When the GAO testified before the Energy and Water Subcommittee of the House Appropriations committee, they reported that flooding in New Orleans would have been worse if the original plan had moved forward.

In fact, Corps staff believe that flooding would have been worse if the original proposed design had been built because the storm surge would likely have gone over the top of the barrier and floodgates, flooded Lake Pontchartrain, and gone over the original lower levees planned for the lakefront area as part of the barrier plan.

(Testimony of Anu Mittal, Director Natural Resources and Environment, General Accountability Office Before the Subcommittee on Energy and Water Development, Committee on Appropriations, House of Representatives, 9/05)

In the 1977 case, a federal judge demanded that the Army Corps provide an adequate environmental impact study as required by NEPA. Ultimately, the judge enjoined only the Lake Pontchartrain floodgates portion of the project, and not any of the proposed hundreds of miles of levees. Years later the Army Corps abandoned the project on its own, after determining that it was not the most appropriate action. In addition to the widespread local opposition from communities and fishermen the Corps was concerned that the project risked replacing one major threat with another.

Mississippi River Basin Alliance, et al. v. H. Martin Lancaster – 1996

In the mid-1990's, the Army Corps of Engineers proposed raising hundreds of miles of levees 100 miles north of New Orleans in Louisiana, Arkansas, and Mississippi. Conservation groups and others did not oppose the idea of raising the levees, but they did have strong concerns about the fact that Corps wanted to drain as much as 11,000 acres of bottomland hardwood wetlands, crucial to health and safety of the Lower Mississippi Basin, to supply the construction material for those levees.

And they weren't the only ones who had concerns: The U.S. Fish and Wildlife Service, Environmental Protection Agency and the Louisiana Legislature all urged the Corps to look at how the proposed project would have impacted the area. It refused to do so. That led the Sierra Club, American Rivers, the National Wildlife Federation, Arkansas and Mississippi Wildlife Federations, and the Mississippi River Basin Alliance to take the Corps to Court. The case was soon settled, with the Corps of Engineers agreeing in 1997 to look at ways of minimizing the damage to the wetlands.

But other problems plagued the project. According to a 1997 Baton Rouge Advocate article, "Corps officials said it will take them 30 years to finish the levee work. That much time is required because funding is lacking for the projects -- not because of the new environmental study, called an environmental impact statement."

Conservation groups never opposed raising the levees; just the destruction of wetlands in order to supply fill material for them. And it wasn't just conservation groups; even the Louisiana Legislature had concerns. The case was settled one year later but the Corps never had the funding to move ahead on the project.

Success with Litigation through NEPA Review

It is true that on some occasions lawsuits filed under NEPA have stopped ill-conceived projects. With the knowledge we have today we can look back with relief and gratitude for the 1972 Court Decision that enjoined the Corps of Engineers from dredging the hardwood wetlands that were recently discovered to be perhaps the last sanctuary of the Ivory-billed Woodpecker.

In 1971, shortly after NEPA's enactment, the Army Corps of Engineers advances a proposal to dredge and channelize the Cache River in Arkansas for flood control. The dredging would have had adverse effects on the vast tracts of bottomland hardwood wetland in the river basin that supports several species of wildlife, including the recently rediscovered Ivory-billed woodpecker. Environmentalists challenged the adequacy of the Corps' NEPA analysis in court, pointing out that the Corps had failed to evaluate alternatives. The court enjoined the Corps from proceeding until it fully considered alternatives (*Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Circuit, 1972)). Subsequent public outcry over the project also led to the abandonment of the dredging project and the creation of the national wildlife refuge where the Ivory-billed woodpecker was recently sighted.

Implementation versus Changing the Law

In a 1997 report, "NEPA, A Study of its Effectiveness After Twenty-Five Years," the President's Council on Environmental Quality deemed the law successful. CEQ Chair Kathleen A. McGinty stated:

Overall what we found is that NEPA is a success – it has made agencies take a hard look at the potential environmental consequences of their actions, and it has brought the public into the agency decision making process like no other statute. In a piece of legislation barely three pages long, NEPA gave both a voice to the new national consensus to protect and improve the environment, and substance to the determination by many to work together to achieve that goal.

The 1997 CEQ study concluded that flaws with NEPA lie with agency implementation, not the law itself. Subsequently, a more recent report issued by the Bush Administration's in 2003, "*Modernizing NEPA Implementation*," made no recommendations for amendments to NEPA by Congress. That report also focused on improving implementation, not changing it.

Categorical Exclusions from NEPA Review

One of the most serious and growing problems in the implementation of NEPA is the increased use of “categorical exclusions.”(CE). Now, CE’s are being used on a regular basis to waive review requirements for road building, logging, drilling and other practices that may have devastating impacts for communities, wild lands, and wildlife habitat. Specific NEPA exclusions to date include:

- Executive order by President Bush directing federal agencies to “expedite” energy-related permits, thereby shortchanging environmental reviews;
- “Categorical exclusions” exempting certain logging projects from standard review requirements;
- Controversial highway projects slated to be completed at an “accelerated” pace by reducing the analysis of their impacts on the community; and
- Passage of the Healthy Forests Restoration Act, which bypasses a critical component of NEPA by limiting the consideration of alternatives for projects covered by the law.

NEPA and Grazing Permits

Some have suggested that grazing permits should be exempted from NEPA – charging that NEPA review is unnecessary and redundant and has forced ranchers off of their grazing allotments. An examination of the facts does not support these allegations.

The assertion that environmental review at the point of processing a grazing permit, is redundant fails to consider that it is the terms and conditions of grazing permits that specifies when, where, how many livestock will graze. It is these decisions that will have an impact on the environment – affecting fish and wildlife, native plants and water quality on thousands of acres of land.

As for the failure to complete these reviews resulting in ranchers being forced off their allotments, 99.9% of allotments (despite widespread failure to complete the required analysis) are still subject to grazing. There are only three cases where NEPA related litigation has stopped grazing from continuing. In each of the three cases the livestock were not removed solely because of a failure to comply with NEPA, but because it was demonstrated that serious damage was occurring. Only one of the cases affected the entire allotment.

The three cases are:

1. *National Wildlife Federation v. BLM*, 140 IBLA 85 (1997). After finding serious ongoing damage to soils, vegetation, riparian areas, water quality, wildlife habitat, and recreational sites, an administrative law judge ordered cattle temporarily kept off of 10% of one grazing allotment, while allowing grazing to continue on the remaining 90%. Later, the BLM, of its own accord, decided that grazing in the sensitive area affected by the judge’s decision made no sense.

2. *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp.2d 156 (D.D.C. 2002). Bison from Yellowstone National Park were being shot as they entered the Horse Butte Allotment on the Gallatin National Forest in Montana to avoid possible transmission of brucellosis to the 147 cattle that grazed there. The Forest Service had committed to complete a NEPA analysis by 1998 to address the impacts of grazing on the allotment, including the killing of bison. As of 2002, the NEPA analysis was still not completed. In order to prevent further killing of bison, the court enjoined grazing on the allotment for one season, until the analysis could be completed.

3. *Western Watersheds Project v. Bennett*, Civ. No. 04-0181-S-BLW (D. Idaho 2005). . The court found that not only had the BLM failed to comply with NEPA, but also that grazing in BLM's Jarbidge Resource Area in Nevada was causing violations of the BLM's Standards for Rangeland Health and standards in the applicable land use plan, and had contributed to an 85% decline in the population of sage grouse. The court enjoined grazing on 28 allotments covering 800,000 acres. After the court entered its order, and before any livestock were removed, the plaintiffs and the affected ranchers reached a settlement that allowed grazing to continue on the allotments.

Exempting grazing permits from the application of NEPA, as has been the effect of Congressional riders since 2000 and the Agencies' failure to complete the required analysis is in fact one of the most serious problems with implementation of NEPA. It could be best addressed by providing the agencies with sufficient funding to conduct the required assessments.

Conclusion

The National Environmental Policy Act represents a commitment that this nation made to its citizens more than a quarter century ago. It is our profound hope that the investigations of this Task Force will lead to better, stronger implementation of this landmark law, not to revisions in the law or its implementation that depart from the common sense direction of its authors to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and resources important to the Nation."

Thank you again for the opportunity to present Sierra Club's perspective.